INTRODUCTION

This thesis concerns recent innovations in the way that criminal justice systems deal with young offenders, namely through a process that is sometimes generically referred to as 'juvenile conferencing'. Juvenile conferences have been instituted across Australia and in numerous other countries. Empirical research was conducted in Tasmania, a small island State of Australia with a population of less than half a million people. Australia is a federation of six States (Tasmania, Victoria, New South Wales, Queensland, South Australia, and Western Australia) and two territories (the Australian Capital Territory and the Northern Territory). On European settlement of Tasmania (then Van Diemen’s Land) the English common law was adopted and applied. It was later modified by the Governor on the advice of the Legislative Council and later the Parliament of Van Diemen’s Land. With Federation in 1901 the Commonwealth was not granted an express power to legislate on criminal law matters. Consequently, the States retained primary responsibility for their own criminal laws. The main sources of criminal law that concern this thesis are Tasmania’s Criminal Code (established under the Criminal Code Act 1924 (Tas)) and other State legislation, particularly the Youth Justice Act 1997 (Tas).

The timing of the beginning of the research was fortunate. It began in January 2000, one month before Tasmania’s youth justice system was completely restructured with the proclamation of the Youth Justice Act 1997 (Tas). Previously the police had two options when dealing with young offenders who had admitted to an offence: to caution the youth and not proceed with the matter, or to refer the matter to the children’s court. The Act introduced a four-tiered system involving informal cautions, formal cautions, community conferences, and the children’s court. The first two tiers, the informal and formal cautions, are processes conducted by the police. Formal cautions are held at police stations and usually include the offender’s parents. Unlike any other Australian formal cautioning system, victims can attend formal cautions in Tasmania. Formal cautions can result in the young offender agreeing to complete undertakings, including up to 35 hours community service and actions to repair the damage caused to the victim. Community conferences, the third tier, are based on a format developed in New Zealand called family group conferences. Both formal cautions and community conferences can deal with quite serious offences, such as sexual assault, wounding, and grievous bodily harm.
Community conferences involve the offender, the victim, their respective supporters, and a police officer. An independent facilitator, employed on a contractual basis by Tasmania’s Department of Health and Human Services (DHHS), convenes the conference. Each person is given the opportunity to talk openly about their perspective of the offence, its impact, and their hopes and fears for the future. Together the group attempts to agree upon ways in which the young offender can repair the emotional and material harm caused by her or his actions. These undertakings can include up to 70 hours community service as well as actions for the benefit of the victim and others. Unlike the agreements reached in a formal caution, the undertakings arising from a community conference are enforceable at court. In other words, if the young offender fails to complete their undertakings, the DHHS notify the police and the police can refer the matter to court.

Ostensibly the system established by the Youth Justice Act 1997 (Tas) seems unremarkable – quite similar to the South Australian juvenile justice system in many respects. However, a complicating factor about Tasmania is that the police are conducting the 'formal cautions' as juvenile conferences. This means that Tasmania essentially has two conferencing systems operating side by side, one operated by the police and the other operated by the DHHS. This development makes Tasmania’s system most unusual because, internationally, different jurisdictions have chosen either police-run conferencing or independently facilitated conferencing. The police and DHHS conferences are the focus of my thesis.

The thesis contains eight chapters. The first three chapters are descriptive chapters that lay a foundation for the remainder of the thesis. Chapter one provides a vital international theoretical context for the developments in Tasmania and for the results yielded from this study. It describes a new theory of criminal justice: ‘restorative justice’. Restorative justice is a rapidly evolving theory which argues that the criminal justice system should empower victims, offenders, and the communities from which they come to deal with the aftermath of crime. The origins of restorative justice are described, together with its values and objectives, and the way in which restorative theory tends to view the traditional criminal justice system. Different themes that are emerging in
restorative justice are discussed. This chapter is essential for the entire thesis, but it is particularly important for chapter seven.

Chapter two moves the thesis towards juvenile conferencing practice, which is recognized as a form of restorative practice. It discusses many of the key findings that have been produced to date on conferencing and then contrasts the conferencing systems that have been established in New Zealand and Australia. Three significant issues are analysed in detail. The first is the complexities involved in successfully diverting significant proportions of young offenders away from court, which is one of the central objectives of the new Tasmanian juvenile justice system. The second issue is the phenomenon known as ‘net-widening’. This generally refers to an unanticipated increase in the number of young people having formal contact with the criminal justice system. It can occur as a result of attempts to divert offenders away from court to alternatives such as conferences. Finally, chapter two highlights the heated debate that took place in Australia over police conferencing and considers the use of police conferencing in the United Kingdom and North America.

Chapter three is devoted to the developments that have taken place in Tasmania’s youth justice system. It provides a useful historical background by describing some of the tensions that existed in juvenile justice policy that predated conferencing and restorative justice. The chapter goes on to explain how these tensions influenced policy formation in Tasmania. Developments in practice are also outlined, the most important of which was the police initiative to trial conferencing in 1995. It becomes clear in this chapter that the new juvenile justice system in Tasmania evolved in a relatively unplanned manner.

The fourth chapter presents one of the major contributions of this thesis. That is, statistical analyses that were performed using the central police database in Tasmania. The analyses provide data on young offenders across Tasmania from 1991 to May 2002. It is important to note that the information presented in this chapter was not available in government reports or attainable from any other agency. Until 1991 the Department of Community Services produced extensive annual reports on juvenile offenders. In 1991 the department was restructured and is now the DHHS. Since 1991 the reports on juvenile offenders included in the Parliamentary Papers have included very little useful
Introduction

information, at least nothing that can address the research questions relevant to this study. The chapter describes the source of the data and how the statistical analyses, in particular regression analyses, were performed. The results provide quite clear evidence relating to three research questions that should be of interest to other conferencing system in Australia and overseas. Is the new Tasmanian system successfully diverting young people away from court? Is net-widening occurring? Have the court’s sentencing patterns changed with the introduction of the new system?

In chapter five I compare and contrast the methods used to recruit, train, and monitor police facilitators and DHHS facilitators. The chapter highlights the problems involved in forcing police officers to train as facilitators. The discussion explores many practical interrelationships between training, monitoring, and practice standards. Chapter five dovetails well with chapter six, which presented the findings arising from the observation of 67 police and DHHS conferences. Six thematic areas are examined including (a) the basic features of the police and DHHS conferences, (b) the impact of the experience of the facilitator, (c) pre-conference preparation, (d) the facilitators’ explanations of the legal context of the conference to the conference participants, (e) the facilitators’ approaches to conferencing, (f) and the undertakings agreed upon.

A completely new direction for restorative theory is presented in chapter seven. This new direction concerns the place of the parents of young offenders in restorative justice. The chapter builds significantly upon ideas first presented in an article I wrote during the course of the research (Pritchard, 2002). This chapter urges restorative theory to make a unique space for parents. Parents may view themselves as part-contributors to the offence committed by their child. They may simultaneously view themselves as victims of the criminal behaviour. In discussing how to practically respond to this ‘contributor-

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1 The reports include information such as the annual cost of juvenile detention and the number of reports tendered to the courts by the DHHS.

2 In the early stages of the research six conferences (three police and three DHHS) were observed partly to help formulate the methodology. Thirty-one police conferences and thirty DHHS conferences were then observed employing the methodology.
victim paradox’ I draw heavily upon my qualitative observations of conferences as well as psychological literature on parental self-efficacy (or self-confidence) (Coleman & Karraker, 1997). Chapter eight concludes the thesis and reflects on its contributions to policy, practice, restorative justice theory, and criminology.
CHAPTER ONE

RESTORATIVE JUSTICE

The purpose of this chapter is to describe a perspective of criminal justice called restorative justice. Restorative justice has developed over the past three decades in an organic way and has been described as a worldwide movement (Morris & Maxwell, 2003). Restorative justice originated from diverse philosophies of justice, as well as different political, cultural and social movements (Crawford & Newburn, 2003).

Arguably the common feature of these perspectives is that they share the view that 'because crime (or any other kind of injustice) hurts, justice should heal' (Braithwaite, J. and Braithwaite, V., 2001: 4).

A very wide variety of restorative practices exist internationally. A well accepted definition of a restorative practice is 'a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future' (Marshall, 1999: 5). Restorative principles are being applied to overcome conflicts in workplaces and schools (Condliffe, 1998). Theoretical applications are being considered for the International Court of Justice (Dignan, 2003) as are means of using restorative justice to resolve inter-state conflict (Ahmed et al., 2001). Inside the criminal justice system restorative justice is being practised or trialed for juvenile and adult offenders (a) as a means of diversion from court, (b) as pre-sentencing and post-sentencing options, and (c) in post-prison release programs. The variation in the actual format of these practices is very broad (Crawford & Newburn, 2003). Some examples which clearly embody restorative justice aims include victim-offender mediation and circle sentencing – informal community forums, attended by victims and offenders, which come to a consensus on sanctions and are facilitated by a judge (Cunneen & White, 2002). Other formats are gaining popularity in North America, such as citizen sentencing panels (called community reparative boards).

Pre-execution restorative programs have also been trialed. For a critique of this practice see (Hoyle & Young, 2003).
and special victim centred hearings run as an adjunct to court proceedings by judges (Bazemore, 1997b). Juvenile conferences are one of the best known restorative practices (Maxwell & Morris, 1999).

There are two reasons why restorative justice is important to this thesis. First, in Tasmania restorative theory influences police and Department of Health and Human Services (DHHS) juvenile conferences in different ways. Secondly, research on juvenile conferencing is deepening and strengthening restorative theory. Although this thesis is primarily about juvenile conferences some of my findings have important implications for restorative theory, especially the ideas presented in chapter seven which concerns the place of the parents of offenders in restorative justice.

The chapter has four sections. The first section outlines the origins of restorative justice. The second section explains the central values and objectives of restorative justice. The following section describes how restorativists see these values and objectives as different from the traditional justice system. Finally, some of the emerging themes of restorative theory are considered.

1.1 ORIGINS OF RESTORATIVE JUSTICE

The development of restorative justice since the 1970s is sometimes explained as the convergence of a variety of ideologies and movements which articulated inadequacies in the criminal justice system (Cunneen & White, 2002). These ideologies and movements ranged from peace-making, communitarianism, and indigenous dispute resolution, to the victims' rights movement (Van Ness, 1993; cf Bottoms, 2003). Important too, were the growing critiques of justice systems based on retribution or rehabilitation (Warner, 1997). This debate was especially relevant to the juvenile justice setting and is explained in an historical context in chapters two and three. Further influences upon restorative justice included problem-oriented policing, which emphasised community 'resources' and prompted new approaches to criminal justice (Goldstein, 1990). In criminology, left realism encouraged critical evaluation of the criminal justice system and its class assumptions (White & Haines, 2000). Academically, one of the single most influential sources has been Christie's oft-quoted 1977 lecture, in which he charged the Western state of 'stealing' the resolution of conflict from those most affected by crime – the
victim, offender, and their community (Christie, 1977). As well as defining the processes for dealing with the aftermath of crime, the state has imposed its own definition of harm: that criminal behaviour is a crime against the state. Christie’s catchword seems to have encapsulated general concern for the place of the individual in modern society. ‘Unfettered competitive individualism’ (White, 2000: 55), industrialisation, population growth, and urban drift (Palk et al., 1998) are all factors charged with dislocating the modern person, disintegrating communities, and widening the proximity between victims and offenders.

1.2 VALUES AND OBJECTIVES OF RESTORATIVE JUSTICE

One core concept of restorative justice is that crime is defined as an injury suffered by victims and communities (Morris & Young, 2000). Along with offenders, victims and communities are central to resolving crime. These three entities – offenders, victims and communities – seem to have become the central framework of restorative justice. Bazemore (1997b), for instance, sees the common ground between offenders, victims, and communities as the fertile ground for restorative justice (seen shaded below in Figure 1.2).

Figure 1.2 The interaction of the central parties to restorative justice.

Of course, restorative justice depends on support by the state. Various types of ‘professionals’ organise and facilitate the restorative forums. However, the principle of ‘deprofessionalisation’ urges that professional input be minimal, unobtrusive, and empowering for the main parties with whom the decision making rests (Zehr, 1990: PP).
Restorative justice generally values informalism and natural dialogue (Morris & Young, 2000; cf White, 1994). It does not seek to label the stakeholders in an offence with strictly defined roles. It is understood that the boundaries between the constructs 'victim', 'offender', and 'community' blur. For instance, victims and offenders often are in some way or another members of the same community. A juvenile offender may well be the victim of domestic violence (Ahmed et al., 2001). Likewise, the victim of a particular offence may simultaneously be the perpetrator of some other wrong. Finally, some offensive behaviour does not affect specific individuals (or corporations such as department stores), in which case it seems appropriate to view the community as the victim. These types of offences are often referred to as 'victimless crimes'. In a sense the community is always injured by crime and hence is always a victim.

Most theorists would agree that for a process to be called restorative it must ensure (a) non-domination of any party, (b) empowerment, (c) respectful listening, and (d) accountability of the offender (Braithwaite, 2003). Non-domination and empowerment dovetail neatly together – participants should feel safe, unthreatened, and fully able to contribute their experience, feelings, uncertainties, and thoughts for the future. Respectful listening obviously requires that participants are able to communicate in their own manner and at their own pace. Arguably, implied within this value is the necessity that restorative forums not be time constrained. Accountability requires that offenders squarely discuss the facts of their actions. For this reason restorative justice has no place in proceedings where the guilt or innocence of a defendant is determined. As chapter two will explain, in many jurisdictions restorative forums are only possible when the offender has admitted their guilt. This differentiates restorative justice from mediation. Restorative justice begins with an acceptance of the major facts, whilst mediation may take place with central facts still in dispute (Moore & Forsythe, 1995). Accepted accountability by the offender and natural dialogue about the crime means that victims may have the opportunity to understand why the offence occurred and whether they are likely to be the target of crime again (Daly, 2003).

The four values just discussed are essential requirements of restorative justice. Other restorative values concern the decisions that the parties may choose to make together: (a) reparation for the victim, (b) rebuilding the dignity of the offender, and (c) social support for offenders and victims. First, the group may decide that it is appropriate for the
offender to provide emotional or material reparation to the victim or others, through symbolic or practical acts. Secondly, it may be hoped that participating in the group decision concerning reparation as well as seeing those plans to fruition may help to rebuild the dignity of the offender. Many authors have emphasised that restorative justice allows the offender to be active instead of passive (Walgrave, 1995). Thirdly, the support of friends and family for victims and offenders is especially important and, if possible, the wider community (Braithwaite, 1999). Victims may view social support as tangible evidence that the community recognises their injury. Hopefully, not only does the offender benefit from realising how important they are to their significant others but also these relationships can be strengthened by the process. Some theorists view restorative justice meetings as an opportunity to deal with wider problems in the offender's community. The symbolic or practical acts of the offender, therefore, may be directed towards their community (White, 2000). With a greater understanding of the impact of crime restorativists anticipate that offenders will be less likely to re-offend. Consequently, communities may hope to experience less crime.

There are certain dynamics between the major parties that restorative justice values very highly indeed but which cannot be manufactured or designed by anyone (least of all police officers, welfare workers, lawyers and the like) (Braithwaite, 2003). These are signs of a genuinely restorative meeting: (a) remorse over injustice, (b) apology, (c) forgiveness, (d) mercy, and (e) community cohesiveness. For the offender, experiencing remorse, offering apology, and receiving forgiveness and mercy are viewed as genuine healing. Compassion by all parties for each other is viewed as the best atmosphere for holistic healing and in this sense hate and anger are seen as counter productive for all. Although forgiveness is heavily dependent upon the victim, the community via other participants may also offer forgiveness. Additionally, restorativists anticipate that victims benefit from expressing forgiveness. It is hoped that the participants are supported by their communities and even that community spirit is enriched by the process (White, 2000).

1.3 RESTORATIVE PERSPECTIVES OF THE CRIMINAL JUSTICE SYSTEM

The criminal justice system has several interlocking parts. These parts have not been planned so that they operate cohesively. In fact, 'to refer to a 'system' is ... merely a
convenience and an aspiration' (Ashworth, 2000: 59). There is an overarching tension in the restorative literature as to the long term goal of restorative justice. Should it attempt to replace the criminal justice system altogether? Are the objectives of restorative justice and the criminal justice system capable of coherent co-existence (Duff, 2003)? Or is it better to simply attach restorative initiatives to the existing criminal justice system in the few places where they are unquestionably useful instead of ‘waiting for the restorative revolution’ (Warner & Gawlik, 2003: 70)?

Restorative justice advocates have argued that restorative practices are superior to many aspects of the sometimes inefficient and expensive criminal justice system (Crawford & Newburn, 2003). The courtroom has attracted much criticism from restorativists. In the courtroom the offender is a passive onlooker, called at best to give evidence or to address the court, but essentially reliant upon legal advocates and controlled by professionals of various sorts (Bazemore & Umbreit, 1995). Though indirect apologies and expressions of sorrow or regret by the offender do occur, the offender can achieve little personally to repair the damage caused by their crime. All the offender has to offer is their liberty (Palk et al., 1998).

A greater area of discussion concerns the aims of sentencing once the guilt of the offender is established. Amongst some restorative justice theorists it was popular to present the sentencing aims of the criminal justice system as confined to state actions upon the offender: (a) punishment/ retribution, or (b) rehabilitation (see Zehr, 1990; Bazemore, 1997b).

1.3.1 Retribution

Retribution is a rationale for the punishment of offenders that is ‘invoked in a number of different ways’ (Warner, 2002: 86). In its simplest form, retribution suggests that punishment is justified because wrongdoers deserve to suffer for their wrongdoing (Fox & Freiberg, 1999). A different perspective of retribution is the modern theory of just deserts, which will be discussed presently. Retribution has been presented as the preferred approach of conservative political perspectives (Hogg & Brown, 1998). Its appeal to policy makers and the public was claimed to rest upon the ability of punishment to display community disapproval, to denounce crime, and to make
criminals pay. In contrast to the healing potential of forgiveness, empowerment, and accountability that restorative justice offers, retribution promotes the infliction of pain upon the offender (Zedner, 1994). Moreover not only does it promote the infliction of pain but some theorists would point to the body of evidence, which I have summarized elsewhere, that indicates imprisonment harms offenders and even increases recidivism (Prichard, 2000).

Many criticisms were extended to one influential hybrid of retributive philosophy, called the theory of just deserts (von Hirsch, 1993). In addition to pure retributive aims, just deserts theory sees a further value in punishment – its capacity to communicate censure or blame ‘mainly to the offender but also to victims and society at large’ (Ashworth, 2000: 72; von Hirsch, 1998). The central contribution of desert theory concerns calculating appropriate levels of punishment with the guide of proportionality. Proportionality considers the relative seriousness of crimes, a ranking to a scale of punishment, and requires that the ‘penalty should not be out of proportion to the gravity of the crime involved’ (Ashworth, 2000: 72). Restorative critics have suggested that deserts theory has had negative ramifications – essentially providing a renewed legitimacy to punishment and equating legal sanctions with pain and discomfort for adult and juvenile offenders alike (Pettit & Braithwaite, 1993; Bazemore & Umbreit, 1995).

However, many of the arguments presented by restorative writers against retribution have been criticised as over simplifications (Crawford & Newburn, 2003). Daly and Immarigeon (1998) in particular pointed out that deserts theory is only one of a number of retributive theories. In his hybrid theory von Hirsch includes general deterrence as a prudential reason for punishment (von Hirsch, 1998). Portraying deserts theorists as advocates of harsh treatment is also a misrepresentation. Desert theorists are concerned with systemic fairness (treating like cases alike) and preventing, in particular, disproportionately high sentences. Whilst some jurisdictions that have implemented desert theory have witnessed increases in the length of prison sentences, California being one example, others have actually recorded overall reductions, namely Finland, Sweden, and Minnesota (Ashworth, 2000). In fact, recently one commentator has spoken of the

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4 A litany of sources have claimed that prisons (a) dislocate inmates from their families and positive role models, (b) stigmatise inmates and their families, (c) decrease employment opportunities, educate inmates in criminal techniques, (d) expose young criminals to sexual assault, extreme violence and drug abuse; and (e) neutralise senses of morality (Clayton, 1970; Hawkins, 1976; Heilpern, 1998; Leopold, 1969; Martin & Webster, 1971; Mathiesen, 1990; Morris, 1995; Sykes, 1956).
common strategic agenda that both restorative justice and deserts theory share (Dignan, 2003: 153). That is, the reform of the prison system and the avoidance of excessively repressive dealings with offenders. Dialogue between restorativists and desert theorists is arguably more conciliatory now than it was in the 1990s (see for example contributors to von Hirsch, Ashworth and Shearing, 2003).

1.3.2 Rehabilitation

The welfare model essentially recognises that environmental and pathological factors can influence some offenders to commit crime. The response, therefore, is to treat offenders in some way to counteract these influences. In the case of young offenders treatment might vary from cognitive behaviour therapy, to removal from their home environment, to counselling. Since the welfare model recognises social inequalities to a degree it has traditionally been aligned with less conservative political ideologies. The welfare model does not have a strong political status, primarily because treatment does not involve retribution or punishment, seems unrelated to the offence, and focuses upon the needs of offenders (Bazemore & Umbreit, 1995). From the perspective of disservice to offenders, the welfare model has been criticised for devitalizing offenders and engendering helplessness, as well as intimating to offenders that they are not accountable for their own behaviour (Bazemore & Umbreit, 1995). Along with others, restorative writers have pointed to some of the excesses and inconsistencies that occurred under rehabilitative models (Braithwaite, 1999). Serious offences sometimes ended in short periods of treatment whilst minor offences could result in extensive periods of rehabilitative incarceration. Indeterminate or semi-determinate sentences placed too much control in the hands of rehabilitative professionals as well as prison and probation authorities, undermining individual rights (Ashworth, 2000). Worse, research could not confirm that any of the therapies employed had any positive effect whatsoever (Seymour, 1988). Disheartening to say the least, the concept that ‘nothing works’ resonated particularly in the juvenile justice setting and led in part to calls for radical non-interventionism for young offenders (White & Haines, 2000). In short, welfare responses have been charged with being inconsistent, ineffective, and often unjust.

A criticism that restorative justice levelled at both retributive and rehabilitative responses to crime is that they result in state action – punishment or treatment – and the inaction
or passivity of the offender (Braithwaite, 1999). Perhaps the most damning evidence against both the punishment model and the welfare model is that the earlier in life that offenders are dealt with by the criminal justice system the greater the likelihood that they will re-offend (Hope, 1998). Also, Gold and Williams' (1970) rigorous British study found that youths who were charged and processed through the legal system were more likely to re-offend than those who had committed similar offences but had not been charged. Chapter three highlights that these concerns were also influential in the development of means of diverting young people away from court in the 1960s onwards.

1.3.3 Victims and Communities

In a strict legal sense, because the criminal justice system sees victims and communities as members of the state it believes that it is acting on behalf of the victim and the community purely by prosecuting the offender (Morris & Young, 2000). From the restorative perspective, although all members of society undoubtedly benefit from the rule of law and the maintenance of peace, the criminal justice system does not address the fact that the victim and community have a closer proximity to the criminal act than the rest of society (Zehr, 1990). In order of importance of those affected by crime, the criminal justice system has placed the state first, victims a distant second, and communities an even more distant third.

