Summary Sanitation: The Extension of Police Powers Over Children in New South Wales

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The article considers various aspects of the Children (Parental Responsibility) Act 1994 (NSW), and argues that the Act was impractical, possibly racist in its application, did not protect children, and breached international human rights standards. The authors argue that the 1997 Act is an improvement, but still has many of the same problems as the 1994 Act, and that repeal of the legislation is preferable.

Introduction

In 1994 the New South Wales Coalition Government responded to a media frenzy on youth crime by the introduction of the *Children (Parental Responsibility) Act* 1994 (the 'Act'). The Act provided that parents could be criminally responsible for the crimes of their children, and gave police wide discretionary powers to remove young people under the age of sixteen from the street and take them home or to a safe house. The Act was initially trialed in the New South Wales (NSW) towns of Orange and Gosford, being primarily geared towards combating juvenile crime in country NSW. In late 1996, due to widespread community concern with the Act, an Evaluation Committee was established[1] by the new Labor Government. This Committee recommended that the Act be repealed as it breached human rights, was likely to be racist in its application, and was wasteful of resources.[2] The New South Wales Government decided not to repeal the Act, but

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1 This