As with offenders, the role of victims in the courtroom is symptomatic of their significance to the criminal justice system. Victims may be required to give evidence and thus are valued by prosecutors. However, the concept of the criminal act having been committed against the state predominates. Victims' needs are largely ignored and in effect become secondary to the interests of 'judges, prosecutors, probation officers, treatment providers, and even the offender' (Bazemore, 1997a: 201). The victim can of course initiate a civil action against the offender. But apart from the fact that civil actions lack the symbolism of social concern that is arguably present at criminal trials, victims' needs are broader than monetary compensation. Victims are denied the opportunity to express their suffering in their own terms - personal stories are broader and infinitely more varied than legislative definitions of crimes (Ahmed et al., 2001). Victims frequently have no knowledge of the offender's situation and their motives for committing the crime. Lacking too is the potential for personal apologies from
offenders, or for victims' wishes to influence offenders’ sanctions (Braithwaite, 1999). The influence that victims should have upon offender's sanctions are one of the complexities in the debate on proportionality, discussed below.

'Communities' are not as easily defined as are 'victims' or 'offenders', at least in the setting of large cities. Indeed, restorativists continue to discuss the meaning of community (Walgrave, 2003). Nevertheless, in practical terms 'the community' at least includes the relatives and friends of both the victim and the offender, and any other citizen effected by the crime. Though it is not denied that most offenders at some stage make a cogent decision to commit crimes, many criminologists claim that a vicious circle exists between crime and community disharmony. Community disharmony and social inequalities engender crime, and crimes further corrode harmony within communities (Blagg, 1998; White, 2002). Myopic attention to offenders ignores the ruptured social bonds that are interrelated with crime (Zedner, 1994). The assertion that crime is related to community disharmony and social inequality is supported, at least in the context of juvenile crime, by the social and offence profiles of young offenders. The typical juvenile criminal is male, has a low income or is unemployed, has weak parental bonds and has a low level of educational achievement (Goldblatt, 1998). Extreme recidivism amongst juveniles is positively correlated with many factors including: attempted suicide; brain damage or a low intelligence quotient, sexual, physical or psychological abuse, a long history of truancy; personal drug or alcohol abuse; weak parental bonds, drug or alcohol abuse within families, psychological disorders within families, domestic violence, death of a family member, and moving place of residence often (Maxwell & Morris, 1999; Braithwaite, 1987; Wundersitz, 1996b).

1.4 EMERGING THEMES OF RESTORATIVE JUSTICE

An interesting way to analyse the emerging ideologies of restorative justice is to consider the different emphases that are placed upon the central parties, the victim, the offender or the community.
1.4.1 Victim-oriented restorative justice

Bazemore (1997a) argued that some forms of restorative practices, such as victim-offender mediation, promote a vision of restorative justice where the victim is the central figure. His main concern was that the restorative goals set for victims colour the perception of offenders and communities – both are perceived in terms of what they can offer the victim. My own experience at a restorative justice conference in Europe suggested that, with the exception of Ireland and the United Kingdom, this victim-focused ideology was prominent in that region (cf Crawford & Newburn, 2003). The content of the presentations and conversations with practitioners revealed a lack of knowledge of types of restorative practices other than victim-offender mediation. In fact, victim-offender mediation was used in the context of being synonymous with restorative justice. There was also a noticeable absence of discussion of the place of communities in restorative justice. One academic agreed with my observations (Aersten, pers. comm., 14/10/2002; see Walgrave & Aersten, 1996; for comparisons of restorative visions in Europe and North America see Walgrave, 2003: 85-86).

1.4.2 Offender-oriented restorative justice

In Bazemore’s view (1997a) the theoretical mainspring of this theme is Braithwaite’s (1989) classic theory of reintegrative shaming, which is described in more detail in chapter seven. Braithwaite (1989) took the threads of dominant criminological traditions and particular sociological observations and wove a new theory which explained how informal social controls can be used to curb criminality. The theory suggests that shame can be used constructively to discourage criminality when elicited in ceremonies attended by the offender’s ‘community of concern’, or significant others, and in the backdrop of an overarching affirmation of the offender. In this way offenders can be reintegrated back into their community of concern. However, the use of shame without socially embedded forgiveness may lead to stigmatisation and ultimately increased criminal behaviour.

5 'Restorative Justice and its Relation to the Criminal Justice System', 10-12 October, European Forum for Victim-Offender Mediation and Restorative Justice, Oostende, Belgium.
Braithwaite wrote his theory before learning of juvenile conferencing in New Zealand but has explicitly accepted that conferences meet his concept of a reintegrative shaming ceremony (Braithwaite, 1999). Braithwaite was involved with David Moore and others in introducing juvenile conferencing to Australia in a pilot scheme in Wagga Wagga (see further, Powers, 2000). The model they developed, referred to as the Wagga model, was influenced by reintegrative shaming but also, through Moore, affect theory and script theory (Nathanson, 1992; Tomkins, 1963; cited in Harris, 2001). Moore's (1993) contribution offered a psychological explanation for the effectiveness of reintegrative shaming. One important implication of affect theory was that all participants in a conference (a) would be experiencing different emotions, (b) through dialogue could move away from negative affects, and (c) particularly in discussion of reparation could collectively move towards the affect of interest/excitement where true reconciliation and reparation would occur.

These early ideas have been enormously influential in juvenile conferencing in the Australian Capital Territory, and parts of the United Kingdom, Canada and America. As described later, the Wagga model has also influenced police juvenile conferencing in Tasmania. Reintegrative shaming has been further developed by Braithwaite and his colleagues using the results of a very large experiment conducted in Canberra (Ahmed, et al., 2001; Harris & Burton, 1998). The application of affect theory to restorative justice has been refined in various ways by individuals connected to the original Wagga Wagga scheme (Moore, & McDonald, 2001).

Volleys of criticisms have been directed towards the use of these theories for restorative justice and, as explored in the following chapter, the use of the Wagga model in juvenile conferencing. The focus on deliberately inducing or manipulating shame in offenders, as advocated in Braithwaite (1989) and Braithwaite and Mugford (1994), has been criticised as excessively controlling, stigmatising, and actually counter to restorative aims (Morris & Maxwell, 2000; Blagg, 1998; White, 1994; Polk, 1994). Others have warned that the influence of affect theory could cause practitioners to develop an unrealistic and rigid emotional map of a restorative forum, such as a juvenile conference, causing them to
treat parties inappropriately if they do not display expected emotions (White, pers. comm., 17/02/02).

Bazemore (1997a) claimed that reintegrative shaming was offender-oriented because of its emphasis on 'correctly' shaming criminals so that they will not re-offend. Arguably this was clearly evident in early applications of the theory to restorative justice, namely in juvenile conferences (Braithwaite & Mugford, 1994). Victims and communities of concern were regarded as important mainly to (a) prompt the offender to recognise the impact of their crime and feel shame, and (b) provide a context of love and acceptance for the offender. In terms of meeting community needs there is little more than a 'hope' that communities will develop better capacities to manage crime (Bazemore, 1997a: 213; Sandor, 1993, 1994; Polk, 1994; White, 1994). Braithwaite (1994; 1999) accepts that social factors are related to crime but sees that these complex questions should be tackled outside of the juvenile conference. The 'moment' of the restorative justice forum is most importantly a chance for the offender to develop a new perspective of their crime and to attract the offender to the people who are most interested in their welfare.

It is difficult to gauge to what extent these criticisms apply to recent adaptations to reintegrative shaming by Braithwaite and his colleagues (Ahmed et al., 2001). It seems that Braithwaite is now placing more emphasis upon reintegrative shaming as a very useful framework for academic research into the emotional dynamics of restorative justice (Braithwaite, J. & Braithwaite, V., 2001; Braithwaite, 2003). Less evident are notions that knowledge of reintegrative shaming theory is crucial for practitioners.

1.4.3 Community-oriented restorative justice

The third ideological arm of restorative justice is oriented towards communities. Whereas the first and second themes either ignore communities or see them as a source of support for victims or offenders, this third theme generally views the community as the epicentre of restorative justice. By insisting on 'meaningful community participation... in solving problems, resolving conflicts, and building or rebuilding damaged relationships' the community can attack 'the primary cause of crime': the breakdown of community relationships (Bazemore, 1997a: 203). This orientation is not supposed to disadvantage victims or offenders. Quite the opposite – communities
actually should be better able to meet the needs of these parties because it has a closer proximity to them than does the criminal justice system.

One example of community-oriented restorative theory is the balanced and restorative justice model, or BARJ (Pranis, 1998). Amongst other things, BARJ requires that the community provide the offender with roles that are valued by others in areas which the offender has some potential. Community bodies, such as employers, civic groups, and charities, are called to offer tasks which build on the strengths of the offender, aiming to instill a ‘sense of belonging, usefulness and control’ (Pranis, 1998: 19) thereby providing an incentive to abide by the norms of the community. Instead of adding or altering single restorative justice programs, the aim of BARJ is to promote a systemic change in ethos towards its holistic approach to restorative justice.

A more recent theoretical development seeking community ownership of restorative practices is restorative social justice (White, 2000; 2003). This model deals with restorative responses to juvenile offending alone. With a strong interest in politically and socially weak members of society, restorative social justice seeks community empowerment by ‘enhancing the welfare and prospects’ of the collectivities to which victims and offenders belong – neighbourhoods and extended families (Cunneen & White, 2002: 379). Interesting aspects of this model are that, first, it suggests that the reparation that a youth agrees to undertake should be directed towards practical needs of the community that would enable it to break cycles of crime. Restorative social justice also advocates for very lateral and original strategies in mapping community resources that might support restorative justice. School buildings, for example, could be used out of hours for any number of programs directed both at young offenders and community spirit. The skills of residents, associations, and institutions can be drawn on in ways that work for each community. Most important, repairing crime is viewed as repairing social harm. Whilst empowering victims and offenders is valued, restorative social justice argues for the inclusion of a broad range of interested parties.

Community-oriented restorative justice is optimistic about achieving change in the offender’s social environment. It considers the restorative justice forum as the beginning of a process in which the offender’s problems are tackled via their social surroundings. There is also a strong belief that communities will be willing to participate in restorative
justice forums. However, exactly how to define the 'community' for the purposes of restorative justice is problematic and a matter of debate (Walgrave, 2003). In each case the parties may identify with different 'communities', be they defined by geography, ethnicity, religion, culture, socio-political values, and so on. In many cases it may be difficult to represent these communities in a meaningful way in a restorative forum. Or it may be the case that a party rejects the community with which they once identified (see Maxwell & Morris, 1993). Perhaps the challenge for restorative practitioners is to be ready to respond to and make use of communities only when they are identifiable?

CONCLUSION

Restorative justice theory is optimistic about change and dealing with the crisis of each crime in a positive way. Though new, undoubtedly the restorative movement is continuing to gather momentum around the world. Experience indicates that putting restorative principles into practice even in a small pilot scheme presents numerous difficulties (McCold & Wachtel, 1998; Hoyle et al., 2002). Vastly more ambitious have been the schemes established to change the juvenile justice systems of whole jurisdictions, as has occurred in New Zealand and parts of Australia. Some of the complex problems encountered by juvenile conferencing schemes – large and small – are the topic of the next chapter.
CHAPTER TWO

JUVENILE CONFERENCES

The growth of restorative justice over the last few decades coincided with the establishment of family group conferences in New Zealand in 1989. Intense interest in the New Zealand initiative, combined with other factors, led to the rapid establishment of similar types of practices across Australia. These practices have some important differences, but generic terms for them are ‘juvenile conferences’ or simply ‘conferences’. The basic format for a juvenile conference is a meeting between the young offender, the victim, and their respective family and friends. A facilitator convenes the meeting. Each participant is given the opportunity to discuss the impact of the crime. The group moves to consider ways in which the offender may repair the emotional and material harm caused. This may be achieved through one or more symbolic or practical acts, such as verbal or written apologies, working for the victim or the community, or attending counselling sessions. Conferencing is recognised internationally as a form of restorative justice (Maxwell & Morris, 1999; Bazemore, 1998b). Commentators have identified a great variety of problems with conferencing, only some of which are discussed in detail in this chapter. These range from diverse negative consequences for all those who participate in conferences through to the difficulties of maintaining legal safeguards for young offenders (see Braithwaite, 1999).

This chapter has two purposes. The first purpose is to continue a process begun in chapter one, that is, contextualising juvenile conferencing in Tasmania. To this end section 2.1 summarises the major findings from the research that has been conducted on juvenile conferencing to date. The results indicate that victims and offenders benefit in many ways from involvement in conferences. Most interesting, when conferences are run in line with the ideals of restorative justice they seem to have a positive impact on recidivism. Section 2.2 describes the development of conferencing in Australia during the 1990s and the emergence of two models for facilitating conferences, models which are still often referred to as the New Zealand model and the Wagga model. Section 2.3
compares some of the key features of the juvenile justice systems in Australia and New Zealand. Tasmania stands out as quite an unusual system, one that incorporates elements of both the New Zealand model and the Wagga model.

The second purpose of this chapter aims to lay the foundation for one of the key research questions that this study has sought to address. Is the new Tasmanian juvenile justice system diverting youths away from court? Section 2.4 compares the positive and negative experiences in Australia and New Zealand in attempting to achieve this goal. One problem is that in some jurisdictions not enough young offenders are directed to conferences by the police. It seems that the police discretion to direct youths where they see fit – their 'gate-keeping' role – can be affected by many factors, including biases. Section 2.5 analyses the phenomenon of 'net-widening', namely an unintended increase in the number of young people processed by the criminal justice system. This often occurs with the implementation of new initiatives like conferencing. My findings on diversion, gate-keeping, and net-widening in Tasmania are analysed in chapter four. Finally, section 2.6 analyses the controversial issue of whether police officers should facilitate conferences. Some authors simply cannot conceive of a less appropriate juvenile conference facilitator than a police officer. Others point to findings that indicate police officers can facilitate juvenile conferences well. The situations in Australia, the United Kingdom (UK) and North America are discussed. The issues raised in this section become fundamental to chapters five and six, which compare Tasmania’s police facilitators with its independently contracted facilitators.

2.1 RESEARCH ON CONFERENCING

One of the reasons why juvenile conferencing has become a major flag bearer of restorative justice is that research to date has yielded encouraging findings. Indeed, it seems that at least in this area of restorative justice ‘the claims of enthusiasts’ are not ‘running ahead of the evidence’ (Ashworth, 2000: 77). In some jurisdictions, such as New Zealand, it appears that conferences are a more cost-effective way of dealing with juvenile crime than court (Morris & Maxwell, 2003). Most victims and offenders who participate in conferences express satisfaction with their involvement. This has been a consistent finding across jurisdictions in Australia (Strang et al., 1999; Trimboli, 2001; Daly, 2003; Palk et al., 1998; Markiewicz, 1997), as well as New Zealand (Morris &
Maxwell, 2003), the UK (Hoyle et al., 2002; Jackson, 2001), and North America (McCold & Wachtel, 1998). Supporters of victims and offenders also generally report high levels of satisfaction with conferences (Morris & Maxwell, 2000; McCold & Wachtel, 1998; Hoyle et al., 2001). Some studies have found that the levels of satisfaction with conferences are far greater than victims and offenders report for their experiences of court (Ahmed et al., 2001; cf McCold & Wachtel, 1998). Satisfied victims report a variety of benefits from participating in conferences. These include being able to speak about their experiences of the crimes, having input into the process, gaining understanding about the offender and their motives for offending, reduced fear of the offender, and receiving a genuine apology (Daly, 2003). Positive outcomes reported by youths include involvement in the conference, satisfaction with the undertakings they agreed to, and improved relations with family members (Hoyle et al., 2002).

2.1.1 Recidivism

The evidence is mounting that conferences also help youths to desist from offending behaviour. The quasi-randomised controlled experiment conducted in the Australian Capital Territory found that – in comparison to court – conferences had a statistically significant positive impact on the re-offending rates of violent offenders aged 10 to 29 years (Strang, 2003). However, no differences were found between court and conference for property offences. Similar results were found in a North American study (McCold & Wachtel, 1998). Two studies with different designs placed conferences in the context of the lives of young offenders and found positive influences upon recidivism (Hoyle et al., 2002; Maxwell & Morris, 1999). The New Zealand study arguably yielded some of the clearest evidence to date on the ingredients of successful conferences (and by implication restorative justice). Nine composite variables proved to be significant predictors of youths not being reconvicted after their conference. These included for the offender (a) apologising genuinely to the victims in the conference, (b) participating in decision making, (c) agreeing with the outcome of the conference, (d) remembering the conference, completing the task agreed to, feeling sorry, and feeling that they had repaired the damage caused, and (e) not being made to feel a bad person (Maxwell & Morris, 1999: 42). (The remaining four predictive factors concerned the parents of the offender, but have not attracted much attention in the literature. These factors are discussed in chapter seven.) Maxwell and Morris' (1999) results suggest that reductions
in recidivism are most likely to occur when conferences are conducted in a restorative way (see also Daly, 2003; Daly & Hayes, 2002). This concurs with findings about other types of restorative forums. When restorative values are observed, reductions in recidivism appear later (Kurki, 2003; Latimer et al., 2001). Amongst other things, genuine apologies, offender remorse, equal participation in decision making, consensus, and the presence of the victim are factors reported to be correlated with reduced recidivism (Kurki, 2003). Deeper explanations of the ability of restorative justice to reduce recidivism vary. Braithwaite and his colleagues suggest that a combination of guilt and shame experienced by the offender is important for reintegrative shaming to take place (Ahmed et al., 2001). Maxwell (2001) disagrees and views empathy for the victim as the crucial factor. Hoyle et al. (2002) seem to place more emphasis on the offender experiencing procedural fairness in the conference. They point to Tyler’s (1990) finding that offenders who perceive the justice system as fair are more likely to obey the law (see also Ahmed et al., 2001).

2.1.2 Negative outcomes of conferences for victims

Conferences can be highly charged and lengthy meetings that delve into the most personal of issues. Research indicates that the process can have different negative outcomes at times. Victims have reported that they (a) were not able to speak enough, (b) were asked too many questions, (c) were not supported, (d) felt intimidated by the number of the offender’s supporters, and (e) became more scared of the offender (Maxwell & Morris, 1993). In Maxwell and Morris’ (1993: 124) study, one third of victims felt worse after attending the conference – in some instances expressing ‘depression, fear, distress and unresolved anger’. Victims also feel disillusionment if the agreements made in the conference are broken by the offender (Trimboi, 2000). However, it seems that better conferencing practices dramatically increase the satisfaction of victims. In particular, face-to-face briefing for the main participants – including the victim and the offender – increases the likelihood of victim satisfaction (Palk, et al., 1998; Morris & Maxwell, 2000; Hoyle et al., 2002). Cunneen and White (2002) have reported a case of post-conference victimisation – where friends of an offender assaulted a victim in retribution for the humiliation that the offender experienced during the conference. Finally, conferencing has met stiff opposition in some indigenous communities in terms of ramifications for all participants (Blagg, 1998;
Two Tauri, 1999).

2.1.3 Negative outcomes of conferences for offenders

Offenders also are vulnerable to negative consequences from conferences. There is some evidence that the legal rights of juveniles are more open to abuse in conferencing schemes than they are in the formal legal system. Youths have reported (a) not being informed of their rights when first charged, (b) feeling that they had no choice as to whether to attend a conference, (c) attending conferences without first making a clear admission of guilt, and (d) being intimidated by the police to attend a conference (Palk et al., 1998; Hoyle et al., 2002). On occasions the outcomes of different conferences concerning similar offences have been disproportionate and this has dissatisfied youths who perceive that they were treated harshly (Maxwell & Morris, 1993). These findings echo Warner’s (1994) earlier concerns about abandoning the formal legal system (cf Morris & Maxwell, 2000). Many researchers have observed instances where youths have been treated in a stigmatising way during conferences (Bargen, 1999). In some cases this has appeared to be far worse than court proceedings could possibly be (Ahmed et al., 2001). Being made to feel a bad person in a conference appears to be related to future offending (Maxwell & Morris, 1999). In one case study it seemed that the youth’s perceptions of a conference as unfair and bureaucratic lessened his respect for the law and contributed to later criminal behaviour (Hoyle et al., 2002). Another study found that up to one third of offenders did not feel that they were actively involved in the conference (Maxwell & Morris, 1993; Daly, 2003). As many as 25% of youths felt that their family or parents were the main decision makers (Maxwell & Morris, 1993). There has been an assumption in the restorative literature that heavy parental involvement is disempowering for young people and therefore is counter to the aims of restorative justice (Daly et al., 1998). However, chapter seven of this thesis challenges that view and considers whether heavy parental involvement can be in the best interests of the young offender in some cases (see Prichard, 2002).

The majority of writers do not view the negative findings just described for victims and offenders as serious enough to put the value of conferencing in question. Especially in New Zealand and Australia, where large scale conferencing systems have been established, it seems impossible to prevent failings from occurring altogether.
Commentators have argued that many of the problems observed in conferencing have been largely attributable to poor practice rather than inherent weaknesses or flaws (Young, 2002). Still, Daly (2003) rightly warns against complacency and wonders whether there is a threshold for negativities in conferencing, beyond which the existence of a scheme should be mooted.

2.2 JUVENILE CONFERENCING IN AUSTRALIA

The Children, Young Persons and Their Families Act 1989 (NZ), which established conferencing in New Zealand, was influenced by a variety of approaches to juvenile crimes including (a) rehabilitative principles, (b) retributive principles, and (c) central concepts of diversion and decarceration (Maxwell & Morris, 1993). Some restorative constructs, namely victim-offender mediation, reparation and reconciliation, are recognised as influences upon the legislation, although the term ‘restorative justice’ does not appear in the Act or early descriptions of it (Maxwell & Morris, 1993). Chapter three will explain that a similar variety of impetuses lay behind the passing of new juvenile justice legislation in many Australian jurisdictions, including Tasmania. In particular, during the 1980s there was a move towards implementing policies fitting a ‘justice model’ – which amongst other things emphasised the protection of the legal rights of young people. Conferencing, and later restorative justice, became subsumed into these legislative changes.

In 1991, shortly after the New Zealand conferencing system was established, interested members of the New South Wales (NSW) police force instituted a pilot program with some similar features in Wagga Wagga (Moore & O’Connell, 1994). The use of police officers to facilitate the Wagga Wagga conferences was a significant departure from the New Zealand practice, which employs independent facilitators. The Wagga Wagga scheme was subsequently influenced by reintegrative shaming and affect theory (see 1.3). This influence became one of the defining features of the ‘Wagga model’ of conferencing. Operating in quite a strict paradigm, the police-facilitators would (a) not avoid – and even actively seek – dynamics in conferences which might elicit shame in the youth, (b) seek to terminate this shame with forgiveness, and (c) conceive other

7 The Wagga Wagga scheme was referred to as an effective cautioning scheme rather than a conferencing scheme (Moore & O’Connell, 1994).
Two participants in the conference as resources to achieve these aims (O'Connell, pers. comm., 10/1/2001). In contrast, the theories that influenced the facilitating practices in New Zealand were, and still are, much more varied. Some New Zealand facilitators insist that their practices are not influenced by reintegrative shaming at all (Daly & Hennessey, 2001). The influences of affect theory and script theory upon the Wagga model resulted in the use of conference scripts for facilitators (Moore, 1993). The scripts outline what the facilitator should say at certain key points of the conference, what format the conference should take, how the facilitator should deal with certain reactions and so on. The purpose of the script is to make each conference unfold according to a kind of psychological map. Following this map is supposed to maximise the opportunity for reintegrative shaming to occur. Moore (1993: 211) spoke of the ‘remarkable similarity’ between conferences ‘regardless of the nature of the offence being discussed’, adding that ‘with few exceptions, participants move through the same sequence of emotions’.

The growth of conferencing in Australia was influenced by many factors including the political context of each jurisdiction (see Power, 2000). As noted, legislative changes to juvenile justice were already being mooted (O'Connor, 1997). Amid heated debate over the use of conferencing for juveniles per se as well as the attributes of the two models, parliamentary inquiries into youth crime and criminal justice responses were instituted in South Australia, Queensland, Western Australia and NSW itself (Alder & Wundersitz, 1994). Simultaneously, the Wagga model was trialed in Queensland, the Northern Territory, the Australian Capital Territory (ACT), and – as discussed in chapter three – Tasmania (Daly & Hennessey, 2001). The first legislatively backed scheme appeared in South Australia in 1993 (Young Offenders Act 1993 (SA)). This was followed by new Acts or amendments to existing Acts in Western Australia (Young Offenders Act 1994 (WA)), Queensland (Juvenile Justice Act 1992 (QLD)),9 New South Wales (Young Offenders Act 1997 (NSW)), Tasmania (Youth Justice Act 1997 (Tas)),9 and the Northern Territory (Juvenile Justice Act 1997 (NT)).10

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8 Amended in 1996.
9 Proclaimed 2000.
Seemingly most of the jurisdictions, including NSW, have rejected the Wagga model in favour of the New Zealand model. The Northern Territory is the only statutory based scheme that has clearly instituted the Wagga model. As discussed below (2.6.1), the Wagga model was used in the ACT by the Federal Police as part of the five-year Reintegrative Shaming Experiment (Trimble, 2001; see also 1.3.2). The Youth Justice Act 1997 (Tas) established ‘community conferences’ – based on the New Zealand model – and police formal cautions. Arguably because of an ambiguous description of formal cautions in the legislation, the police were able to continue the Wagga model conferences that they had been trialing prior to the proclamation of the Act in 2000. Tasmania appears to be the only jurisdiction in Australia, and possibly the world, which incorporates the New Zealand model and the Wagga model in the same system. Chapter three will explain in more detail what occurred in Tasmania.

The ‘Wagga’ and ‘New Zealand’ models are terms that are still used today. Both approaches are now used in different parts of the world. From some perspectives the New Zealand model places more emphasis on involving families in making the decisions that affect them (Markiewicz, 1997). For instance, facilitators routinely pause conferences to give the offender’s family an opportunity to discuss ideas for reparation – which implies a strong emphasis upon empowerment of the family and deprofessionalisation (Jackson, 2001). The Wagga model arguably focuses more upon on the moment of the conference in terms of (a) restoration between the parties and (b) (for some practitioners) the successful reintegrative shaming of the offender (Jackson, 2001).

Many, but not all, of the initiatives that employ the Wagga model are police led. In Britain many localised restorative justice projects have evolved. Jackson (2001) claims that some practitioners have not grasped the differences between the two models (see further Crawford & Newburn, 2003) while other practitioners are seeking to develop hybrid approaches. These comments are pertinent to the Tasmanian context where the practices truly have evolved without much deliberate planning – or theorising.

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11 Victoria began a pilot program of the New Zealand model in 1995 (Markiewicz, 1997). Recently this has been expanded to cover Melbourne, Gippsland, and Hume (Rebecca Grace, pers. comm., 26/06/2003). Grace is the Senior Project Officer in the Juvenile Justice Section of the Department of Human Services, Victoria.

12 In some parts of Britain the Wagga model is referred to as the ‘Canberra model’, where it was employed for the five-year Reintegrative Shaming Experiment.
The systems uniformly apply to young people aged 10 to 17 years. One of the primary purposes of the new systems is to divert as many young offenders away from court as possible. For this reason police cautions and juvenile conferences are often called diversionary procedures. Minor offences are dealt with by informal police cautions. Where a youth has allegedly committed an offence of intermediate seriousness they are eligible to be diverted away from court. Juveniles who do not deny committing the offence are referred to a 'gate-keeping' process, in most cases run by the police.
Generally, during this process factors such as the seriousness of the offence, the youth's prior criminal history, and patterns of offending behaviour are reviewed (see further Maxwell & Morris, 1993). The case may be sent to court if diversion is not deemed appropriate. If a form of diversion is suggested, the consent of the youth will be sought and the young person may still elect to go to court.

Formal cautions are conducted by police officers at police stations. They are generally a simple format involving the youth, an officer, and a guardian or responsible adult. In some jurisdictions the victim is invited to attend. Typically, the purpose of the caution is to explain to the offender the possible consequences of future offending behaviour. A lack of remorse on behalf of the offender, aggression or similar indicators that the cautioning process is pointless may cause the officer to refer the case back to the gatekeeping process.

Conferences are lengthier than cautions and typically involve many more individuals, including the victim. If a conference does not result in an agreement concerning undertakings for the juvenile then the matter is returned to the gate-keeping process and may be referred to court. Likewise, if the youth fails to complete the undertakings the matter can also be sent to court.

Generally, serious offences are ineligible for diversion and can only be dealt with by the court system, although in some situations in New Zealand serious offences can go directly to conferences. As noted, the courts also hear cases involving offences of intermediate seriousness where the youth concerned (a) has denied committing the offence, (b) has not been offered a diversionary forum after the gate-keeping process, (c) was involved in a failed diversionary forum, or (d) did not complete the undertakings agreed upon in a conference. There are a number of intricate differences between the jurisdictions regarding the courts' role. However, there are two main situations in which the courts can refer cases to conferences. First, the court can send juveniles who have admitted guilt directly to a conference as an alternative to hearing the matter. This effectively allows the courts to check the gate-keeping process. Second, the courts can use conferences as a sentencing option, alone or in conjunction with other forms of disposition.
As illustrated in Table 2.1 below, adapted from Strang (2001), Power (2000), and Morris and Maxwell (1993), significant differences exist between the conferencing systems in Australia and New Zealand.
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Offences Ineligible for Diversion</th>
<th>Pleas Eligible for Diversion</th>
<th>Gate-keeping</th>
<th>Formal Caution</th>
<th>Conferences</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACT</td>
<td>Most serious violent offences, sexual offences, domestic violence, certain traffic and licensing laws</td>
<td>Youth must admit guilt and consent to diversion</td>
<td>Police (Children’s Services Act 1986 (ACT))</td>
<td></td>
<td>Police facilitator</td>
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<tr>
<td>(Canberra)</td>
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<td></td>
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<td></td>
</tr>
<tr>
<td>NSW</td>
<td>Indictable offences which cannot be dealt with summarily; sexual offences, offences causing death, certain drug offences, offences relating to apprehended violence orders, most traffic offences</td>
<td>Youth must admit guilt and consent to diversion</td>
<td>Police. Disputes between police and conference coordinators referred to DPP.</td>
<td>Police can require youth to give an apology</td>
<td>Independent facilitator</td>
</tr>
<tr>
<td>- Young Offenders Act 1997 (NSW)</td>
<td></td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>NT</td>
<td>Most serious violent offences, and sexual offences</td>
<td>Need not admit guilt</td>
<td>Police</td>
<td>Police can administer a basic caution</td>
<td>Police facilitator</td>
</tr>
<tr>
<td>- Juvenile Justice Act 1997 (NT); Police Administration Act 2000 (NT)</td>
<td></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>NZ</td>
<td>Murder, manslaughter and traffic offences not punishable by imprisonment</td>
<td>Need not admit guilt, only decline to deny charges</td>
<td>Mandatory referral to conference if no police warning delivered</td>
<td>No legislative ground: police practice to give warnings, sometimes with an informal sanction</td>
<td>Independent facilitator</td>
</tr>
<tr>
<td>Jurisdiction and Legislation</td>
<td>Ineligible Offences for Diversion</td>
<td>Pleas Eligible for Diversion</td>
<td>Gate-Keeping</td>
<td>Formal Cautions</td>
<td>Conferences</td>
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<tr>
<td>QLD - Juvenile Justice Act 1992 (Qld)</td>
<td>Police discretion</td>
<td>Youth must</td>
<td>Police</td>
<td>Police can suggest youth apologise to the victim</td>
<td>Two independent facilitators</td>
</tr>
<tr>
<td>SA - Young Offenders Act 1993 (SA)</td>
<td>Police discretion regarding meaning of 'minor' criminal offence; has included sexual assaults and robberies</td>
<td>Youth must admit guilt and consent to diversion</td>
<td>Police</td>
<td>Police power to impose substantial undertakings. Failure to complete undertakings can lead to court.</td>
<td>Independent facilitator Veto option for offender and police officer.</td>
</tr>
<tr>
<td>TAS - Youth Justice Act 1997 (Tas)</td>
<td>10-13 years: murder, manslaughter, attempted murder + 14-16 years: serious sexual offences and robbery + 17 years: traffic offences</td>
<td>Youth must admit guilt and consent to diversion</td>
<td>Police</td>
<td>Police power to impose substantial undertakings. Victims can be present. Failure to complete undertakings does not lead to court.</td>
<td>Independent facilitator Many formal cautions run as conferences by police facilitators Veto option for offender, victim, and police officer.</td>
</tr>
<tr>
<td>VIC (Melbourne) - No legislation</td>
<td>Not used for minor matters.</td>
<td>Youth must admit guilt.</td>
<td>Court referral; only in place of Supervisory Order</td>
<td>-</td>
<td>Independent facilitator</td>
</tr>
<tr>
<td>WA - Young Offenders Act 1994 (WA)</td>
<td>Most serious violent and sexual offences; some traffic offences</td>
<td>Youth must admit guilt</td>
<td>Police &amp; Prosecutor</td>
<td>Police can administer a basic caution</td>
<td>Independent facilitator within a ‘team’</td>
</tr>
</tbody>
</table>
2.3.1 Offences ineligible for diversion

Different approaches have been adopted regarding which offences are ineligible for diversion. In South Australia and Queensland the police have discretion as to which offences they may decide to divert. The other jurisdictions have chosen to specify which offences are sufficiently serious to automatically require court proceedings, regardless of whether the young person admits to the offence. Several jurisdictions have excluded sexual offences altogether and most of the serious violent offences (Western Australia, ACT, Northern Territory, and NSW) whilst New Zealand’s system only excludes murder and manslaughter. Tasmania has three categories of offences that are ineligible for diversion, corresponding to three age brackets. Offenders aged between 10 and 13 years cannot be diverted away from court for murder, manslaughter and attempted murder. In addition to these crimes, offenders aged 14 to 16 years cannot be diverted for serious sexual offences, aggravated armed robbery, armed robbery, robbery, or preparing to commit a property offence armed with a dangerous weapon. The offences ineligible for diversion for 17 year olds include all the offences listed above as well as traffic offences.

2.3.2 Plea required for diversion and consent

With the exception of New Zealand and the Northern Territory, young people must admit guilt before they can be diverted away from court. In most cases it is also necessary that the young person consent to attend the caution or conference. However, consent is not required in Western Australia or Victoria. Queensland is unique in that, where a victim is involved, the victim must give their consent before a conference can be held.

2.3.3 Gate-keeping body

The process of channelling cases to different tiers of the youth justice system is called ‘gate-keeping’. The gate-keeping process is obviously restricted to those cases which are eligible for diversion. In all jurisdictions the discretion to informally caution young offenders rests with the police. The police also have the sole power to divert juveniles to a formal caution, although neither Victoria nor the ACT have formal cautioning systems.
The gate-keeping process for conferencing is more complex. The continuing pilot program in Victoria has a very specific gate-keeping process – conferences are accessible only for those youths who are expecting to appear in court and would probably be given a supervisory order (Rebecca Grace, pers. comm., 26/06/2003; Strang, 2001; see also Ban, 1996). South Australia, Tasmania, Queensland, the ACT, and the Northern Territory have allocated the discretion to divert youths to a conference to the police. Of these five police gate-keeping systems, all except South Australia, have provided for the possibility for the courts to refer matters to juvenile conferences. That is, the courts have the power to refuse to hear a matter and refer it automatically to a juvenile conference. Alternatively, post conviction the courts can refer juveniles to conferences. In Western Australia and NSW the police share the gate-keeping role with other agencies including the courts. The system in Western Australia involves a mixed gate-keeping role between the police and public prosecutor. Conference facilitators in NSW are involved in gate-keeping. Where they disagree with the police, cases can be referred to the public prosecutor for adjudication. New Zealand differs markedly from all Australian jurisdictions in its gate-keeping process. Although the police still have the discretion whether to deal with a matter informally or through a formal caution, all other matters not dealt with in either of these ways must be referred to a conference. This 'mandatory' system is arguably the most significant feature of the New Zealand diversionary system (Power, 2000: 218).

2.3.4 Formal cautions

Formal cautions exist in all jurisdictions except for Victoria and the ACT. In most jurisdictions formal cautions are relatively simple processes involving a police officer, the young offender and an adult. In Queensland the police are able to ‘suggest’ that the offender apologise to the victim (Juvenile Justice Act 1992 (Qld), s. 16(2)), whilst in NSW the police can ‘require’ an apology (Young Offenders Act 1997 (NSW), s. 29). These very minor police powers are a stark contrast to formal cautioning in South Australia and Tasmania. In both these states the police can ask the young offender to agree to substantial undertakings. Refusal by the juvenile may cause the matter to be referred to court. South Australian formal cautions can result in up to 75 hours community service, compensation for the victim, or ‘anything else appropriate in the circumstances’ (Young

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13 Grace is the Senior Project Officer in the Juvenile Justice Section of the Department of Human Services, Victoria.
Offenders Act 1993 (SA), s. 8(1)(a) – (c)). Similar undertakings can be imposed in Tasmanian formal cautions, although the community service has an upper limit of 35 hours (Youth Justice Act 1997 (Tas), s. 10(2)(c)).

In one sense the South Australian model of formal cautioning provides the police with more power than does the model introduced in Tasmania. In South Australia if a youth agrees to undertakings in a formal caution but fails to complete those undertakings the police can then refer the matter to court (Young Offenders Act 1993 (SA), s. 8(8)). However, the Tasmanian model of formal cautioning also has a provision unique amongst Australian jurisdictions. The Youth Justice Act 1997 (Tas) allows for the presence of victims at formal cautions (s. 9(3)(a)). Tasmanian police have interpreted this section to allow for discussion between the victim and the young offender and, consequently, for the facilitation of formal cautions as conferences. Effectively Tasmanian police may choose to conduct formal cautions for some cases and conferences for other cases.

2.3.5 Conferences

Tasmania has the most unusual system of conferencing due to the police practice of conducting some formal cautions as conferences in addition to the Department of Health and Human Services (DHHS) conferences. All other jurisdictions have adopted either police conferences (ACT and NT) or independently run conferences (NSW, NZ, Qld, SA, Vic, and WA). Queensland has developed an interesting practice in using two facilitators for each conference. Similarly, Western Australian facilitators operate as a member of ‘teams’ that are assigned conferences to coordinate.14

In a sense all young offenders who attend a conference have a veto option over the undertakings purely because their agreement and positive orientation towards the conference is essential. However, some jurisdictions specify which conference participants must agree upon undertakings before a conference can be concluded successfully. Queensland is the only jurisdiction which stipulates a consensus amongst

14 It is beyond the bounds of this thesis to examine in further detail the employment arrangements of the independent facilitators in the jurisdictions. However it is worth noting that an important consideration in some jurisdictions has been whether facilitators should be employed or whether their involvement in restorative justice should be on a voluntary, unpaid basis (Crawford & Newburn, 2003). Others have considered whether it is inappropriate to employ social workers as facilitators. Their main concern is whether social workers can divorce their professional welfare training from their restorative practices (see for example Hoyle et al., 2002). A third issue is the nature of employment for independent facilitators. Should they be employed on a full-time basis or as contractors?5
all conference participants. In NSW only the offender and the victim must agree, whilst South Australia requires the mutual agreement of the youth and the police officer. The DHHS conferences in Tasmania need the agreement of the youth, the victim, and the police officer. Police officers administering formal cautions in Tasmania can 'require the youth to enter into ... undertakings' (s. 10 (2), Youth Justice Act 1997 (Tas)). However, when the Tasmanian police conduct conferences they tend to seek at least the agreement of the victim, the young person, and the police officer 'facilitator'.

2.4 DIVERSION AND POLICE GATE-KEEPING

The Youth Justice Act 1997 (Tas) (s. 7) states that one of the primary objectives of the new juvenile justice system in Tasmania is to divert young offenders away from court. Achieving reductions in the number of youth court appearances is therefore the first test of the new system. As with many other jurisdictions, in Tasmania it is the police who predominantly decide how each case it to be dealt with, be it an informal caution, formal caution, police conference, DHHS conference, or court.

Many commentators have warned against allowing the police to be the gate-keepers to juvenile justice systems. Their main concern is that police biases against certain groups will lead them to treat juveniles from those groups more harshly. An example of harsh treatment would include a formal caution and a community service order for a youth who might otherwise have been informally cautioned. These juveniles will be disadvantaged since increased contact with the police seems to be positively correlated with criminal behaviour in juveniles (Blagg & Wilkie, 1997; Sandor, 1993). There is some evidence that police treat some categories of juveniles differently from others. For example, disproportionately high frequencies of indigenous youths are sent to court in NSW and South Australia (Hennessey, 1999; Wundersitz, 1996a). Similarly, being of Maori decent was found to be a predictive factor of arrest for juveniles in New Zealand (Maxwell & Morris, 1993). Others have suggested that the police are biased against male offenders (Powers, 2000; cf Hennessey, 1999). Concerns have also been raised about police biases against (a) low socio-economic groups, (b) youths from unstable families, (c) youths whose parents have a negative attitude towards the police, and (d) youths from families with criminal histories (Lee, 1995; Maxwell & Morris, 1993). Unfortunately the police gate-keeping practices concerning race, gender, socio-economic background,
offending history and so on could not be analysed in my own Tasmanian study, partly because of the inflexibility of the police data base from which statistics were drawn.

However, I was able to produce robust statistics on the rates of juvenile diversion in Tasmania. The results indicate that the police have been diverting youths away from court to their own formal cautions and conferences as well as to DHHS conferences. These results are analysed in detail in chapter four. It can be mentioned here, though, that the Tasmanian police do not seem to be reluctant to use the DHHS conferences. Police reluctance to refer youths to conferences has crippled some non-police juvenile conferencing schemes in other jurisdictions in the past. Indeed, if the police 'shut the gate to restorative justice, it is nigh impossible to push it open against their resistance' (Braithwaite, 1999: 342). For instance, eighteen months after the establishment of the diversionary scheme in NSW in 1997, over 70 per cent of youths were still being processed through the court system (Power, 2000). Although just under 20 per cent of young offenders were diverted through the formal cautioning system, as few as three per cent were referred to a conference.

Some have argued that the police are biased against conferencing because they perceive it to be a 'soft option' which would not deliver the valuable 'short, sharp shock' received from a court appearance or detention (Sarre, 1999: 246). In some instances it may simply be that the police are disinterested in new diversionary systems, or are simply 'unaware' of them (Power, 2000: 285). However, to a degree the courts can check heavy biases in police gate-keeping because in most systems the courts can refer cases onto a conferencing scheme – which can be a clear sign to the police that their gate-keeping processes are inappropriate. For this reason, Power (2000) partly blamed the low referral rates to conferences in NSW upon a lack of support from the bench. That is, he believes the courts could have forced the police to refer more cases to conferences. It is interesting to note that the courts have also been directly responsible for the failure of restorative justice initiatives. For instance, the courts in Queensland scuttled a well founded victim-offender program simply by failing to refer many cases to it (Condliffe, 1998).

The South Australian conferencing scheme appears to have had support from the courts, though there have been variations between magistrates (Wundersitz, 1996a). Perhaps
this is one of the reasons for the success of the scheme in terms of (a) the high levels of diversion and (b) the numbers of cases referred to conferences by the police. Police in South Australia send almost one third of juvenile offenders to court. Just over 33 per cent are dealt with by way of an informal caution, 22 per cent by formal cautions, and the remaining 10 per cent or so are sent to conferences (Power, 2000).

Despite only being a pilot program in one city it is worth noting the success of the Wagga Wagga scheme as well. In Wagga Wagga in 1990, 72 per cent of juvenile offenders were sent to court and by 1992 this figure had dropped, remarkably, to less than 10 per cent. By 1991 over 40 per cent of the young people who were diverted from court were sent to a police conference (Moore & Forsythe, 1995; Power, 2000).

Advocates for the Wagga Wagga scheme suggested that one of the main reasons for its success was that on a weekly basis a panel of sergeants reviewed every juvenile case that was eligible for a conference (Moore & McDonald, 1995). Evidently the sergeants saw the value of conferencing juvenile offenders. However, unlike the other schemes considered thus far, the police in Wagga Wagga were diverting youths to their own conferencing program. Also it is arguably easier to monitor and maintain good gate-keeping practices in one regional town, such as Wagga Wagga, than across an entire state, or indeed a country in the case of New Zealand. Different gate-keeping practices were observed in different regions of New Zealand (Maxwell & Morris, 1993). Additionally, the Wagga Wagga scheme was by all accounts operated by particularly dedicated and enthusiastic police officers (Powers, 2000).

The Western Australian gate-keeping system, which involves both the police and the public prosecutor, appears to be functioning well. Of the youths dealt with formally by the police, that is, excluding informal cautions, 65% are formally cautioned, 11.2% are sent to conferences, and just over 23% are referred to court (Ferrante et al., 2000).

None of the police gate-keeping schemes have matched the performance of the mandatory gate-keeping process of the New Zealand system. Maxwell and Morris’ (1993) study indicated that across the country only 10.3 per cent of juveniles were sent to court: 31 per cent were referred to a conference and the remainder were dealt with by warning or some other form of diversion. Importantly, almost all of the youths who were sent to court intended to dispute the charges. This means that the courts were
predominantly performing their adjudicatory role – determining guilt – instead of dealing with a large number of guilty pleas. Power (2000) concludes that these figures indicate that New Zealand’s mandatory gate-keeping process is superior to police gate-keeping both in (a) diverting youths away from court and (b) diverting youths to non-police run conferences. His analysis of the experience in other jurisdictions is that the police have been reluctant to divest themselves of their discretionary powers and want to retain the ‘ultimate choice’ as to whether a young offender attends a conference or appears in court (Power, 2000: 296). Unfortunately, in some instances the police have placed little faith in the viability of conferencing as an alternative to court. Many feel that this is partly due to an ingrained view of a court appearance as a successful outcome (Sarre, 1999; Wundersitz, 1996b; Power, 2000).

2.5 NET-WIDENING

Clearly, diversionary schemes can be negatively affected when gate-keepers do not refer enough cases to them. However, many commentators are equally concerned about gate-keepers referring too many cases to diversionary processes. This is considered to be particularly worrying when minor cases, which previously would not have been dealt with, or would have been dealt with by way of an informal procedure, are drawn into a scheme (Lee, 1995; Cohen, 1985). Police warnings or cautions, conferences, and court appearances are forms of state intervention. By increasing the number of young people with whom the state has official contact, diversion widens the nets of social control (Schelkens, 1998). Anxieties about what is known as net-widening predate conferencing and restorative justice (Ditchfield, 1976). The term net-widening is also used in reference to an increase in the duration or severity of state intervention – ‘wider, stronger and different nets’ (Austin & Krisberg, 1981: 165; Blagg & Wilkie, 1995).\footnote{Two examples are an increase in penalties and an increase in the time taken to process an offender.} Cohen (1985) suggested that one way in which the severity of the state intervention might increase would be through harsher court penalties. He was concerned that with the introduction of diversionary schemes the courts would view those juveniles who appeared before them negatively. That is, the courts might think that young offenders who have been sent straight to court must be deserving of harsh treatment. This suggestion becomes important in chapter four.
2.5.1 Evidence of net-widening in the Australian and New Zealand conferencing systems

Evidence of net-widening has been reported in a variety of diversionary systems internationally (Seymour, 1988; Lee, 1995; cf Bottoms et al., 1990; McCold & Wachtel, 1998). Ferrante et al. (2000) did not specifically attempt to study the occurrence of net-widening in Western Australia. Neither did they provide the annual rates of juvenile conferences (which began in Western Australia in 1995). However, they reported the total annual number of juvenile court convictions as well as the total annual number of juveniles formally cautioned from 1992 to 2000 (Ferrante et al., 2000: 52, 111). When the number of convictions and cautions for each year are added together it strongly suggests that net-widening is occurring in Western Australia. In 1992 the combined figure of convictions and formal cautions was 8,335. By 2000 the total number of juveniles convicted or formally cautioned had risen dramatically to 14,324 juveniles. This substantial rise seems largely due to an increase in the number of formal cautions given by the police. In 1992 there were 3,804 formal cautions, whilst in 2000 there were 11,267. The conviction rate for this 1992 – 2000 period dropped from 4,531 to 3,057.

More positive findings came from the New Zealand system, which began in 1989. In the three years just after the introduction of conferencing, 1991 to 1993, the total number of youth offences cleared by the police, family group conferences, and court fluctuated very little (Maxwell & Morris, 1996). In other words from 1991 to 1993 there was no overall increase in the number of young people having contact with the criminal justice system. Conferencing began in South Australia in 1994. Wundersitz (1996a) compared the total number of formal interventions (formal caution, community conference, and court) in the period prior to the new system (1992-1993) with the period after the implementation of the new system (1994-1995). She found that there was a reduction from 11,638 formal interventions in the 1992-1993 period, to 9,994 in the 1994-1995 period.

However, Wundersitz (1996a) warned that without data on the number of informal cautions no firm conclusions could be drawn. That is, if the frequency of informal cautions were calculated there might have been evidence of net-widening in the 1994 – 1995 period. Power (2000) analysed the frequencies of formal interventions in South Australia in the years 1994 to 1998. His data suggested that there had been a reduction in the number of formal interventions from almost 13,000 cases in 1994 to under 9,000 in 1998. It should be noted that Power (2000) drew on three different sources of
statistics from three different bodies in South Australia. Without detailed knowledge of the data collection techniques employed by the three agencies it is unclear how well the figures can be compared. Interestingly, there was no evidence of net-widening during the Wagga Wagga pilot scheme – even though the police had the power to refer cases to their own conferences. In actual fact, whilst the scheme operated, fewer youths were dealt with by way of court or conferences combined (Moore & Forsythe, 1995). One of the main contributions of this thesis is to provide longitudinal data on net-widening in Tasmania, similar to the statistics presented by Ferrante et al. (2000). However, unlike any of the studies referred to above, the present research, analyses nine years of data prior to the introduction of the new conferencing system (1991-1999) and compares this with data from the first two years of the new system (2000-2001). Trends from the two periods are tested for statistical difference using regression analyses. This provides some of the clearest evidence to date on net-widening in a conferencing scheme.

2.5.2 Effects of net-widening

There is dissension in the literature as to whether net-widening is necessarily a harmful phenomenon, at least insofar as increasing numbers in diversion schemes is concerned. Some commentators are wary of any contact between the state and young people. The well founded positive correlations between traditional criminal justice processing and juvenile recidivism seem enough to imply that diversion processes will also label or stigmatise young people. Polk (1994: 130), for instance, emphasises the ‘ever present coercive threat of the court’ in conferencing – and even the use of the word ‘justice’ in the title of the New Zealand conference facilitators to argue that conferences are not a true form of diversion, only an alternative form of ‘justice processing’. Similarly, Schwartz and Preiser (1992) emphatically warn that entangling juveniles in the justice system presents serious risks to their development which outweigh the supposed positive aspects of diversion. However, Warner (1997) points out that there is no evidence that diversion programs cause labelling and stigmatisation. Indeed, whereas recidivism is positively correlated with arrest and court appearances (Gold & William’s, 1970),

16 The sources Power (2000: 299-301) analysed included data from the (a) Strategic Development Branch, South Australian Police, (b) Juvenile Justice Advisory Committee, Attorney-General’s Department, and (c) Office of Crime and Statistics, Attorney-General’s Department.

17 See for example Farrington (1977); Gold & Williams (1970).
Two conferencing seem to reduce recidivism (Latimer et al., 2001; see also Ahmed et al., 2001: 5-6).

Braithwaite (1999) suggests that net-widening in some circumstances may benefit young offenders and others. Net-widening may bring hitherto unaddressed social problems, such as domestic violence, abuse, and school bullying, to the community’s attention (Braithwaite, 1994). Braithwaite (1999) also believes that, in keeping with his normative republican theory of criminal justice (see Braithwaite & Pettit, 1990), conferences can become a state supported framework for the expansion of individual socio-political freedom and the right sort of grassroots community control. Net-widening which facilitates this expansion is of itself ‘a good thing’ (Braithwaite, 1999: 91). This perspective is diametrically opposite to that of Polk (1994: 135) who argues that historically the ‘justice system has the capacity to transform over time even the best designed diversion program’ (citing Lemert (1981) and Austin & Krisberg (1981)). What may begin as community co-option of state power can easily reverse (Polk, 1994).

2.5.3 Causes of net-widening

Numerous explanations have been forwarded to explain why net-widening occurs. Many suspect that diversion encourages interventionist welfare considerations in policing gate keeping (Polk, 1994). That is, believing a form of diversion – such as a conference – is truly beneficial for young offenders, the police choose to deal with a greater number of minor offenders this way. On the other hand perhaps net-widening can be driven by police disinterest in a diversionary scheme, which leads them to divert mostly those cases which they are not interested in processing themselves and which previously they might have disregarded (Braithwaite, 1999). Simultaneously, the agencies conducting the scheme may actively seek more referrals from the police (Braithwaite, 1999), which in turn may attract more funding and expansion of the diversionary scheme (Condliffe, 1998). Condliffe (1998) also points to changes in the legal processing of young people that occur with the introduction of diversionary schemes. For instance, generally youths are required to admit guilt before they are eligible for a conference. Some commentators suggest that there naturally exists some pressure on youths to plead guilty to finalise the legal process quickly (Wundersitz et al., 1991). Warner (1994) detailed a whole raft of legal issues that – even without any deliberate abuse of police power – might conspire to
(a) draw more youths into the justice system, and (b) yield more convictions.

2.6 POLICE CONFERENCES

It was noted above that in many jurisdictions a police officer attends each conference. In some cases the police officer has a veto right over the conference outcomes. Generally there has been little criticism of police involvement as conference participants (Dignan, 1999), although occasionally excessively punitive attitudes have been observed (Bargen, 1999). Daly (1999) found that police officers attending juvenile conferences in South Australia had more positive opinions of the main participants than did the independent facilitators. Notably, the officers perceived less defiance in the behaviour of the youths. The police officers and the facilitators also appeared to work together well, without much friction. There is some evidence that police officers can play a positive role in conferences by using their professional experience to steer group discussion away from disproportionately harsh outcomes for young offenders (Young & Hoyle, 2003).

Overall, it is widely accepted that police support is vital for conferencing programs (Bargen, 1999; Sarre, 1999; Wundersitz, 1996a).

On the other hand, the issue of police officers actually facilitating conferences has met stiff opposition. The main concern is that by facilitating conferences police powers are increased to an unacceptable level. In addition to the power to investigate crimes and powers of arrest, some argue that police-run conferences also confer quasi-judicial powers to the police to judge and punish offenders (White, 1994). It is questionable whether sufficient legal safeguards can be put in place to prevent abuses of these powers (Warner, 1994). Furthermore, quasi-judicial powers for police officers do not seem to comply with Article 40(2)(b)(iii) of the United Nations Convention on the Rights of the Child, which states that every accused child is to be guaranteed a hearing by an 'independent and impartial authority'. Indeed, a number of writers have expressed suspicion about police motives for wanting to facilitate conferences. Sandor (1993) plainly sees the police force as a self-serving bureaucracy that always seeks to expand its powers. Others wonder if there is a 'hidden agenda' behind the apparent willingness on the part of the police to 'embrace' restorative justice, namely a longstanding frustration with the courts to give sufficiently punitive responses to juveniles (Dignan, 1999: 56). Acting as conference organisers and facilitators allows police officers to exert influence over the
sanctions ‘agreed’ upon. The police have also been portrayed as the government body least capable of empowering in a restorative way indigenous people and young people, with whom they have a history of conflict (White, 1994; Blagg, 1997; Cunneen, 1997).

2.6.1 Police conferencing in Australia

It was explained above that police conferencing in Australia took the form of the Wagga model, its perspective being shaped by reintegrative shaming and affect theory. Advocates of the Wagga model reported that police officers facilitated conferences very well and to the satisfaction of the participants (Moore, & McDonal, 1995). Police facilitators were portrayed as objective umpires. Their professional position was not viewed as a barrier to objectivity, but rather as something that lent gravity to the conference proceedings. Furthermore, police stations were described as a useful ‘neutral ground’ upon which to conduct conferences (Moore, 1993: 211). Reactions against these views claimed that (a) police relations with young people were marred by a history of violence and abuses of power, (b) police officers do not have sufficient mediation skills to facilitate in a restorative manner, and (c) police stations could never be viewed as neutral places (Sandor, 1993).

Police conferencing practices in the ACT were closely observed during the Reintegrative Shaming Experiment. Many positive events were witnessed during the police conferences and the results indicated that the processes had positive effects on violent crime in particular. However, even those who had supported the early Wagga Wagga scheme were not impressed with the standards of the police facilitators in the ACT. Braithwaite commented that he saw ‘disturbing’ amounts of stigmatisation and concluded that the Canberra program ‘is hardly a best-practice one’ (Braithwaite, J. & Braithwaite, V., 2001: 58). Braithwaite admitted that the stigmatising practices were partly due to inadequate understanding of reintegrative shaming theory on behalf of the police facilitators – who tended to latch onto the shame word (Braithwaite, J. & Braithwaite, V., 2001). It seems, though, that conditions were not altogether ideal for police conferencing in the ACT. The Wagga Wagga scheme involved only a few experienced police officers. In contrast, over 100 police facilitators were included in the ACT program, which ‘inevitably resulted in the training of many officers who had neither
the aptitude nor interest’ in conferencing (Power, 2000: 206). Many police facilitators in Tasmania would also fall into this category of having been obliged or told to facilitate conferences. The consequences of these policies are discussed in chapter five.

2.6.2 Police conferencing in the UK

The story of police conferencing outside Australia has been quite different. During the 1990s in the UK police cautioning practices, which at this stage had not been influenced by restorative justice, came under increasing criticism (Crawford & Newburn, 2003). Official recognition was given to the fact that cautions had the potential to damage juvenile development if conducted the wrong way. Evidence arose that the police were abusing the cautioning process, particularly in regards to processing youths without clear and reliable confessions (Evans, 1996). Various questionable practices were observed including moral lecturing, intimidation, case construction around police versions of events, intimating imprisonment as a likely outcome for future offending and so on (Young & Goold, 1999; Lee, 1995). Cautions were described as ‘degradation ceremonies’ that reinforced the role of the police as ‘moral condemners’ (Lee, 1995: 325).

The Thames Valley police employed the Wagga model to revitalise their cautioning techniques. The researchers who evaluated this initiative reported that there has been an unmistakable ‘widespread’ and ‘genuine’ improvement in the cautioning practices (Hoyle et al., 2002: 66). The new practices are called restorative cautions. They run on average for 45 minutes (instead of 15 minutes that the average old style caution would take). The facilitators use a ‘script’ and invite the offender and their supporters to discuss the impact of the crime. In fact, these restorative cautions could arguably be mistaken for police conferences. In addition to restorative cautions, for more serious offences involving a victim the Thames Valley police now run conferences (Hoyle et al., 2002). The unfolding of these events seems to have given police conferencing more political acceptability in the UK than it ever won in Australia. No doubt police diversionary practices in the UK are less controversial because they cannot result in undertakings for the young offender to complete, unlike formal cautions in South Australia and ‘formal cautions’ (police conferences) in Tasmania. Nevertheless, some writers seem to adopt a

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*Additionally, the facilitators may well have been influenced by the negative comments one very senior officer made publicly about conferencing.*
resigned pragmatism towards police conferencing in the UK. That is, (a) conferences are viewed as only a more complex version of a caution, (b) stopping police conferencing would be too difficult now, (c) in any case, what exists now is better than what existed before, and (d) police officers are as good as any other professional group to facilitate conferences (Young, 2001).

How did the police facilitators perform in the Thames Valley evaluation? The answer is well enough for the researchers to conclude that police conferencing should continue. First, it was evident that many officers were committed to learning how to facilitate well. Many conferences were run fairly, the youth gained some insight into the impact of their offence, and generally satisfaction amongst the participants was quite high (Hoyle et al., 2002). It was noted above that scripts are a common feature of the Wagga model that provide the facilitator with a framework for how to run each conference. The researchers argued that the officers’ practices were best when they did not deviate from the conference script, regardless of their experience. Amongst other things, following the script made the officers vastly more neutral and unimposing, empowered all of the main participants, and ‘maximised restorative justice’ (Hoyle et al., 2002: 67). However, Hoyle et al. (2002) criticised the police for the way in which they prepared the conferences. One third of participants were not briefed about the conference at all – meaning that consent was in question. Only 13% of participants were given face-to-face briefings by the facilitator. Finally, two thirds of young offenders felt that they had no meaningful choice in whether to attend. Inadequate conference preparation (a) inhibited the participants’ ability to prepare what they wanted to say, to choose a supporter, and to be empowered in a restorative way, (b) denied the participants procedural justice, and (c) jeopardised participants’ respect for the police and for the justice system. Worrying also were that some youths were still processed without clear admissions of guilt. Occasionally, officers dominated the proceedings and prevented discussion between the participants.
2.6.3 Police conferences in North America

Since 1995, well over 2000 North American professionals, including police officers, have been trained to facilitate conferences using the Wagga model (McCold & Wachtel, 1998). An 18-month trial of police conferencing in Pennsylvania produced mixed results. Similar to the experience in the ACT, it seemed that some of the 20 officers had misinterpreted reintegrative shaming and actually adopted stigmatising facilitation techniques. Even a second, unscheduled training session concerning these practices failed to eradicate them (McCold & Wachtel, 1998). Advocates of police conferencing were hoping that significant changes would occur in wider police attitudes and in the police sub-culture. No evidence supported this hypothesis. However, the attitudes of the police facilitators changed. They became more community oriented and less oriented towards pure crime control. Offenders and victims were seemingly comfortable with police facilitators.

CONCLUSION

The growth of juvenile conferencing in Australia over the last decade has been very rapid. The conferencing system established in Tasmania has many of the hallmarks of other jurisdictions. One significant difference is that it includes both police-run conferences and conferences conducted by independent facilitators. The next chapter will explain the evolution of the Tasmanian system in more detail. The heavy involvement of the police in all aspects of the Tasmanian system make it valuable to study. Will it succeed in diverting youths away from court? Or, with enthusiasm for diversionary procedures, will the police actually increase the number of youths that have formal contact with the justice system? Finally, how will the practices of the police conferences and the DHHS conferences compare? These issues are addressed in chapters four, five, and six with findings that are significant for conferencing systems nationally and internationally.

19 On the use of the New Zealand model in North America see Immarigeon (1996).
CHAPTER THREE

THE TASMANIAN JUVENILE JUSTICE SYSTEM

This third chapter is the final descriptive chapter. Chapter one described the broad international context of restorative justice, which has claimed juvenile conferencing as its own. Chapter two discussed the birth of conferencing in Australia and New Zealand, slightly ahead of modern restorative theory. The essential characteristics of the diversionary systems in these jurisdictions were outlined as well as some controversial issues surrounding diversion, including police-run conferencing. This chapter explains the legislative machinery of the Tasmanian juvenile justice system and how it works in practice. A rounded understanding of Tasmania’s legislation must consider its evolution. Many of the forces which shaped the Youth Justice Act (1997) (Tas) predated both restorative justice and the establishment of conferencing in New Zealand. In particular, the 1970s and 1980s were marked by a national debate between two paradigms which are often referred to as the welfare model and the justice model. The first part of the chapter will describe these models and outline other influential concepts. In 3.2 the discussion considers how these influences operated in Tasmania in the late 1980s. Key policy papers are described (Briscoe & Warner, 1986; Department of Community Services, 1991) as well as features of practice in the welfare and policing sectors. Importantly, a number of internal documents indicate that police practice changed quite significantly before the passing of the Youth Justice Act (1997) (Tas). The third part of the chapter (3.3) highlights the reforms introduced by the Act and analyses its policy orientation. Seemingly the justice model and the goal of diverting youths away from court have moulded the legislation to a great extent. The final part of the chapter is devoted to describing how the legislative provisions for formal cautions and juvenile conferences are applied in practice (3.4). As indicated in chapter two, many of the ‘formal cautions’ conducted by the police are in fact Wagga style conferences.
It is important to view the formation of Tasmania’s new youth justice system in the 1990s in both a national and historical context. Many writers draw attention to policy tensions that had existed in the juvenile justice arena since the 1970s – in particular tensions between two models or approaches. The models are often referred to as the welfare model and the justice model (Freiberg et al., 1988).

3.1.1 Welfare model

The beginnings of the welfare model can be traced to the turn of the 20th century. The American ‘child saving movement’ influenced the establishment of the first separate court proceedings for juvenile offenders in Australia (Cunneen & White, 2002). Parliamentary debates and other historical records of the time indicate a growing conviction that (a) children were at risk of stigmatisation from proceeding through the adult courts and prisons, and (b) discovering and treating the causes of child misbehaviour could prevent youths from becoming adult offenders (Seymour, 1988). Importantly the new courts dealt with neglected and uncontrollable children as well as young offenders. These early developments were to remain defining features of the welfare model.

From the 1950s the welfare model attracted a new ‘scientific legitimacy’ with the rise of the social sciences (Seymour, 1988: 111). Positivist schools of criminology were confident that the scientific method could determine biological, psychological, and social-psychological factors operating upon juveniles that attracted them to deviant behaviour (Pratt, 1993). Deviant behaviour – crime being one such behaviour – was viewed as an indicator of abnormal juvenile maturation and a predictor of adult criminality (O’Connor, 1997). This perspective encouraged a blurred distinction between

20 Tasmania was slightly delayed in this respect. It was not until 1918 with The Children’s Charter that separate courts with exclusive jurisdiction over juveniles appeared. A recurring dynamic in Australian juvenile justice was the ‘uncritical adoption’ of policies originating in America (Seymour, 1988: 165). Often critiques of American systems were voiced in Australia without regard to important differences between the jurisdictions.

21 In practice this meant that probation officers were given the task of uncovering the environmental background of children and providing reports to the courts.
youths who were troubled and youths who had committed offences.\textsuperscript{22} It also engendered a view that the state had a responsibility to reduce deviant behaviour. This could be successfully achieved with therapies and forms of rehabilitation (Naffine, 1993). Much discretionary power was given to government welfare departments through the courts' use of orders that were indeterminate in content and length. In Tasmania's case committal orders were indeterminate and allowed the Director of Community Services to determine a youth's custody.\textsuperscript{23} Committal orders were applicable as a response to criminal behaviour or for more general welfare considerations. In many instances the orders were continued until the department considered that the youth had responded to the therapy or welfare strategy (Warner, 1997).

A thorough re-assessment of the youth justice system and its philosophical foundations began in the 1970s, again with the influence of developments in America where welfare strategies had been employed far more extensively than in Australia (Seymour, 1993; Cunneen & White, 2002). The law and order lobby and civil libertarians alike critiqued the welfare model for failing to provide juveniles with the same procedural safeguards in the legal system as those granted to adults. Amongst other injustices, commentators pointed to (a) the court's intervention in non-legal matters, (b) interventions that were disproportionately severe for the offence committed, (c) the lack of public scrutiny of departmental decision making, and (d) the expansion of the nets of social control (O'Connor, 1997). Additionally the welfare model's positivist explanation of the causes of crime became considered in some academic quarters as overly simplistic. The efficacy of treatments and rehabilitative programs were brought into question, contributing to a 'new mood of scepticism' in the juvenile sector (Seymour, 1988: 163). This struck at one of the fundamental concepts of the welfare model. That is, that the state could intervene in a positive way in the life of a young person. It appears that to some extent this scepticism was triggered by exaggerated negative analyses of empirical research on rehabilitative programs (Sarre (2001) in reference to Martinson (1974)). Sarre (2001) suggests that the indiscriminate belief that 'nothing works' is still widely held amongst Australian policy makers.

\textsuperscript{22} Tasmania's \textit{Child Welfare Act 1960} (Tas) stipulated that 'each child suspected of having committed, charged with or found guilty of an offence shall be treated, not as a criminal but as a child who is, or may have been, misguided and misdirected' (s. 4). Numerous examples are recorded by Seymour (1988) of the types of behaviours which attracted state intervention. One such example was promiscuity amongst young females.

\textsuperscript{23} \textit{Child Welfare Act 1960} (Tas), s. 23(1A).
3.1.2 Justice model

Disenchanted with the welfare model, proponents of the justice model sought several significant changes in practice and policy. The justice model did not centre itself upon any particular theory of the causes of crime (O'Connor, 1997). All advocates of the justice model sought to return the courts to the centre of juvenile justice and to restrict the juvenile justice system to criminal matters and not welfare matters. For civil libertarians the open court process together with due process could protect youths from excessive intervention from the state via departmental welfare strategies and abuses of power by the police (Warner, 1987). Determinate punishment that was proportionate to the seriousness of the crime and culpability of the offender was highlighted as the central purpose of sentencing (von Hirsch, 1976). Important too in the justice model is the principle that sentences should be as least restrictive as possible. The impetus to minimise interference in the lives of young people was driven by a number of factors. As well as viewing rehabilitation as ineffective, the justice model responded to the strong evidence that youths were stigmatised or labelled by the process of arrest, trial, and sentencing (Farrington, 1977; Lemert, 1972). Undoubtedly the justice model focussed upon the offence rather than the offender. Various aspects of the justice model appealed to the right, which itself particularly emphasised that young offenders should be held accountable for their criminal actions (Pratt, 1993).

But as a solution to the inadequacies of the welfare model, the justice model raised new complexities. Several concerns sprang from the heavy reliance upon the courts. Some were disdainful about the adversarial atmosphere of the courtroom and the long delays involved in processing young offenders (Department of Community Service, 1991). Further, no empirical data supported the assumption that the court process deterred either the individual criminals sentenced or potential criminals in wider society (Ashworth, 2000). Others urged that the court system disadvantages some groups of juveniles, such as those from lower socio-economic groups (O'Connor, 1997; see also Hennessey, 1999; Wundersitz, 1996b). Some court orders seemed to lack sensitivity to the realities of young offenders' lives. For instance, if youths absconded from the residence that had been specified in a custody order this could be treated as an additional offence, thereby contributing to their criminal record (Department of Community Service, 1991).
The justice model rapidly gathered momentum internationally during the 1980s and 1990s. In 1985 the United Nations adopted the Standard Minimum Rules for the Administration of Juvenile Justice, referred to as the Beijing Rules. These endorsed several important features of the justice model, including proportionality and accountability (Carney, 1997). Nationally, the first steps towards formal recognition of the justice model were in the separation of juvenile welfare and juvenile justice. This occurred firstly in South Australia in 1979 (Wundersitz, 1996b). In other states this was achieved legislatively. Legislative separation of the two spheres did not take place in Tasmania until 1997. This will be explained in more detail below. O'Connor (1997: 239) asserts that the justice model represents the ‘new orthodoxy’ in Australian juvenile justice policy. However, commentators agree that the policy developments were ‘changes in emphasis rather than in direction’ (Seymour, 1988: 170; Braithwaite, 1999). That is, each jurisdiction sought to balance the welfare and justice approaches in such a way that they might counter each others’ weaknesses. Indeed, Seymour (1988) reflects that the caring ethos – the legacy of the early child savers – was not discarded.

3.1.3 Other influences

A number of other factors influenced the juvenile justice arena during recent decades aside from the welfare and justice models. Informal responses to crime, such as warnings for minor offences, were common practice amongst the police since the turn of the last century. It was not until the 1960s that official attempts to divert young offenders away from court were trialed in Australia (Seymour, 1988). Some jurisdictions opted to formalise police cautioning processes. Others established informal tribunals called panels (Pratt & Grimshaw, 1985). The general purpose of panels was to discuss the offence, the issues facing of the offender, and to counsel the offender. In some jurisdictions the panel could require the offender to enter into an undertaking to be of good behaviour (see further Wundersitz, 1996b). The appeal of diversion was – and still is – to prevent young people suffering negative consequences from appearing in court and to reduce the possibility of incarceration. Diversion is perceived by many as a

24 Rules 5 and 6 respectively.

25 For instance NSW passed the Children (Care and Protection) Act 1987 (NSW) and the Children (Criminal Proceedings) Act 1987 (NSW).
practical response to the fact that the majority of young offenders who are detected committing offences do not re-offend (Wundersitz, 1996b; Maxwell & Morris, 1993). Diversion of young offenders in appropriate circumstances was also given international recognition in the *Beijing Rules*.\textsuperscript{26}

Another influence upon juvenile justice are principles of crime control (Maxwell & Morris, 1993). Advocates of these principles are often referred to as the law and order lobby. They press the importance of protecting neighbourhoods and getting tough on crime, including youth crime (White & Alder, 1994). The lobby suggests, inter alia, that appropriate responses to youth crime are strong penalties and in particular different forms of custody to take troublesome youths off the streets (White, 1994). Internationally, the law and order lobby has at times successfully swayed political discourse on young criminals in Australia and overseas (White & Haines, 2000). The crime control approach has been charged with misunderstanding youth crime and promoting strategies that ultimately aggravate offending rates.

Finally, aspects of what is now known as restorative justice began to attract interest in the juvenile setting. As noted in chapter two, the use of victim-offender mediation in the criminal justice setting in various international jurisdictions drew the attention of the legislators in New Zealand in the 1980s. Moulding the concepts of mediation and Maori traditional dispute resolution techniques in the form of family group conferences enabled the New Zealand justice system to respond to some of the needs of victims and families (Maxwell & Morris, 1993). Review of the 1989 legislation also reveals clear influences from the welfare and justice models together with an interest in diversion. Maxwell and Morris (1993: 168) conclude that the formation of the new juvenile justice system in New Zealand 'resisted pressure to adopt a crime control approach'.

The developments in New Zealand themselves became an important influence in the reformulations of juvenile justice in Australia in the 1990s (O'Connor, 1997). In particular the innovation of family group conferencing became a tool that all the Australian jurisdictions noticed favourably. By the mid-1990s the link between conferencing and the more general restorative justice literature (as opposed to

\textsuperscript{26} Rule 11.
reintegrative shaming as an arm of restorative justice) was apparent. Conferencing and restorative justice was viewed as a solution to see-sawing policy shifts between the welfare model and the justice model – a clear way at last to balance the strengths and weaknesses of the models (see Braithwaite, 1999). From this perspective families could be given an appropriate way to support and help their child through the justice system.

To some extent international agreements may have fanned the issue of empowering families in Australia (Carney, 1997). Certainly a 1991 Tasmanian government report mentions, amongst other instruments, the Beijing Rules (Department of Community Service, 1991). This covenant emphasised supporting families so that they can ‘fully assume [their] responsibilities within the community’ (Rule 14.2).

Others were interested in New Zealand style (non-police-run) conferences. I explained in chapter two that in 1991 the police in NSW copied the family group conference format. After the practice was emulated in Wagga Wagga the link to reintegrative shaming and, later, affect theory was noticed. In many circles, including police and politicians, the combination of police-run juvenile conferencing with reintegrative shaming was particularly appealing. Arguably the solution was perceived as encompassing (a) crime control approaches, (b) victims’ rights, (c) the principle of offender-accountability from the justice model, and (d) a healthy disdain for ineffective welfare therapies.

JUVENILE JUSTICE IN TASMANIA: THE 1980S AND 1990S

As with other states (see Freiberg et al., 1988: 63-66), Tasmania became particularly aware of the grievances identified by the justice model in the early 1980s when a number of nationally significant reports were produced (Carney Report, 1984; ALRC Report, 1981). In 1980 the Department of Community Services approached two consultants to identify essential areas of procedural legislative reform in Tasmania’s children’s courts system (Briscoe & Warner, 1986). The government planned to pass a new youth justice legislation in 1987 (Warner, pers. comm., 13/9/2001). This did not occur until 1997 and the Act was not proclaimed until February 2000, mainly because of the state’s fiscal constraints. The consultants’ qualitative observations raised several concerns, not all of

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27 As an anecdotal example of the rate at which restorative justice spread in Australia, Naffine’s (1993) piece on the philosophies of juvenile justice describes restorative justice in a short postscript.
which are listed here. The courtrooms and waiting areas did not facilitate adequate separation of juvenile offenders and adult offenders. The court proceedings for juvenile offenders were (a) highly legalistic and formal, (b) difficult for parents and young offenders to comprehend, (c) precluded participation by the offender, and (d) frequently resulted in long delays between the time of the offence and the final hearing (Briscoe & Warner, 1986). Additionally, of the 2500 annual juvenile appearances (a) 80% pleaded guilty, (b) between 50% to 60% of youths sentenced would leave the court without penalty, and (c) a further 10% of juveniles were leaving the court with fines of less than $20 (Briscoe & Warner, 1986; Department of Community Services, 1991). Obviously the majority of cases involved very minor offences. The most common outcome was an admonishment and discharge. This outcome usually took the form of a verbal reproach from the magistrate and a discharge without a criminal conviction. The high rate of admonish and discharges during the 1980s is important to chapter four, which presents very interesting findings on the frequencies of such court outcomes from 1991 to 2001.

The consultants’ recommendations highlighted the risk of stigmatising youths – minor or repeat offenders alike – through protracted and incomprehensible court proceedings (Briscoe & Warner, 1986). Another possible cause of stigmatisation that was identified was linked to court proceedings for welfare matters; it was suggested that children in need of care might be stigmatised by being treated similarly to offenders (Warner, 1987). The consultants’ recommendations mirrored the justice model paradigm. Rather than exploring alternatives to court to avoid stigmatisation, they suggested that the court process could be streamlined to expedite juvenile cases and engage young offenders more effectively (Briscoe & Warner, 1986). It is important to note that at this stage the police, who were able to comment on the consultants’ report along with other stakeholders, affirmed their confidence in the positive effect that court proceedings could have upon young offenders. For example, the Commissioner commented that in court an ‘atmosphere of formality’ tends to create ‘a lasting impression in the minds of young persons’ (Briscoe & Warner, 1986: 20). This official police perspective was to change dramatically in the following decade, as discussed below.

28 These included the Secretary of the Law Department, the Senior Magistrate, and the Law Society.
Five years after the report the state government made a formal description of its policy aims in juvenile justice. Significantly the issues paper did not abandon the welfare model. Rather it emphasised that the interests of young people and the community could be best served by balancing the welfare and justice approaches. In particular, the paper recommended that the ‘flexibility and sensitivity’ of the welfare approach be retained (Department of Community Services, 1991: 11). One way in which this could be achieved would be the institution of family group conferences. Conferences offered the ability to develop ‘individual case management plans in consultation with the young offender themselves, their families and other significant people in their lives’ (Department of Community Services, 1991: 20). The issues paper recommended police cautioning as the primary level of intervention before conferencing. The experience of other states and New Zealand with cautioning and conferencing were clearly guiding influences. Other than flexibility, the benefits of diversion included (a) the empowerment of families to support young offenders and the strengthening of family ties, (b) avoiding the stigma of court for youths, and (c) fiscal savings from a potential dramatic reduction in juvenile court appearances. The final point indicates that, whilst the issue paper endorsed due process and saw the courts as having an important role, it clearly envisaged a new youth justice system where court appearances were a ‘last resort’ (Department of Community Services, 1991: 23).

3.2.1 Welfare practice

It might have appeared to some commentators that Tasmania was reluctant or at least uncertain as to whether to move away from its heavily welfare model oriented Child Welfare Act 1960 (Tas) (see O’Connor, 1997). It was not until the passing of the Child, Young Persons and Their Families Act 1997 (Tas) and the Youth Justice Act 1997 (Tas) that welfare was formally separated from justice. However, there are indications that practice in the justice and welfare sectors changed well before the legislative developments in 1997. First, it appears that a move towards decarceration began in the late 1980s. Youths in need of care and young offenders were housed in three institutions around the

29 Panels as a form of diversion were specifically rejected, inter alia, because of their perceived propensity to stigmatise youths in the same way as court proceedings. See Pratt & Grimshaw (1985) on the United Kingdom experience with juvenile tribunals (cf Lee, 1995).

state. Importantly, between 1988 and 1991 two of the institutions were closed (Drelich, pers. comm., 15/5/2003). Secondly, welfare professionals also relate that by the early 1990s agreements had been reached between the welfare departments and the magistrates. The magistrates began to specify in their committal orders (a) the length of the committal, and (b) whether a young offender was to be incarcerated in the remaining juvenile detention centre (Warner, 1992; Drelich, pers. comm., 15/5/2003). Seemingly the welfare sector was voluntarily delineating its discretionary powers over juvenile offenders. Unfortunately it appears that records relating to these events were destroyed in a fire in government premises in 1999.

3.2.2 Police practice

Tensions between the police and welfare agencies that have existed in other states do not appear to have troubled Tasmania to the same extent (cf Trimboli, 2001; Power, 2000). The Department of Community Service’s (1991) policy paper indicates that various government agencies were happy to work with the police and to recognise their role in having first contact with most young offenders. Anecdotal reports of long serving police and welfare professionals suggest that positive working relationships extended back to the 1970s (Lennox, pers. comm., 27/8/2001; Drelich, pers. comm., 10/3/2002).

Up until 1994-95 Tasmanian police had concentrated upon cautioning as a form of diversion. Informal cautions were not covered by any regulations. Formal cautions, as described in the *Standing Orders*, were conducted at police stations by inspectors. In 1995 Senior Constable John Lennox in Tasmania’s Eastern District received training, with others, in Wagga style juvenile conferencing. The training was by Terry O’Connell, who was instrumental in establishing the Wagga model of conferencing in 1991. Lennox began Wagga style conferencing and the process quickly received the

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31 Les Drelich has worked in state government welfare departments since the 1970s. He is currently one of three Youth Justice Coordinators who manage community conferencing in Tasmania. Another factor in the closing of the two institutions may well have been fiscal concerns. Rationalisation of several government departments, including the Department of Community Services, occurred during this period.

32 Senior Constable John Lennox coordinates youth justice for Tasmania’s Eastern District. He was one of the most important figures in the establishment of police conferencing in Tasmania and is referred to frequently in this thesis.

33 Formal cautions were used for minor offences committed by first time offenders who had admitted their guilt (*Standing Orders*, 109.6 (4), 109.6 (7); cited in Warner, 1992).

34 O’Connell initially came to Tasmania with Margaret Thorsborne to teach a group consisting of teachers and some police officers.
enthusiastic backing of high ranking officers. In April 1995 Acting District Superintendent Bennett distributed a memo to the divisions of the Easter District concerning cautioning and what he called 'diversionary conferencing'. It stated that police had the option to either caution juveniles or to conduct a 'diversionary conference'. The definition of a 'diversionary conference' was unmistakably descriptive of a Wagga style conference – victims, offenders, their respective supporters, and a police 'facilitator' discussing a crime and deciding how best to repair the harm it caused. One very important sentence in the memo stated that diversionary conferences would be 'done under the guise of an official caution, as a pre-court option for police' (Bennett, pers. comm., 11/4/1995). That is, the provisions concerning formal cautions in the Standing Orders could be used to conduct Wagga style, police-run conferences. These events had a profound effect on the way in which the Youth Justice Act 1997 (Tas) was implemented in practice. As the next section reveals, the police interpreted section 10 of the Act – establishing formal cautions – to mean that they could facilitate police conferences. Once again, police conferences are conducted 'under the guise of formal cautions.'

Regarding the efficacy of court, by 1998 internal police documents indicate that policy had moved diametrically away from a belief in the positive impact of court proceedings on juvenile offenders. A memo from the Commissioner in October 1998 emphasised the importance of maximising levels of diversion. Significantly, it stated that the perception amongst some officers that 'anything short of a prosecution is a 'let off'' was an 'impediment to achieving high levels of conferencing'. Confidence in court proceedings was portrayed as old fashioned and misguided.

**THE YOUTH JUSTICE ACT 1997 (TAS)**

Various influences are evident in the Youth Justice Act (1997) (Tas). It seems that the Act has employed many of the policy considerations articulated by the Department of Community Services (1991). Clearly diversion is one of the main purposes of the legislation, as stated in section 7. The provisions outlining community conferences also allow for very specific outcomes for young offenders. For instance, in addition to

35 Correspondences provided by John Lennox.
restitution, compensation, community service orders, and apologies, section 16(1)(g)
provides that youths can be required to enter into an undertaking ‘to do anything else
that may be appropriate in the circumstances’. This arguably reflects the earlier emphasis
on the importance of ‘flexibility’ in dealing with juveniles. More obvious is the
importance placed on families. Amongst other things, the family bonds are to be
preserved and strengthened in dealing with young offenders.36 Furthermore, an objective
of the Act is to ‘enhance and reinforce’ the role of families in minimising youth crime,
punishing and managing young offenders, and directing youths to becoming ‘responsible
citizens’.37 In this provision the influence of the justice model is evident. The Act
emphasises the justice model far more than it does the welfare model. The objectives
and principles of the statute state that the community should be protected from crime,
that juvenile offenders are to be encouraged to accept personal responsibility for their
behaviour, and that offenders should learn about the human impact of crime. A number
of sections emphasise the importance of proportionality (ss. 4(e), 5(1)(b)(i),(j)) and the
avoidance of unnecessary interference in the lives of young offenders (ss. 5(2)(c), (d)).
Regarding welfare considerations, the appropriate rehabilitation of offenders is identified
as an objective of the Act, although so to is the appropriate punishment of offenders (s.
4(e)).

As discussed in chapter two, Tasmania’s new juvenile justice system is similar to South
Australia’s (2.3). The police are the gate-keepers of the new system (see 2.3.3 and 2.4).
Previously the police had three options when dealing with juveniles: to informally caution
them, to arrange for an inspector to administer a formal caution, or to direct youths to
court. The Act replaced this with a four tiered system.38 At the first tier it gave
legislative recognition to the police discretion to informally caution youths. The second
and third tiers included formal cautions administered by police and ‘community
conferences’ (juvenile conferences) overseen by the DHHS with independent facilitators.
Both formal cautions and community conferences can result in undertakings for the
offenders. Failure to complete the undertakings agreed to in a community conference
can lead to court. The same does not apply to undertakings agreed to in a formal

36 Youth Justice Act 1997 (Tas), s. 5(2)(b).
37 Youth Justice Act 1997 (Tas), s. 4(f).
38 Youth Justice Act 1997 (Tas), ss. 8(1), 9(1), 10(1), 13(1).
Youths can be diverted to either type of caution or a community conference when (a) they admit their guilt, (b) they give written consent to be diverted from court, and (c) when the offence they have committed is not a ‘proscribed offence’. The definition of proscribed offence includes three age brackets: 10 to 13 years, 14 to 16 years, and 17 years. The younger an offender the more serious their charge may be whilst still being eligible for diversion (see 2.3.1). Notably, diversion is possible for some very serious offences, including wounding, assault, and indecent sexual assault. As discussed in chapter two (2.3), in comparison to other jurisdictions Tasmania grants the police considerable powers. As well as being the primary gate-keepers, the police can administer formal cautions and require youths to enter into undertakings. However, clearly the choice of independently facilitated community conferences over police-run conferences was a significant one. This choice resonates with the debate that existed in the 1990s concerning New Zealand style and Wagga style conferences. The discussion will return to this issue in the following section.

Probably the most significant development for the protection of the legal rights of young people was the legislative separation of juvenile welfare and juvenile justice. The spheres were divided with the passing of the Child, Young Person and Their Families Act (1997) (Tas) and the Youth Justice Act 1991 (Tas) respectively. This prevents the courts from treating youths in need of care as offenders, or offenders as those in need of welfare intervention. The Youth Justice Act 1997 (Tas) (ss. 47(1)(h), 81) also removed the possibility for indeterminate sentences by requiring courts to specify periods of detention. However, few steps have been taken to ensure that youths are informed of their legal rights. Certainly there are no statutory provisions, as in New Zealand, which place an onus on the police to explain to juveniles when they have an option to make a statement or accompany an officer to a station. Section 9(5) requires that officers inform youths of their entitlement to legal advice, but this is only to aid them in their decision as to whether to consent to a diversionary procedure after they have admitted their guilt. Section 15(2) provides that legal advocates can attend a conference if the facilitator

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39 Youth Justice Act 1997 (Tas), s. 3(1). The new Act has raised the age of criminal responsibility from 7 to 10 years. Previously, the Criminal Code Act 1924 (Tas) provided that acts or omissions of people under the age of 7 could not constitute an offence.

40 Youth Justice Act 1997 (Tas), ss. 7, 9(2), 3(1).
deems their presence appropriate. (As discussed below, this has never occurred in practice.)

The Youth Justice Act (1997) (Tas) increased the courts sentencing options. Under the Child Welfare Act 1960 (Tas) sentencing options were limited to (a) fines, (b) compensation and restitution orders, (c) orders for community service for youths aged 16, (d) supervision and probation orders, (e) a declaration that a young person be made a ward of the State, or (f) a committal order that a young offender be remanded for observation by the State for up to three months. Now, in addition to fines and detention orders the courts can impose good behaviour bonds, orders for restitution or compensation for victims, suspended detention orders, and community service orders for youths over the age of twelve. Importantly the courts can also require that a community conference be convened under section 37. This means that the court effectively has the power to overrule the police gate-keeping decision and divert cases away from the court process. It is useful to list the sentencing options available under the old system and the new system. This information becomes important in chapter four to explain how sentencing categories were generated for the purposes of analysing statistics from Tasmania police (4.2). Tables 3.1 and 3.2 list most of the sentencing options available under the old system and the new system. A description of the practical meaning of the sentences is provided also (adapted from Warner, 1991, 2002; Department of Community Services, 1991: 34-38).

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41 Child Welfare Act 1960 (Tas) ss. 21(2)-(4), 22, 23(1)(b), 23(1)(c), 24. Compensation and restitution orders could be given under the Criminal Code Act 1924 (Tas) (s. 424). Juveniles 16 years and older could be sentenced to prison for indictable offences under section 21(1).

42 Youth Justice Act 1997 (Tas), s. 47(1)-(2).
### Table 3.1 Sentences available for young offenders under the old system in the Children’s Court

<table>
<thead>
<tr>
<th>Sentence</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Admonish and discharge</td>
<td>Usually involved an admonition by the court and a discharge without penalty or conviction. Was intended to formalise the court’s warning about the consequences of future offences.</td>
</tr>
<tr>
<td>Good behaviour bonds CWA s. 23(1)(a)</td>
<td>A form of contract between the offender and the court during which the offender agreed to be of good behaviour for a specified period, less than 12 months. A breach of this agreement could result in an offence.</td>
</tr>
<tr>
<td>Conviction recorded</td>
<td>Convictions did not have to be recorded for juveniles found guilty of most offences. Convictions could be recorded as the sole sentencing outcome or in combination with other sentences.</td>
</tr>
<tr>
<td>Fines, and orders for restitution and compensation CWA s. 21(2), CCA 424</td>
<td>Monetary penalties generally used for young offenders in employment. In addition to fines the court could order that the offender provide restitution and/or compensation for the benefit of the victim</td>
</tr>
<tr>
<td>Licence disqualification TA ss. 34, 35 (2)(a)</td>
<td>Discretion to disqualify from holding a driving licence for offences including reckless and negligent driving. This sentencing outcome was used – and still is – often in juvenile cases involving motor vehicle theft. The court could specify exactly when the period of disqualification came into effect. In practice this meant that young offenders who did not have a licence could be prevented from attaining one in the future for a set period. For example, a 14 year old, who could normally attain a licence at the age of 16, might be prevented from attaining a licence until the age of 17.</td>
</tr>
<tr>
<td>Supervision and probation orders</td>
<td>Supervision orders could be made in relation to all children (then classified as 7-16 years) and could be 3 years in length. Child welfare officers or probation officers supervised the behaviour of the child and any conditions the court deemed necessary. Probation orders had the same effect except they could only be made in relation to those aged 15 or older and involved supervision by probation officers.</td>
</tr>
<tr>
<td>Community service orders PDA s. 10</td>
<td>Applicable only to youths aged 16. Required offenders to perform unpaid work in the community.</td>
</tr>
<tr>
<td>Wardship CWA s. 23(1A), 46, 49, 50</td>
<td>Made the Director of Community Services the sole guardian of a child: able to (a) determine whether they lived in an institution, with foster parent, or with their own parents/relatives, and (b) control the child’s wages or property. Wardship generally terminated when the child reached the age of 18.</td>
</tr>
<tr>
<td>Committal orders</td>
<td>Committal orders enabled the Director of Community Services to direct that a child be detained in an institution. Could be coupled with wardship. Applied to youths aged 7-16. Those aged 16 could be imprisoned in the same manner as adults.</td>
</tr>
</tbody>
</table>

*CWA = Child Welfare Act 1960 (Tas)*  
*POA = Probation of Offenders Act 1973 (Tas)*  
*TA = Traffic Act 1925 (Tas)*  
*CCA = Criminal Code Act 1924 (Tas)*
**Table 3.2** Sentences available for young offenders under the new system in the Children’s Court

<table>
<thead>
<tr>
<th>Sentence</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dismiss and reprimand &lt;br&gt; <em>YJA</em> s. 47(1)(b)</td>
<td>In effect, identical to an admonish and discharge as under the old system (see Table 3.1).</td>
</tr>
<tr>
<td>Good behaviour bonds &lt;br&gt; <em>YJA</em> ss. 47(1)(c), 51.</td>
<td>As above, except with a limitation of 6 months (see Table 3.1).</td>
</tr>
<tr>
<td>Conviction recorded &lt;br&gt; <em>YJA</em> s. 49</td>
<td>Convictions cannot be recorded if the youth is dismissed and reprimanded or given a good behaviour bond. With the remaining sentencing options the court still has wide discretion in deciding whether to record a conviction. Convictions can be recorded as the sole sentencing outcome.</td>
</tr>
<tr>
<td>Fines, and orders for restitution and compensation &lt;br&gt; <em>YJA</em> s. 47(1)(e), (2)(b)-(c)</td>
<td>As above (see Table 3.1).</td>
</tr>
<tr>
<td>Licence disqualification &lt;br&gt; <em>VTA</em> ss. 34, 35 (2)(a)</td>
<td>As above (see Table 3.1).</td>
</tr>
<tr>
<td>Probation orders &lt;br&gt; <em>YJA</em> s. 47(1)(f), <em>POA</em> s. 7(1)(d)</td>
<td>Probation orders are available for all youths (aged 10-17) and require the offender to submit to the supervision and directions of probation officers.</td>
</tr>
<tr>
<td>Community conference &lt;br&gt; <em>YJA</em> s. 37</td>
<td>The court can order that, if the youth agrees, a community conference be convened (a) without hearing the matter, (b) in lieu of a sentence, or (c) in combination with other sentence outcomes.</td>
</tr>
<tr>
<td>Community service order &lt;br&gt; <em>YJA</em> s. 47(1)(g)</td>
<td>As above (see Table 3.1), except available for offenders over the age of 12.</td>
</tr>
<tr>
<td>Detention orders and suspended detention orders &lt;br&gt; <em>YJA</em> s. 47(1)(h), (2)(a), 79, 90</td>
<td>Youths cannot be imprisoned. However, the court can order that a youth serve a period of detention in a detention centre. Suspended detention orders can specify 12 months for youths under the age of 16, and up to 2 years for youths aged 16-17. During this period the youth must not commit an offence which if committed by an adult could result in imprisonment. Special conditions can also be attached to suspended detention orders, such as abstaining from alcohol and reporting to a youth justice worker.</td>
</tr>
</tbody>
</table>

*YJA* = *Youth Justice Act 1997* (Tas)  
*VTA* = *Vehicle and Traffic Act 1999* (Tas)  
*POA* = *Probation of Offenders Act 1973* (Tas)  
*SA* = *Sentencing Act 1997* (Tas)
3.4 FORMAL CAUTIONS AND COMMUNITY CONFERENCES IN PRACTICE

This is one of the most important descriptive sections of the thesis. It describes how police formal cautions and DHHS community conferences are conducted in practice. The first section describes how the police operate both cautions and conferences under the legislative provisions for formal cautions. This section gives some consideration to principles of statutory interpretation and concludes that the police do have the powers to conduct conferences under the *Youth Justice Act 1997* (Tas). The shorter second section highlights how the police and DHHS interact in the operation of community conferences.

3.4.1 Formal cautions

‘Formal caution’ is defined under section 3 of the *Youth Justice Act 1997* (Tas) simply as ‘a caution administered under section 10’. Section 10 does not specify the format of a formal caution: how it is to begin, who is to speak, what is to be discussed, or what the police officer is to say. It merely states that formal cautions ‘against further offending’ are to be ‘administered’ by police officers. Section 10 does specify what undertakings the officer can require the youth to enter. These include (a) compensation for the injury suffered or expenses incurred by victims of the offence, (b) restitution, (c) up to 35 hours community service, (d) an apology to the victim, and (e) an undertaking to do anything else appropriate in the circumstances.

The most unusual aspect of these provisions is that under section 9(3) victims should be given the ‘opportunity to attend the administration of the formal caution.’ Tasmania is the only jurisdiction in which this occurs. There is no mention of victims being able to speak during the administration of the formal caution. In fact, under section 9(3) the officer is not obliged to invite the victim at all, but only if it is ‘appropriate in all the circumstances’. Indeed, formal cautions can be conducted with the young offender alone. Section 10(4)(a) states that formal cautions be administered in the presence of a representative of a community group with whom the youth identifies, such as an Aboriginal Elder.

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43 *Youth Justice Act 1997* (Tas), s. 3: to administer a formal caution officers must be authorised by the Commissioner.

44 *Youth Justice Act 1997* (Tas), s. 10(1). Formal cautions may be treated as evidence of prior offending history if the youth later appears in court on another matter (ss. 10(1), 10(3)(b), 10(4)(a)). The caution itself can be administered by a representative of a community group with whom the youth identifies, such as an Aboriginal Elder (ss. 11, 12).
guardian or responsible adult ‘if practicable’. On the other hand, young offenders and their guardians or the responsible adult present are permitted to speak. Section 10(5) states that these parties must be allowed to comment on any undertakings that the officer proposes.

The police perspective of section 10 is that it enables them not only to ‘administer cautions’ but to facilitate juvenile conferences. They highlight two aspects of the legislation. First, that officers can require youths to enter into undertakings for the benefit of the victim. Secondly, that the victim may be present at the formal caution. Amongst other things, they argue that this implies that interaction between the officer, the victim, and the offender can take place at a formal caution. The officer needs to be able to determine the needs of the victim and the capabilities of the offender in determining a suitable undertaking (Lennox, pers. comm., 5/3/2002). For instance, the victim may wish the offender to repair a vandalised fence on a certain date. But the offender may not be able to arrange transport for that time or otherwise complete the undertaking for any number of genuine reasons. A different undertaking may need to be arranged that is practical for the youth and satisfactory for the victim. In any case, victim’s views often change dramatically after they meet an offender and so do their perceptions of desirable outcomes (Lennox, pers. comm., 5/3/2002). To disallow the victim to speak at a formal caution or to interact with the offender would result in an absurdity. That is, the pragmatics of the undertakings could not be sorted out at that point. Furthermore, if the officer believes that an apology to the victim is appropriate and the young offender agrees so, it seems obvious that this should be able to occur during the formal caution when the victim and the offender are together (Lennox, pers. comm., 5/3/2002). From my own view, Lennox’s arguments are logical. However, as I will explain below, I do not think that police conferences are in keeping with the spirit of Youth Justice Act 1997 (Tas).

The Commissioner’s Instructions and Guidelines (2002) concerning the Youth Justice Act 1997 (Tas) concentrate primarily on formal cautions. They state that a formal caution is a ‘formal and structured caution facilitated by a police officer [which] may assist the youth to realise the effect their actions have had on other people and society’ (Instructions and Guidelines, 2002: 4). Furthermore;
The process may also engage the victim and provides them with an opportunity to participate in the justice system. The victim may express his/her feelings about the crime, seek an explanation from the offender and have input into the disciplining process. ... The youth, victim and police are able to discuss the negative consequences of the offence and plan how the youth may repair the harm caused (Instructions and Guidelines, 2002: 4).

The guidelines go on to specify the structure of a formal caution. This structure is unmistakably that of a Wagga style conference (see Moore, 1993; Moore, 1995; Braithwaite & Mugford, 1994). In particular the guidelines direct officers to invite the offender to describe their actions, to invite the victim to respond and then others to respond, and then to encourage 'full discussion' (Instructions and Guidelines, 2002: 12).

After this the officer invites the group to make suggestions about ways in which the youth can repair the harm suffered by the victim. An outcome that suits all parties is sought and the youth signs a written agreement to complete the undertakings.

This is precisely what occurs in practice, at least in the 33 'formal cautions' that I observed as part of this study. The practice is described in detail in chapter six. The reason why practice concurs so closely with the 2002 guidelines is because the guidelines were drafted well after the practices had been developed. All of the points in the guidelines were included in a police training course I observed in October 2000, which is discussed in chapter five. In fact, in 1998 the first official policy statement concerning police conferencing was issued from the Commissioner's Office. The memo clearly differentiated conferencing from cautioning. It stated that a conference was the preferable form of diversion. Cautions should be used, the memo clarified, where there was no victim or the victim did not want to attend. In my own observations of practice this differs between officers. Some officers conduct police conferences when a victim is able to attend. Without the victim the procedure they follow is that of the nationally accepted term of a 'formal caution' - a warning conducted at a police station (see Seymour, 1988: 234-241). Other officers never conduct formal cautions in this way.

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45 Three 'formal cautions' were observed prior to the development of the questionnaires and a further 30 were observed employing the methodology.

46 It also explains the effectiveness of conferencing in terms of 'restorative justice', which is the first documented official use of the term in Tasmania.
That is, regardless of whether a victim is present they facilitate a conference using parents or other supporters to generate discussion on the crime and a suitable resolution.

Another feature of police conferencing practice is that sometimes the officers invite third parties – individuals who are not significant others of the offender and are not victims of the offence. Examples include members of the fire brigade, teachers from the offender’s school, counsellors, and so on. These people are invited to police conferences because the police facilitators believe they will make a valuable contribution to the restorative process. For example, one fire fighter operates a program for young people who commit offences such as arson. The purpose of the program is to inform youths about the dangers of fire. Often offenders were asked to participate in the program. Such third persons were clearly not attending the conference as a ‘responsible adult’ to oversee the youth’s interests for the purposes of section 10. On other occasions the police facilitators arranged for youths to attend anger management courses, skill development courses and the like. Finally, the numbers of people attending police conferences fluctuated as much as the DHHS-run community conferences. Indeed, the largest conference observed was a police-run one, involving six offenders and 13 others.

One feature of the Instructions and Guidelines (2002) that is obviously at odds with the Youth Justice Act 1997 (Tas) concerns the offender’s obligation to complete undertakings agreed to in a formal caution. The Instructions and Guidelines (2002: 13) state that the youth must be informed ‘that he or she will be liable for prosecution if the youth does not … complete the undertakings required’. This is untrue. Unlike (a) police cautions in South Australia and (b) community conferences in Tasmania, if a young person does not complete the undertakings they agreed to in a formal caution no further action can be taken. However, the police do monitor whether undertakings are completed. Failure to complete undertakings agreed to in a formal caution will be taken into account by the police if the youth concerned offender offends again. As chapter six discusses further, only rarely did officers actually state that prosecution was a possible outcome for non-completion of undertakings. More commonly the officers specifically avoided the whole issue.47

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47 A number of officers would like the legislation to be changed so that the undertakings in formal cautions were enforceable at court (Lennox, pers. comm., 21/11/2000).
After the *Youth Justice Act 1997* (Tas) was proclaimed it became clear to the DHHS that the police were conducting an unknown number of conferences ostensibly as 'formal cautions'. Upon seeking legal advice, the DHHS formed the view that the police were not acting ultra vires – beyond their powers – in facilitating discussion between the youth, their guardians, and the victim and formulating ways in which the offender could repair the damage caused (Vickers, pers. comm., 29/5/2003). The main reason for this view was that the Act allowed victims to attend conferences and did not stipulate that interaction or discussion could not occur. Another incentive for the DHHS to take this view was to protect its good relations with the police and to ensure their cooperation in the implementation of the new system (Vickers, pers. comm., 29/5/2003). Arguably this was an astute political decision. In retrospect, to have fought to prevent the police from conducting conferences could have damaged the enthusiasm with which the force had embraced diversion and restorative justice. This in turn may have affected police gatekeeping practices in (a) the total number of diversions or (b) the number of diversions to community conferences.

I agree with the DHHS view of the *Youth Justice Act (1997)* (Tas). However, whilst police conferences may not be ultra vires, arguably they are not in keeping with the spirit of the Act. The *Acts Interpretation Act 1931* (Tas) (s. 8A) states that an 'interpretation that promotes the purpose or object of the Act is to be preferred to an interpretation that does not promote the purpose or object', 'whether or not the purpose or object is expressly stated in the Act'. Perhaps the single most important point to make is that in the context of when the *Youth Justice Act 1997* (Tas) was formed there was a prominent national debate over police conferencing and the expansion of police powers. A choice existed between the Wagga model of police conferencing or the New Zealand model of independently facilitated conferences. Most of the jurisdictions chose the New Zealand model and two chose the Wagga model, namely the Northern Territory and the ACT. No jurisdiction chose both. South Australia instituted a diversion scheme with (a) a form of formal cautioning which granted the police a heavy role in diversion, and (b) New Zealand model conferences. Arguably the purpose of the *Youth Justice Act 1997* (Tas) was

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48 Catharine Vickers was the DHHS Project Manager for the implementation of the *Youth Justice Act 1997* (Tas) in 2000.

49 Under the *Acts Interpretation Act 1931* (Tas) (s. 8B) it is also permissible in interpreting legislation to consider extraneous material, that is material other than the Act itself.
to establish a system almost identical to this – which categorically did not involve Wagga style conferences. Other arguments could focus on the language used by the Act.\textsuperscript{50}

3.4.2 Community conferences

There are three Youth Justice Coordinators in the DHHS. In some instances the police discuss particular cases with these coordinators to determine the suitability of community conferencing for individual offenders. Their central role is to choose which independent facilitator deals with each community conference. Coordinators assist facilitators in preparing for conferences. At their own instigation, or if they are invited by the facilitator, coordinators sometimes attend community conferences with the specific role of explaining to the participants their options in determining suitable undertakings for the young offender. An issue that is developed in chapter six is that coordinators also have a long list of programs designed to help young people in different ways, identical to those used by police in their conferences (see 3.4.1). At the community conference the coordinator can describe various programs for the participants to consider as undertakings. The coordinators are also aware whether the programs have vacancies for new entries. The Youth Justice Act 1997 (Tas) permits the use of such programs as undertakings under section 16(1)(g).

The actual practice of community conferences is much the same as that described in chapter two, and is discussed in detail in chapter six. Facilitators are paid to spend up to 10 hours preparing conferences, which includes face-to-face briefing for the main participants. Strangely the Act states that young offenders are entitled to one supporter only.\textsuperscript{51} This provision is ignored. About two thirds of conferences involve two or more supporters for the youth (see further 6.2). Facilitators invite victims and their supporters and anyone else they feel may be able to give special input, such as counsellors, teachers, the fire fighter referred to previously, and so on. So called ‘victimless crimes’ may involve representatives from the local council, for instance, to give an idea of the impact of the offence. For offences such as shoplifting representatives of the company affected may be invited to attend. All conferences are attended by a police officer. In practice

\textsuperscript{50} Most interesting is the terminology used for both informal cautions and formal cautions, namely ‘cautioning an offender against further offending’ (Youth Justice Act 1997 (Tas), ss. 8(1), 10(1)). Additionally, whilst both types of cautions are ‘cautions administered’, community conferences are defined as ‘conferences convened’ (s. 3).

\textsuperscript{51} Youth Justice Act 1997 (Tas), s. 15(3).
the officers who attend community conferences tend to be the authorised officers who are experienced at conducting police cautions and conferences. Arrival at the conference is staggered so that the victim and their supporters arrive 15 minutes before the offender. After an introduction and explanation of the conferencing process, the facilitator in turn invites the offender, the victim and the others to describe their perspective of the offence. The discussion then turns towards appropriate reparation, which can include (a) compensation, (b) restitution, (c) up to 70 hours community service, (d) an apology, (e) or anything else appropriate in the circumstances. The victim, the offender, and the police officer must reach an agreement. Most community conferences finish with what is called the 'breaking of the bread' – light refreshments and a chance to talk, which may last up to half an hour. If an agreement is not reached on the day, or if the youth fails to complete their undertakings the police have the discretion to refer the matter to court. Facilitators have the power to adjourn a community conference under section 17(5).

CONCLUSION

Tasmania's juvenile justice system has evolved in an unusual way. The policy issues that were debated in Tasmania into the early 1990s were similar to those considered elsewhere in Australia. Its Youth Justice Act (1997) (Tas) was also unremarkable by national standards, instituting formal cautioning and the New Zealand model of conferencing in a similar fashion to South Australia. However, prior to the passing of the legislation one police district began trialing the Wagga model and this practice quickly received the affirmation of the senior ranks. When the legislation was proclaimed in 2000 the police continued to employ the Wagga model under the guise of formal cautioning. The government welfare sector did not oppose this development, mainly because of ambiguity in the Youth Justice Act (1997) (Tas). Tasmania's experience has been characterised by a willingness between the police and government sectors to cooperate and arguably an aversion to confrontation. This is commendable. Indeed in chapter six I point to a number of reasons why this rapport is a strength of the Tasmanian system. Yet, Tasmania's experience has equally been characterised by an

52 Youth Justice Act 1997 (Tas), s. 16(1).
53 Youth Justice Act 1997 (Tas), s. 17(4).
54 Youth Justice Act 1997 (Tas), s. 20(2).
unreflective and unplanned acceptance of two theoretically different approaches to conferencing and restorative justice. How will the Wagga model and the New Zealand model operate side by side in the Tasmanian context? Chapters five and six address this question by reviewing the selection and training of conferencing practitioners and their practices. However, preceding this the discussion will next present original quantitative data on diversion, net-widening, gate-keeping, and sentencing trends in the new Tasmanian juvenile justice system.
Chapter two canvassed some of the systemic issues that have troubled juvenile conferencing schemes in the past. One of the deceptively simple aims of juvenile conferencing is to divert as many young people away from court as possible. Previous diversion systems have failed to do this. Worse, once equipped with diversionary practices such as cautions and conferences, some juvenile justice systems have actually increased the number of youths who have contact with an arm of the criminal justice system (Ditchfield, 1976). This phenomenon is known as net-widening. Other unintended effects of diversion might include harsher treatment of repeat offenders by the courts (Cohen, 1985). No Tasmanian government or independent agency has attempted to analyse whether these complex problems are affecting the new juvenile justice system. Without any annual reports or other forms of quantitative data generated by government departments at hand, the present study undertook an original statistical analysis of the central police database in Tasmania dating back to 1991.55

The *Youth Justice Act 1997* (Tas) clearly sets a true reduction in the frequency of juvenile court appearances as one of the primary goals of the Tasmanian juvenile justice system (see 3.3). In particular, the Act intended to divert minor offenders away from court. Hence the most fundamental research question for the present study was whether the diversion of minor juvenile offenders is occurring in Tasmania. The research presented in this chapter strongly suggests that this goal has been met. It seems that diversion was not altogether the result of the proclamation of the *Youth Justice Act 1997* (Tas) but the continuation of a consistent trend throughout the 1990s. The second most important research question to be asked of the new Tasmanian system was whether there was any evidence of net-widening. Such evidence would heavily qualify the positive findings concerning diversion. Indeed, dramatic signs of net-widening could be used to argue...

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55 The Department of Health and Human Services, Tasmania, ceased producing detailed statistics on juvenile offenders in 1991.
that the new system is worse than its predecessor (Cohen, 1985; cf Braithwaite, 1999). However, encouraging results are presented that indicate that no net-widening has occurred in the first two and a half years of the new juvenile justice system (January 2000 – May 2002). These findings concerning diversion and net-widening reflect positively upon Tasmania police and the way they have administered their gate-keeping function. Not quite as clear are the results concerning sentencing trends. The single worrying aspect of these findings concerns an increase in the use of detention.

A necessary precursor to the presentation and discussion of these results is a description of the source of the data, the central Tasmanian police database. Important too is a detailed description of how the data were extracted and the techniques that were employed to ready the data for statistical analysis. Discussion of the results will include an explanation of the statistical methods used, namely regression analyses, the rationale behind them, and the central research questions. Several figures and tables present the most important findings. The discussion will critically examine possible interpretations of the findings and consider implications for the systemic functioning of the Tasmanian juvenile justice system.

4.1 DESCRIPTION OF THE INFORMATION BUREAU SYSTEM

In the early stages of the research four separate databases were assessed to see whether they could yield data concerning diversion, net-widening and gate-keeping. Two relevant databases are operated by the Department of Police and Public Safety (hereafter "Tasmania Police"), a third is operated by the Department of Health and Human Services (DHHS) and a fourth by the Magistrates Court of Tasmania. Open discussions with information technology personnel in each department were held concerning the databases and their suitability to meet the research questions. Additionally, manuals and users' guides for three of the databases were examined. Although I initially intended to use a combination of information from different databases, it became clear that one database alone, the Tasmania Police Information Bureau System (IBS), would be best suited. The IBS is the oldest state-wide database that can provide data on the treatment of young offenders by the criminal justice system.

Personnel included Richard Wylie from the Magistrates Court of Tasmania, Lin MacQueen in the Department of Health and Human Services, and Steven Levis, John Schofield and Pilar Bastias-Perez in Tasmania Police.
The IBS was developed in 1989 and it has several functions. It acts as a nucleus for 19 separate police databases which record information on all police concerns, ranging from traffic infringements to call centre communication and crime analysis. Perhaps the most important function of the IBS is to record information about most individuals that come in contact with the police, including youths who have admitted to an offence and have been sent to a formal caution, a community conference, or court. The officer who has dealt with or arrested a person generally enters the information about them.

Apart from name, address, sex and age, the police may choose to enter considerable detail about an individual depending on the seriousness of the alleged offences. Details include previous addresses, aliases, nicknames, fingerprints and photographs, occupation, and modus operandi. A physical description may include marks and features, hair and eye colour, height, build, race and complexion. Clearly, this data is valuable for police investigations. However, aspects of the database are limited for data analysis, namely those fields which are recorded irregularly. Data can be entered irregularly for three reasons. First, there are no systems in place that force officers to enter data in all fields other than an alleged offender's name, address, sex and age. For instance, unfortunately for the present study the 'occupation' of juveniles is not often recorded. Secondly, it is acceptable for police officers to enter information in some of the fields based on their impressions. An important example is the field 'race'; an officer may simply enter 'white' based on the appearance of an individual who in fact identifies as a member of the Tasmanian Aboriginal community. This irregularity has prevented the present study from analysing data on racial issues. Finally, many fields allow officers to enter data as 'free text', that is, with idiosyncratic descriptions. For instance, 'white', 'Anglo-Saxon', or 'Caucasian' might be entered to describe the same person.

However, a great deal of information concerning juveniles' treatment by the criminal justice system can be extracted from the IBS. Much of this information is automatically transferred to the IBS from other police databases. One important database that is linked to the IBS is the Prosecutions System, which records court proceedings. All offences committed by an individual are recorded using a coding system which categorises all offences into different classes. This coding system overcomes many of the vagaries of free text. Whilst the coding system is considered to be accurate it is still subject to human error, though the same frailty affects most databases (Levis, pers.)
Meetings with the Tasmania Police information technology personnel began in October 2000. In July 2002 raw data was received. Although the types of data that concerned the research were easily viewed on the IBS, actually extracting that data and reformatting it presented numerous difficulties for the Tasmania Police information technology personnel. The IBS was designed with Crystal, a database development program. Crystal proved to be particularly inflexible software. Four police information technology personnel spent an estimated 45 hours extracting the data. Indeed, high levels of cooperation marked all the dealings with the police, in contrast to experiences elsewhere. Trimboli (2000), for instance, was refused access to the New South Wales police data base in her study of conferencing.

The raw data canvassed the entire IBS. That is, every recorded contact, excluding informal cautions, between individuals and the Tasmanian criminal justice system from April 1991 to May 2002. The data consisted of over one million records, each record representing one matter. Each matter concerned one or more offences for which an individual had admitted guilt or had been found guilty before the court. The raw data received from Tasmania Police contained data under the following column headings: person ID, sex, date of birth, court location, court date, court outcome, and description. Table 4.1, below, is an actual screen copy from the raw data. (In this table and the tables that follow some details were altered to further protect anonymity.)

Table 4.1 Example of IBS raw data received from Tasmania Police

<table>
<thead>
<tr>
<th>person</th>
<th>sex</th>
<th>dob</th>
<th>court location</th>
<th>court date</th>
<th>court outcome</th>
<th>description</th>
</tr>
</thead>
<tbody>
<tr>
<td>593638</td>
<td>M</td>
<td>3/11/86</td>
<td></td>
<td>3/16/02</td>
<td>FORMALLY CAUTIONED AT POSSESS LIQUOR IN PUBLIC</td>
<td></td>
</tr>
<tr>
<td>593645</td>
<td>M</td>
<td>11/5/60</td>
<td>LAUNCESTON</td>
<td>9/27/01</td>
<td>FINED $110 COSTS $36.65 DISOBEY TRAFFIC LIGHT</td>
<td></td>
</tr>
<tr>
<td>593636</td>
<td>M</td>
<td>5/26/86</td>
<td></td>
<td>3/21/02</td>
<td>FORMALLY CAUTIONED AT DESTROY PROPERTY</td>
<td></td>
</tr>
</tbody>
</table>

To protect anonymity, before providing the data for the present research, the police generated a person ID for each offender. The sex and the date of birth of each offender were included. The court location field listed the town in which the case was heard. No

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57 Steven Levis is the Manager of Information Services for Tasmania Police.
court location was entered if the matter had been dealt with by a diversionary procedure. Important also was the data contained in the court date field. This recorded the date of disposal and not the date of the hearing. The court outcome field contained a free text description of the disposals. Occasionally idiosyncratic descriptions had been entered by police officers. Often the descriptions followed relatively similar formats. Recorded in this field too were those matters that had been diverted away from court, the type of diversionary procedure involved and often other details. Finally, the ‘description’ field included free text descriptions of the offence or offences that constituted each matter.

4.2 TRANSFORMATION OF THE TASMANIA POLICE DATA FOR STATISTICAL ANALYSIS

Together with a research assistant with expertise in information technology and database construction, over 60 hours were spent transforming the raw data received from Tasmania Police into a format suitable for statistical analysis. This task was completed with Microsoft Access, which could interpret the data extracted from Crystal. As noted, the raw data contained records up to the 30th of April 2002. The results below present the years 1991 to 2001. It was decided to define the years from the 1st of May to the 30th April. Thus, for example, the year 1991 actually contains data from 1/5/1991 to 30/4/1992. Likewise, the year 1999 contains data from 1/5/1999 to 30/4/2000. Obviously then, ‘2000’ refers to 1/5/2000 to 30/4/2001 and ‘2001’ equates to 1/5/2001 to 30/4/2002.

For clarity’s sake it is useful to mention here that regression analyses had been decided upon as a means of answering the key research questions (see 4.3 for rationale). Regression analyses would assess the trends in the years 1991-1999 and detect whether the outcomes of 2000-2001 – the period of the new system – departed from these trends to a significant degree. It was essential for this process that the two periods be tested on identical measures. This had a number of ramifications.

58 There was one main reason for defining the years in this way. The new system began when the Youth Justice Act 1997 (Tas) was proclaimed in February 2000. The three months of data in 2002 – that is, February 2002 to April 2002 – were considered very valuable for the data analysis. Defining years this way enabled the analysis to maximise the amount of data pertaining to the period of the new system.
First, the decision was made to exclude all data concerning offenders under the age of 10 and over the age of 17, which is the new age definition of a youth as provided in the Youth Justice Act 1997 (Tas). Excluding all data not relating to offenders aged 10 to 17 reduced the data set from over one million records to about fifty thousand. The age of offenders was calculated at the date of the court disposal using the date of birth field together with the court date field. It was impossible to calculate the age of offenders at the date of the offence or offences concerned. The pre-2000 system defined youths as those aged seven to sixteen years inclusive (see 3.1.2). One minor effect of excluding offenders under the age of 10 years was the jettisoning of a small amount of data – 415 records in total – concerning offenders aged seven to nine who had contact with the pre-2000 system. More complicated were the consequences of including those aged 17 from the pre-2000 period. These offenders were processed through the justice system as adults – ineligible for diversionary procedures that existed at the time and sentenced by adult courts.

The second ramification of needing to compare the pre-2000 period and the post-2000 period on identical measures concerned the classification of offences eligible for diversion introduced by the Youth Justice Act 1997 (Tas) (s. 3; see 3.3). Pre-2000 the police had a high degree of discretion as to the age of the offenders who could be diverted away from court as well as the types of offences that could be diverted. However, section 3 of the Youth Justice Act 1997 (Tas) introduced a more specific categorization. Offenders aged 10 to 13 years can be diverted for all offences other than murder, manslaughter, and attempted murder. In addition to these ‘non-diversionable’ offences, youths aged 14 to 16 years cannot be diverted for aggravated sexual assault, rape, armed robbery, or aggravated armed robbery. This classification also applies to 17-year-olds except that they also cannot be diverted for traffic offences. The greatest concern of ignoring the difference between the two periods was that the levels of diversion in the post-2000 period would seem artificially low. That is, the results would not account for the fact that officers in the post-2000 period were unable to divert as many offenders as they had under the previous system. The main step taken to counter this problem was the exclusion of all traffic offences from the analysis. Traffic offences accounted for well over 20 per cent of the raw data on juveniles. However, the remaining seven ‘non-diversionable’ offences – murder through to aggravated armed robbery – were not deleted from the pre-2000 data because they constituted such a
small percentage (0.18%) of the raw data and would therefore have a negligible impact on the statistical findings.

Far more time consuming were the measures taken to deal with the introduction of 'global results' into the IBS as a means of recording court appearances involving multiple offences. Up until 1998 court appearances involving multiple offences had been recorded in a very simple way: one entry per offence. See for example Table 4.2, below.

**Table 4.2** Example of the recording of court appearances involving multiple offences in the IBS pre-1998.

<table>
<thead>
<tr>
<th>person_id</th>
<th>sex</th>
<th>dob</th>
<th>count_location</th>
<th>court_date</th>
<th>court_outcome</th>
<th>description</th>
</tr>
</thead>
<tbody>
<tr>
<td>42 M</td>
<td></td>
<td></td>
<td>3/3/75 HOBART CPS</td>
<td>8/22/96</td>
<td>7 DAYS IMPRISONMENT WHOLL BREACH OF BAIL</td>
<td></td>
</tr>
<tr>
<td>42 M</td>
<td></td>
<td></td>
<td>3/3/75 HOBART CPS</td>
<td>8/22/96</td>
<td>6 MONTHS IMPRISONMENT WHC AGGRAVATED SURGERY</td>
<td></td>
</tr>
<tr>
<td>42 M</td>
<td></td>
<td></td>
<td>3/3/75 HOBART CPS</td>
<td>8/22/96</td>
<td>6 MONTHS IMPRISONMENT WHC STEALING</td>
<td></td>
</tr>
<tr>
<td>42 M</td>
<td></td>
<td></td>
<td>3/3/75 HOBART CPS</td>
<td>8/22/96</td>
<td>14 DAYS IMPRISONMENT WHOLI BREACH OF BAIL CONDITIONS</td>
<td></td>
</tr>
<tr>
<td>42 M</td>
<td></td>
<td></td>
<td>3/3/75 HOBART CPS</td>
<td>8/22/96</td>
<td>14 DAYS IMPRISONMENT WHOLI BREACH OF BAIL CONDITIONS</td>
<td></td>
</tr>
<tr>
<td>42 M</td>
<td></td>
<td></td>
<td>3/3/75 HOBART CPS</td>
<td>8/22/96</td>
<td>7 HOURS COMMUNITY SERVICE STEALING</td>
<td></td>
</tr>
<tr>
<td>42 M</td>
<td></td>
<td></td>
<td>3/3/75 HOBART CPS</td>
<td>8/22/96</td>
<td>6 MONTHS IMPRISONMENT WHC AGGRAVATED SURGERY</td>
<td></td>
</tr>
</tbody>
</table>

In this example one person was sentenced on the same day for eight different offences. The offences and the specific sentence that was applied to each offence were recorded individually. Thus, this data might be termed 'offence-centric'. After 1998 a new method of recording court appearances was introduced that changed the data dramatically. These are still used and are called global results. Global results are the entire sentence a person has received in one court appearance for multiple offences. See for example Table 4.3, below.

**Table 4.3** Example of the recording of court appearances involving multiple offences in the IBS using global results.

<table>
<thead>
<tr>
<th>person_id</th>
<th>sex</th>
<th>dob</th>
<th>count_location</th>
<th>court_date</th>
<th>court_outcome</th>
<th>description</th>
</tr>
</thead>
<tbody>
<tr>
<td>485977 F</td>
<td></td>
<td></td>
<td>1/2/73 LAUNCESTON</td>
<td>4/28/99</td>
<td>4 MONTHS IMPRISONMENT WHOLLY SUSPE STEALING</td>
<td></td>
</tr>
<tr>
<td>485977 F</td>
<td></td>
<td></td>
<td>1/2/73 LAUNCESTON</td>
<td>4/28/99</td>
<td>GLOBAL RESULT: REFER COMPLAINT 24102. OBTAIN GOODS BY FALSI</td>
<td></td>
</tr>
<tr>
<td>485977 F</td>
<td></td>
<td></td>
<td>1/2/73 LAUNCESTON</td>
<td>4/28/99</td>
<td>GLOBAL RESULT: REFER COMPLAINT 24102. OBTAIN GOODS BY FALSI</td>
<td></td>
</tr>
<tr>
<td>485977 F</td>
<td></td>
<td></td>
<td>1/2/73 LAUNCESTON</td>
<td>4/28/99</td>
<td>GLOBAL RESULT: REFER COMPLAINT 24102. OBTAIN GOODS BY FALSI</td>
<td></td>
</tr>
<tr>
<td>485977 F</td>
<td></td>
<td></td>
<td>1/2/73 LAUNCESTON</td>
<td>4/28/99</td>
<td>GLOBAL RESULT: REFER COMPLAINT 24102. OBTAIN GOODS BY FALSI</td>
<td></td>
</tr>
<tr>
<td>485977 F</td>
<td></td>
<td></td>
<td>1/2/73 LAUNCESTON</td>
<td>4/28/99</td>
<td>GLOBAL RESULT: REFER COMPLAINT 24102. OBTAIN GOODS BY FALSI</td>
<td></td>
</tr>
</tbody>
</table>

As Table 4.3 indicates, repetitions in the court outcome field simply state 'global result' and refer to a complaint code. Officers viewing the live IBS would be able to use this complaint code to track the actual sentence, which in the case above seems to be a wholly suspended sentence for four months. I was unable to do this without the
complaint codes or the live IBS. Effectively, the introduction of global results changed the IBS data from being 'offence-centric' to 'matter-centric'. That is, making the court appearance – whether it dealt with one or multiple offences – the central unit.

To overcome the problem presented by the introduction of global results, steps were taken to transform all the data into a matter-centric format. All offences recorded with the same person ID and court date were grouped and only the most serious sentence was recorded. For example, where detention, monetary orders and an order for recorded conviction were imposed in one matter, only the detention was recorded. The sentences were categorized into a nine tiered hierarchy, ranging from most serious to least serious sentences. These categories combined sentences from the old system and the new system that were equivalent to each other (see 3.3 for a detailed comparison of the sentencing options under both systems). Table 4.4, below, shows the sentencing options under the old system and the new system and the terminology used in the analysis for this study.

Table 4.4 Categorisation of the sentencing options in the old and new systems for the present study

<table>
<thead>
<tr>
<th>OLD SYSTEM</th>
<th>NEW SYSTEM</th>
<th>TERMINOLOGY FOR STUDY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Admonish and discharge</td>
<td>Dismiss and reprimand</td>
<td>Admonished and discharge</td>
</tr>
<tr>
<td>Good behaviour bonds</td>
<td>Good behaviour bonds</td>
<td>Good behaviour bonds</td>
</tr>
<tr>
<td>Conviction recorded</td>
<td>Conviction recorded</td>
<td>Conviction recorded</td>
</tr>
<tr>
<td>Fines &amp; orders for restitution &amp; compensation</td>
<td>Fines &amp; orders for restitution &amp; compensation</td>
<td>Monetary order</td>
</tr>
<tr>
<td>Licence disqualification</td>
<td>Licence disqualification</td>
<td>Licence disqualification</td>
</tr>
<tr>
<td>Supervision &amp; probation orders</td>
<td>Probation orders</td>
<td>Supervision orders</td>
</tr>
<tr>
<td>Community service orders</td>
<td>Community service orders</td>
<td>Community service orders</td>
</tr>
<tr>
<td>Wardship</td>
<td>-</td>
<td>Wardship</td>
</tr>
<tr>
<td>Committal orders &amp; Imprisonment</td>
<td>Detention orders &amp; suspended detention orders</td>
<td>Detention</td>
</tr>
</tbody>
</table>

Wardship was a special case in that the new juvenile justice system removed wardship as
a sentencing tool. Licence disqualifications might appear to be a strange sentence category to record when all traffic offences were excluded from the analysis of ‘diversionable’ offences. However, licences can be disqualified for motor vehicle theft and indictable offences in addition to traffic offences. In fact, the court can order that a young offender be disqualified from driving before they have attained a driving licence. Sixteen is the age at which a driving license can be sought. An unlicensed 15 year-old who is found guilty of stealing a car might be prevented from seeking a driving license until they are 18 years of age.

4.3 RESEARCH QUESTIONS AND SUPPOSITIONS

Spanning state wide data on juveniles eight years before the introduction of the new system, the IBS data appeared well equipped to address the three key research questions concerning diversion, net-widening, and sentencing patterns. The most important research question concerned the diversion of minor juvenile offenders away from court into diversionary procedures. It was expected that the new juvenile justice system would succeed in this aim and that this would be measurable in three ways:

• there would be a significant reduction in the number of juvenile court appearances in the period 2000-2001 in comparison to the period 1991-1999,

• the 2000-2001 period would record a significant reduction in the courts’ use of admonish and discharge orders – which Briscoe and Warner (1986) had found was the most common sentence for minor, first-time offenders,

• there would be a significant increase in the annual referral of youths to different diversionary practices in the 2000-2001 period.

The second research question concerned net-widening. It was anticipated that net-widening would occur in Tasmania’s new system as it had in Western Australia over a ten year period. Specifically, it was expected that the number of youths having contact with Tasmania’s juvenile justice system in the 2000-2001 period would be greater in than the 1991-1999 period.

The final question to be answered concerned the impact of the Tasmanian juvenile justice system on sentencing patterns. A decrease was expected in the use of admonish
and discharge orders, mentioned above. However, less certain were the hypotheses regarding other, more serious sentences. Cohen’s (1985) opinion that diversion, whilst benefiting minor offenders, results in harsher judicial treatment of repeat offenders seemed a useful thesis to test. Hence it was expected that there would be an increase in the use of the more serious sentences in the 2000-2001 period.

4.4 RESULTS

Modifying the raw data in the way explained yielded the number of juvenile court appearances for each of the years 1991 – 2001. Easily identified too were the annual totals of juveniles attending diversionary procedures, including cautions and conferences. Adding these yearly figures together provides the total number of recorded contacts between the criminal justice system and juveniles (see Table 4.5, below).

<table>
<thead>
<tr>
<th>Year</th>
<th>Court</th>
<th>Diverted</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991</td>
<td>2576</td>
<td>109</td>
<td>2685</td>
</tr>
<tr>
<td>1992</td>
<td>2307</td>
<td>245</td>
<td>2552</td>
</tr>
<tr>
<td>1993</td>
<td>2173</td>
<td>363</td>
<td>2536</td>
</tr>
<tr>
<td>1994</td>
<td>2030</td>
<td>207</td>
<td>2237</td>
</tr>
<tr>
<td>1995</td>
<td>1585</td>
<td>684</td>
<td>2269</td>
</tr>
<tr>
<td>1996</td>
<td>1613</td>
<td>628</td>
<td>2243</td>
</tr>
<tr>
<td>1997</td>
<td>1595</td>
<td>648</td>
<td>2243</td>
</tr>
<tr>
<td>1998</td>
<td>1318</td>
<td>1577</td>
<td>2895</td>
</tr>
<tr>
<td>1999</td>
<td>1148</td>
<td>1436</td>
<td>2584</td>
</tr>
<tr>
<td>2000</td>
<td>861</td>
<td>1451</td>
<td>2312</td>
</tr>
<tr>
<td>2001</td>
<td>362</td>
<td>1545</td>
<td>1907</td>
</tr>
</tbody>
</table>

Most apparent is the steady reduction in the yearly figures of juvenile court appearances, over 2500 in 1991 down to 362 in 2001, which represents a 700% reduction. Not as dramatic, though equally apparent is the steady increase in the use of juvenile diversion over the course of the decade: 109 juveniles in 1991 and 1545 in 2001. We also notice two sudden increases in diversion in 1995 (n=684) and again in 1998 (n=1577). Overall, the total number of juveniles being processed by the justice system, either through the courts or through a diversionary procedure, fluctuates but does not reveal a consistent trend over the ten year period.

The basic data concerning sentences is also interesting. Table 4.6, below, presents the annual figures for the nine sentence categories developed for the study.
Table 4.6 Yearly figures (1991-2001) of juvenile court sentences.

<table>
<thead>
<tr>
<th></th>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Detention</td>
<td>88</td>
<td>76</td>
<td>78</td>
<td>97</td>
<td>108</td>
<td>111</td>
<td>119</td>
<td>139</td>
<td>146</td>
<td>205</td>
<td>109</td>
</tr>
<tr>
<td>Wardship</td>
<td>35</td>
<td>18</td>
<td>12</td>
<td>10</td>
<td>7</td>
<td>17</td>
<td>10</td>
<td>11</td>
<td>7</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Community Service</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Order</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Supervision Order</td>
<td>482</td>
<td>369</td>
<td>253</td>
<td>237</td>
<td>245</td>
<td>240</td>
<td>236</td>
<td>182</td>
<td>177</td>
<td>174</td>
<td>43</td>
</tr>
<tr>
<td>Licence Disqualified</td>
<td>74</td>
<td>41</td>
<td>50</td>
<td>44</td>
<td>50</td>
<td>59</td>
<td>33</td>
<td>29</td>
<td>32</td>
<td>54</td>
<td>10</td>
</tr>
<tr>
<td>Monetary Order</td>
<td>732</td>
<td>665</td>
<td>661</td>
<td>662</td>
<td>540</td>
<td>492</td>
<td>511</td>
<td>487</td>
<td>451</td>
<td>257</td>
<td>123</td>
</tr>
<tr>
<td>Recorded Conviction</td>
<td>35</td>
<td>29</td>
<td>22</td>
<td>25</td>
<td>31</td>
<td>25</td>
<td>32</td>
<td>44</td>
<td>30</td>
<td>14</td>
<td>10</td>
</tr>
<tr>
<td>Good Behaviour Bond</td>
<td>101</td>
<td>115</td>
<td>161</td>
<td>193</td>
<td>168</td>
<td>184</td>
<td>190</td>
<td>102</td>
<td>113</td>
<td>101</td>
<td>34</td>
</tr>
<tr>
<td>Admonished and</td>
<td>894</td>
<td>870</td>
<td>827</td>
<td>622</td>
<td>329</td>
<td>371</td>
<td>366</td>
<td>216</td>
<td>137</td>
<td>10</td>
<td>5</td>
</tr>
<tr>
<td>Discharged</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

TOTAL COURT        | 2576 | 2307 | 2173 | 2030 | 1585 | 1613 | 1595 | 1318 | 1148 | 861  | 362  |

Most notable is the change in the use of an admonish and discharge as a means of disposal. In 1991 2576 juveniles appeared before the courts (see Table 4.5). Table 4.6 indicates that one third of these appearances in 1991 were disposed of by way of an admonish and discharge (n= 894). Yet, by 2001 the courts have almost ceased to use admonish and discharge orders as a sentencing tool. Of the 362 court appearances in 2001 only five juveniles were dealt with in this way. Obviously 2000, the year that the Youth Justice Act 1997 (Tas) was proclaimed, saw a quite distinct drop from 137 to 10 cases involving admonish and discharge orders. Interesting also is the 50% reduction in disposals involving admonish and discharge orders from 1993 to 1995.

Whilst the least serious sentence, admonish and discharge, dropped over the decade, the most serious disposal – detention – displayed an upward trend. Small but steady increases in detentions are apparent from 1993 (n=78) to 1999 (n=146).
increase in the use of detention took place in 2000 (n=205). However, this was followed by an even greater fluctuation in 2001 when the number of detentions halved (n=109). This figure seems comparable to the use of detention in the 1994 (n= 97) to 1998 period (n=139). A 'floor' of some kind may exist in the Tasmanian system, meaning that a certain minimum number of sentences are likely to involve detention each year.

Decremental trends are apparent for all other sentence categories across the decade. Steep reductions also occurred from 2000 to 2001 in the courts' use of supervision orders (75%), licence disqualifications (80%), monetary orders (55%), and good behaviour bonds (65%). It should be kept in mind though that juvenile court appearances also decreased over 50% in this period (2000-2001).

4.4.1 Regression analyses

Regression analyses were performed on the frequencies of court appearances and diversions shown in Table 4.5 and the rates of admonish and discharge orders recorded in Table 4.6. As noted, this statistical method calculates the predicted upper and lower limits within which an observation is expected to fall on the basis of a linear trend in the data. Data that subsequently fall outside the predicted course -- the upper or lower confidence intervals -- of a trend suggests that some external factor has impacted upon the variable concerned. Imagine the records of a hypothetical company in the 1980s. Whilst its profits fluctuated they steadily climbed from $1,000,000 in 1980, to $3,000,000 in 1986, and then fell to $750,000 in 1987. Regression analysis could be used to assess the company's profit trends from 1980-1986. The analysis might have shown that had the trend from 1980-1986 continued the predicted profit for 1987 should have lain somewhere between $3,400,000 (the upper confidence interval) and $2,800,000 (the lower confidence interval). Anything above the upper confidence interval or below the lower confidence interval is statistically different from the course of the trend in 1980-1986. Clearly the actual figure for 1987 fell way below the lower confidence interval. Therefore the regression analysis would indicate that the 1987 figure of $750,000 was not

These figures are comparable to completely different data gathered by the Australian Institute of Criminology (AIC). The AIC collated quarterly figures of youths in Tasmania's juvenile detention centre from 1994 to 2001. The year 2000 contained the two highest quarterly figures across the eight years analysed (Cahill & Marshall, 2002: 17). Care must be taken in comparing the figures from this study with those from the AIC. The figures presented in Table 4.6 relate to numbers of youth matters appearing before the courts. The AIC data concerns youths in detention.
due to normal fluctuations that the company had experienced previously. Something else affected the company in 1987 – probably the stock market crash.

Regression analysis was adopted as the simplest and most direct method of determining whether there is an increasing or decreasing linear trend in the data, and for determining upper and lower limits for subsequent predicted values in accordance with the observed trend (Howell, 2002; Studenmund, 2001). While regression analysis provides an accurate description of trends in the data it does not take account of more complex dependencies from one observation period to the next. Time series analysis, used in economic modelling, provides a more comprehensive analysis but also requires many more observation periods. In the present data trends are based on nine observation periods, representing the years 1991 to 1999. The trends are then used to forecast results for 2000 and 2001. Because the possibility of serial dependency cannot be excluded the upper and lower confidence limits should be regarded as approximate or indicative.

Confidence intervals were calculated for both 2000 and 2001. Table 4.7 presents the results of the regression analyses – the forecasted upper and lower confidence intervals for 2000 and 2001 as well as the actual values for those years.

Table 4.7 Upper and lower confidence intervals for 2000 and 2001: juvenile court appearances, admonish and discharge orders, diversions, and total juvenile cases.

<table>
<thead>
<tr>
<th></th>
<th>Lower confidence interval 2000</th>
<th>Upper confidence interval 2000</th>
<th>Actual 2000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Juvenile court appearances</td>
<td>654</td>
<td>1270</td>
<td>861</td>
</tr>
<tr>
<td>Admonish and discharge</td>
<td>-259</td>
<td>261</td>
<td>10</td>
</tr>
<tr>
<td>Diverted</td>
<td>774</td>
<td>2252</td>
<td>1451</td>
</tr>
<tr>
<td>TOTAL JUVENILE CASES</td>
<td>1734</td>
<td>3216</td>
<td>2312</td>
</tr>
</tbody>
</table>
2001

<table>
<thead>
<tr>
<th></th>
<th>Lower confidence interval 2001</th>
<th>Upper confidence interval 2001</th>
<th>Actual 2001</th>
</tr>
</thead>
<tbody>
<tr>
<td>Juvenile court appearances</td>
<td>465</td>
<td>1117</td>
<td>362</td>
</tr>
<tr>
<td>Admonish and discharge</td>
<td>-376</td>
<td>173</td>
<td>5</td>
</tr>
<tr>
<td>Diverted</td>
<td>903</td>
<td>2467</td>
<td>1545</td>
</tr>
<tr>
<td><strong>TOAL JUVENILE CASES</strong></td>
<td><strong>1692</strong></td>
<td><strong>3260</strong></td>
<td><strong>1902</strong></td>
</tr>
</tbody>
</table>

4.4.1.1 Juvenile court appearances

Table 4.7 indicates that a statistically significant reduction in the number of juvenile court appearances occurred in 2001. The 2000 figure of 861 juvenile court appearances was safely within the confidence intervals forecast from the trend in 1991-1999. However, in 2001 only 362 youths were directed to court and this falls below the predicted lower confidence interval for that year of 465. This indicates that the departure from the trend in the number of court appearances for 2001 is statistically significant and that the drop was not attributable to chance fluctuations. That is, the factors influencing the juvenile court appearances for 1991 to 2000 changed in 2001.

Figure 4.1 provides a more complete picture of youth court appearances indicating a very steady decrease through the 1990s.
The substantial downward slope presented in Figure 4.1 is highly statistically significant ($t(7) = -12.55, p < 0.001$). The slope represents an annual reduction of 171 juvenile court appearances. That the 2001 figure fell below the confidence interval is indicative of an even greater impetus within the system to reduce juvenile court appearances.

4.4.1.2 Admonish and discharge orders
The findings concerning the use of admonish and discharge orders are presented here because of their implications for diversion. Results describing the trends of all other sentences are presented in section 4.3.1.5, below. The number of admonish and discharge orders for 2000 and 2001 were not significantly different from the prediction derived from the regression analysis – Table 4.7, above, reveals that the figures for those years lay within the confidence intervals. However, Figure 4.2, below, clearly indicates that the number of admonish and discharge orders steadily reduced over the ten years analysed, almost to the point of extinction.

The clear downward trend presented in Figure 4.2 is itself highly statistically significant ($t(7) = -8.96, p < 0.001$) – the slope representing a reduction of over 100 matters annually disposed of by way of an admonish and discharge.
4.4.1.3 Diversionary procedures

During the same period, 1991-2001, when juvenile court appearances were annually shrinking in number – especially it seems those appearances which might have resulted in the use of an admonish and discharge order – the police began diverting youths to different types of diversionary procedures. Though the first two years of the new Tasmanian juvenile justice system recorded increases in the numbers of youths being diverted away from court, Table 4.7 indicates that the figures for 2000 and 2001 were not higher than might have been expected by the trend of the preceding years. Nevertheless, once again a substantial and significant trend (t (7) = 5.26, p = 0.0012) was found from 1991-2001 and this is presented in Figure 4.3.

![Figure 4.3 Diversionary procedures 1991-2001](image)

The upward slope in fact represents a yearly increase of 172 juveniles processed by means of diversion – almost the exact figure of the annual reductions in court appearances for juveniles across the same period. The results clearly indicate that rates of diversion grew as juvenile court appearances fell.

This is an appropriate juncture to describe what the IBS reveals about the use of diversionary procedures by the police in 1991-2001. The first important thing to note is that informal cautions have never been systematically recorded across the state and they do not appear in the data. This represents an important 'hole' in the results and is discussed later in reference to net-widening. Chapter three outlined how the police
utilized diversionary procedures during the 1990s (3.2). Very many terms were used in the IBS to record diversionary procedures. These can be separated into five categories, as presented below in Table 4.8. A format of cautioning had been used for some time, predating the IBS, which involved police inspectors. These diversionary practices were not given a consistent term when recorded in the IBS from 1991. Consequently, the first category, below, includes a variety of terms that were used to describe ‘cautions’, including ‘diversionary cautions’, ‘police cautions’ and so on. The second category includes all procedures recorded as ‘police conferences’. These were introduced in late 1995 by one senior constable. The third category includes all those procedures that were specifically recorded as ‘formal cautions’. As chapter three explained, the technical term ‘formal caution’ encompasses both police conferences and formalised cautions. Community conferences and cannabis cautioning program procedures constitute the fourth and fifth categories.

**Table 4.8 Numbers of juveniles processed by different means of diversion, 1991-2001.**

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Various terms for old-style cautions</td>
<td>109</td>
<td>245</td>
<td>363</td>
<td>207</td>
<td>628</td>
<td>516</td>
<td>79</td>
<td>22</td>
<td>15</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Police Conferences</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>56</td>
<td>110</td>
<td>82</td>
<td>300</td>
<td>139</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Formal Cautions</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>487</td>
<td>1216</td>
<td>1158</td>
<td>1076</td>
<td>1192</td>
</tr>
<tr>
<td>Community Conferences</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>40</td>
<td>246</td>
<td>210</td>
<td></td>
</tr>
<tr>
<td>Cannabis Cautioning Program</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>38</td>
<td>84</td>
<td>128</td>
<td>143</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>TOTAL DIVERTED</strong></td>
<td>109</td>
<td>245</td>
<td>363</td>
<td>207</td>
<td>684</td>
<td>628</td>
<td>648</td>
<td>1577</td>
<td>1436</td>
<td>1451</td>
<td>1545</td>
</tr>
</tbody>
</table>

There are several interesting features of Table 4.8. The first is that the numbers of cautions in 1991 were minimal. These cautions, as chapter three described (3.2), were permitted under the Police Commissioner’s *Standing Orders* (Warner, 1992). A noticeable increase in cautions took place in 1995. In this year the first use of the term ‘police conference’ appeared. The following year when the *Youth Justice Act 1997* (Tas) was passed, the use of police conferences increased and the term ‘formal caution’ appeared, despite the fact that the legislation had not yet been proclaimed. Interestingly, it was
only in 2002 that the Police Commissioner's *Instructions and Guidelines* specifically required officers to use the term 'formal caution'. Clearly anticipating the introduction of the new system, the police tripled the number of diversions to formal cautions in 1998 and these levels were maintained through to 2001. By 2000 the use of other terms for cautions all but disappeared. Noticeably, 'police conferences' were still recorded even into the first year of the new juvenile justice system. Forty community conferences took place in the year '1999'. Reference to the raw data indicates that these were held in the months February to April 2000 (see 4.2 on the parameters of the years presented in the results). This increased to over 200 diversions in 2001. Finally, the cannabis cautioning program (hereinafter cannabis cautions) began in 1999 and grew slightly in 2001.

Looking at the first two years of the new system specifically it is clear that forms of police diversion (namely formal cautions and cannabis cautions) account for the majority of official juvenile contacts with the criminal justice system. Figure 4.4, below, presents the percentages of juveniles attending court and different diversion programs in 2000 and 2001.
Figure 4.4 Percentages of juvenile court appearances, formal cautions, cannabis cautions, and community conferences in 2000 and 2001.

2000

2001

Figure 4.4 indicates that approximately 10% of juvenile cases are dealt with by way of a community conference in both years. The reduction of juvenile court appearances to less than 20% in 2002 corresponded with an increase in formal cautions. In 2001 formal cautions and cannabis cautions together account for 70% of juvenile cases, increasing from 50% in the previous year.

4.4.1.4 Total juvenile cases
Reference to Table 4.7, above, reveals that in 2000 and 2001 the numbers of juveniles that had some type of official contact with the criminal justice system – be it a court appearance or some form of diversionary procedure – in no significant way differed from the trends of the 1991-1999 period. That is, the actual values for 2000 and 2001 were within the confidence intervals for the values predicted by the linear regression. Figure
4.5 provides more detail on the frequencies of juvenile cases across the decade.

The slope illustrated in Figure 4.5 for the years 1991 to 2001 shows a slight downward trend but is not statistically significant ($t(9) = 0.98, p = 0.35$). Thus, the rates of juvenile cases have declined slightly over the ten year period encompassing the introduction of the diversionary schemes. However, quite noticeable are the fluctuations in the observed yearly figures. It is tentatively suggested that the rates of juvenile cases in 1994 to 1997, together with the substantial downward trend from 1998 to 2001 indicate that the system may stabilise at a lower level. That is, in the coming years the average number of juvenile cases may be significantly lower than the average recorded in the 1990s.

4.5 DISCUSSION

The results presented in this chapter are surprising. Plainly evident is an acceptance of – and indeed an early implementation of – some of the central objectives of the *Youth Justice Act 1997* (Tas) in the early 1990s, before the legislation was passed. How are the many findings to be interpreted collectively? Perhaps this is best achieved through referral to the research questions described in section 4.3.
4.5.1 Diversion and gate-keeping

Three differences were anticipated between the 1991-1999 period and the 2000-2001 period. These were that, because of the introduction of the new system in 2000, in the 2000-2001 period there would be (a) a downturn in the number of juvenile court appearances, (b) a downturn in the number of admonish and discharge orders, and (c) an upturn in the number of juveniles directed away from court into diversionary procedures.

There was a reduction in the number of juvenile court appearances in the period of the new system (2000-2001). Importantly, this reduction was statistically significant in the second year, 2001. This significant difference could be attributed to the proclamation of the *Youth Justices Act 1997* (Tas) and the implementation of the new juvenile justice system. However, the introduction of the new system did not result in a significant reduction of the use of admonish and discharge orders by the courts. Neither was there a statistically significant increase in the number of juvenile diversions.

Nevertheless, a clear picture emerges from the graphs of juvenile court appearances, admonish and discharges, and referral to diversionary procedures. Statistically significant and substantial trends were found for all three variables. Juvenile court appearances steadily declined throughout the ten year period analysed by the data. Arguably the majority of youths who were being directed away from court were those who the police considered to be minor or petty offenders. This view is supported by the fact that the simplest disposal available to the courts, admonish and discharge orders, were used with decreasing frequency through the 1990s. Further, juvenile court appearances and admonish and discharge orders declined at a similar rate: 170 per year and 103 per year respectively. It seems that the decline in juvenile court appearances was partly due to the referral of offenders to diversionary procedures instead of court. Diversionary procedures increased at a rate of 172 cases per year from 1991 to 2001 – almost exactly the same rate at which juvenile court appearances declined. Therefore, rather than changes occurring in the 2000-2001 period, as was expected, it seems that diversion was already occurring in earnest before the passing of the *Youth Justice Act 1997* (Tas). After the Act was passed but before it was proclaimed, the rates of diversion increased suggesting that the police acted in full anticipation of the new system’s implementation in 2000. Consequently, the introduction of the new juvenile justice system appears to have merely continued pre-existing trends regarding the diversion of especially minor
offenders away from court. However, in 2001 there was an accelerated decrease in juvenile court appearances and this seems to have been the direct result of the new legislation.

Chapter three outlined the history of juvenile justice in Australia with a special emphasis on innovations in Tasmania in recent decades. Diversionary practices, which had been trialed in various formats including panels and cautions, were not foreign to the police in Tasmania (Seymour, 1988). Although police officers were able to conduct formal cautions in the early 1990s under the Police Commissioner's *Standing Orders*, chapter three suggested that police interest in diversion really began to increase from 1995, mainly through the influence of one senior constable, John Lennox. Himself influenced by one of the original operators of Wagga style conferencing in the New South Wales police, Lennox promoted police conferencing.

With the backing of the Commissioner for Tasmania Police, Lennox encouraged both police conferencing and cautioning. A memo from the Commissioner indicates that by 1998 police policy embraced diversion for juveniles and police conferencing in particular as a form of restorative justice. What might be described as eagerness to implement the system contained in the *Youth Justice Act 1997* (Tas) is evidenced by the immediate adoption of the term 'formal caution' in 1996 (see Table 4.8, above). From 1997 onwards the bulk of police cautions were recorded as such. More telling is the two-fold increase in cautions and conferences in 1998 (n=1577). The levels of diversion reached in 1999 were maintained in 1999, 2000, and 2001 (see Table 4.8).

These lines of thought lead to the conclusion that the *culture* of the Tasmanian juvenile justice system changed dramatically through the 1990s. Importantly, the key stakeholders had been involved in discussions about reform in the juvenile justice sector since the mid 1980s and legislative changes had been anticipated even in 1987 (see Briscoe & Warner, 1986). The welfare departments had been pivotal in reducing the number of youths sent to detention centres, so that by the beginning of the 1990s two of the three centres closed down. Additionally, in agreements with magistrates welfare professionals began limiting their discretionary power over juvenile offenders (see 3.2). What the results presented in this chapter emphasise is that the police perspective also changed in a very significant way in the last decade. Beginning with, inter alia, disillusionment with the
court system, the tenor of the later part of the 1990s was one of confidence in the
purpose of diversion. In the police force a firm attraction to juvenile conferencing and
restorative justice developed among key figures of different ranks. Heavy involvement
of the welfare sector and the police characterised the formation of the Youth Justice Bill.
The Youth Justice Act 1997 (Tas) was passed in 1997 but in the three years it took to
proclaim the legislation the police began practising their gate-keeping role in full
anticipation of the new system.

The results in this chapter also indicate that the Tasmanian police have performed very
well in exercising their gate-keeping role. In the 2001 period the police sent just 19% of
young offenders to court. In comparison, one year after the South Australian
diversionary system began the police in that state sent 33% of juvenile cases to court
(Wundersitz, 1996a). After the New South Wales diversionary system had been
operating for three years the police were still directing 70% of juveniles to court (Power,
2000). The rates of diversion in Tasmania are comparable to those achieved in Western
Australia after six years of operation, where just over 23% of young offenders were sent
to court (Ferrante et al., 2000). However, it is not clear to what extent the diversion rates
in Western Australia can be attributed to the police. This is because the Western
Australian gate-keeping role is shared between the police and public prosecutor. In 1993
when the New Zealand system, like Tasmania’s system currently, was a few years old,
only 10.3% of juveniles were referred to court. Obviously, though, one of the
distinguishing features of the system in New Zealand is the mandatory gate-keeping
process that does not involve the police at all.

It is also encouraging to note that as gate-keepers the Tasmanian police have not been
reluctant to refer juvenile cases to community conferences; 11% of juveniles are dealt
with this way. This is comparable to the number of juveniles diverted to conferences by
the South Australian police force (10%). In contrast, in 1997 the New South Wales
police diverted only 3% of juveniles to conferences, which was interpreted as antipathy
towards the conferencing process as a ‘soft option’ (Sarre, 1999: 246; Power, 2000).

What my analysis of the IBS was unable to ascertain is whether the Tasmanian police are
biased – unintentionally or intentionally – towards any particular groups or minorities in
the way they exercise their gate-keeping role. This has been a major fear of a number
of commentators (Blagg & Wilkie, 1997; Sandor, 1993, 1994). It is imperative that future research on the Tasmanian juvenile justice system investigates whether there are any differences between the way in which the new system treats juveniles depending on their (a) socio-economic background, (b) sex, and (c) cultural background.

4.5.2 Net-widening

Of course, as mentioned at the introduction to this chapter, the success of a diversion scheme in diverting a large numbers of youths away from court can be heavily qualified by evidence of net-widening. It was anticipated that that net-widening would occur with the introduction of the new system in Tasmania. In particular, it was expected that there would be a statistically significant increase in the total number of youth cases – court and diversion combined – in the 2000 to 2001 period. (Each one of the youth cases, it is worth remembering, does not represent a young person, but a ‘matter’. A matter may be one offence or several offences for which a youth is sent to court or dealt with by way of a formal caution or community conference.)

However, no significant increase in the number of youth matters was evident in the 2000 to 2001 period. Instead, quite an interesting pattern appeared across the entire decade of 1991 to 2001. That is, rates of diversion appeared to increase at the same rate that juvenile court appearances decreased – meaning that the total number of juvenile cases remained stable. But before this outcome can be reasonably accepted as evidence that net-widening has not occurred with the introduction of diversion in Tasmania, the question of population stability has to be addressed.

Tasmania has a small island population of less than half a million people. Particularly during the late 1990s it population had been slowly declining. The rate of decline has been most apparent in the age bracket of 18 to 38 years (Jackson & Kippen, 2001). However, the number of juveniles in Tasmania has been decreasing as well. Figures suggest that from 1991 to 2001 the number of youths aged 12 to 14 years declined 3.4% (n=719) in this period. Additionally, in this decade the number of 15 to 19 year olds declined 5% (n=1754) (Fraser & Fraser, 2003). In total, from 1991 to 2001, 2473 people aged between 12 to 19 years left Tasmania.

60 This is principally because the number of people leaving the state is greater than (a) the number of births and (b) the number of people arriving to settle here (Jackson & Kippen, 2001).
Chapter Four

Obviously a very well designed study would need to be conducted to determine whether a decline of this size would actually affect the rates of juvenile crime. Theoretically at least, all other factors unchanging, if the 3-5% of juveniles who left the state came from a cross-section of Tasmanian society, a 3-5% reduction in the number of juvenile cases might appear over time. A reduction of 5% of juvenile cases would equate to between 110 and 145 cases for any given year. The first point to make about this is that the results clearly indicated that the number of juvenile cases fluctuates considerably some years. For instance, Table 4.5 indicated that in 1998 there was an increase of 653 cases, followed by a 311 reduction in 1999. Amongst other things, this means that a 5% reduction might be difficult to detect statistically over a ten year period.

Notwithstanding, it was noted above that there might be indications that the total number of youth cases dealt with is reducing. This tentative suggestion was based upon the low rates of juvenile cases in 1994 to 1997, together with the substantial downward trend from 1998 to 2001. If indeed the system stabilises at a lower level of annual juvenile cases this may be partly attributable to the decreasing juvenile population.

However, what if the reduction in the juvenile population somehow caused a reduction in crime much greater than 5%? A possible cause for the first scenario might be that for some reason the 3-5% of juveniles that left the state happened to include very many serious recidivists. And with their departure the frequency of juvenile crime fell significantly – that is, much more than 5%. This would have very important implications for the way in which the data in this study would be interpreted. It would mean that the levels of state intervention in the lives of young offenders had remained stable when the frequency of juvenile crime had dropped. That is, the justice system would have increased the proportion of young Tasmanian’s with which it deals. If this were true then the findings of this study could be interpreted to suggest that net-widening had occurred in the juvenile justice system.

It is argued that this dynamic is unlikely. In fact, if anything there are reasons to believe that this cohort of youths would contain a lower than average number of recidivists. The youths leaving the state probably do not come from a cross section of Tasmanian

61 Studies suggests that a small number of juvenile offenders, less than 5%, are repeat offenders. This group can account for up to 60% of crimes committed by juveniles (Cunneen & White, 2002; Wundersitz, 1996b).
society. Rather, it is clear that attraction to interstate employment opportunities is a driving factor behind Tasmania's declining population (Jackson & Kippen, 2001). Hence, probably the majority of youths leaving the state belong to families which have the financial flexibility to uproot themselves and relocate for better employment conditions. As discussed in chapter seven, youth crime is correlated with social disadvantage in families: poverty and unemployment in particular (Gale et al., 1993; Cunneen & White, 2002; Braithwaite, 1989). These factors are also correlated with recidivism amongst youths (Gale et al., 1993; Morris & Maxwell, 1997).

Future research may wish to analyse the relationship between juvenile crime and the number of juveniles leaving the state. It is unclear how population decrease may have affected the data on the number of juvenile cases from 1992 to 2002. There is a possibility that the population decrease is reflected in the results, namely in the low figures recorded for 1994-1997 and 2000-2001. However, it is confidently argued that it is unlikely that juvenile population decrease is in someway disguising the occurrence of net-widening in Tasmania.

The finding that net-widening does not appear to have occurred in Tasmania is a positive one. Enthusiasm for diversion amongst the police might have prompted them to send to diversionary processes those matters which previously they would have dealt with informally, thereby widening the net of social control (Polk, 1994). These results should be of interest to other Australian jurisdictions and even the expanding police diversionary systems in the United Kingdom and Ireland. This is because it is an indication that net-widening is not an axiomatic characteristic of diversion to conferencing programs, even diversion schemes fed by police gate-keepers. Wundersitz (1996a) and Power's (2000) reviews of South Australia indicated that the police gate-keepers in that state had not engaged in practices which caused net-widening. However, arguably the present study provides clearer evidence than either of these studies for two reasons. First, the results from the IBS are more comprehensive mainly because a far greater time period was analysed to evaluate whether net-widening was occurring in the Tasmanian system -- 11 years in total. This counters problems associated with small trends spanning a year or two. In comparison, Wundersitz (1996a) compared the period 1992-1993 with the period 1994-1995, whilst Power (2000) concentrated on the years 1994 to 1998. Secondly, unlike Power's (2000) data the present analysis drew on a single source of
information, the IBS. This avoids complexities concerning the way in which different
government agencies chose to extract data. That is, the data used in my analysis are likely
to be more consistent than Power's (2000).

However, three important caveats must be placed on these results. First, as Wundersitz
(1996a) noted in her own study in South Australia, there is no data available on the use of
informal cautioning across Tasmania. Chapter three explained that informal cautions are
typically those given on-the-spot by police officers and do not take place at police
stations or involve victims as do formal cautions. It is reasonable to question whether
the police enthusiasm for formal cautioning and community conferencing may also
encompass an enthusiasm for informal cautioning. Perhaps Tasmanian police now issue
informal cautions for juvenile behaviour that they might have ignored previously? If the
frequency of informal cautions was added to formal cautions, conferences, and court
appearances it might indicate that net-widening had actually taken place. How future
research will measure informal cautioning is problematic.

The second caveat is that, as noted in chapter two, net-widening includes 'wider,
stronger, and different nets' (Austin & Krisberg, 1981: 165). Arguably the new system
deals with young offenders in a more intense way than before. That is, under the old
system the majority of youths were dealt with by way of short court appearances. Most
involved an admonish and discharge. In 2001 63% of youths were 'formally cautioned'.
The practices observed in this study suggest that most of these 'formal cautions' were
actually police conferences lasting about one hour, often involving the victim as well as
the offender in intense discussions. A further 11% of juveniles passed through
community conferences. Is this more intense processing bad for minor, first time
offenders? Many restorative justice advocates would say not; the youths avoid the stigma
of court proceedings and gain self-esteem through taking responsibility for their actions
(Braithwaite, 1999). Victims benefit also. Notwithstanding, a simple appraisal of the
new system would state that with the increased length and intensity of intervention by
the criminal justice system the nets of social control have been deepened. Furthermore,
the benefits highlighted by restorativists are dependent upon good practice in 'formal
cautions' (police conferences) and community conferences. Chapter six will outline two
instances from the observation of police conferences that involved very poor practice;
one of these degenerated into shouting between the main participants and ended with the victim crying.

Finally, there are important economic implications in the use of more ‘intense’ nets. Several studies have suggested that the bulk of juvenile offenders who are apprehended by the justice system appear in official records only once (Wundersitz, 1996b). Self report studies indicate that most of these youths simply grow out of criminal behaviour (Cunneen & White, 2002). Given this, does it make economic sense to deal with so many youths by way of an hour long formal caution/police conference?

4.5.3 Sentencing trends

The sixth, rather broad supposition suggested that with the introduction of the new juvenile justice system there would be an increase in the severity of the sentences. This was based on Cohen’s (1985) view that the courts tended to treat juveniles more harshly when a diversion scheme was introduced – mainly because they perceived those juvenile who had not been fit for diversion negatively. The results did not indicate that the Tasmanian magistrates treated youths more harshly with the introduction of diversion. In fact, there seemed to be an overall decrease in the use of supervision orders and licence disqualifications, even accounting for the dramatic reductions in the numbers of youth appearances. Sentences involving a period of detention showed an upward trend in 1998 to 1999, and rose very sharply in 2000. This was followed by an even sharper downward trend in 2001 back to levels similar to 1995. It is difficult to interpret what caused these fluctuations. Re-assessing the frequency of sentences involving detention in two or three year’s time will be an important goal. At least for now there are no clear signs of more punitive sentencing patterns emerging in the youth courts.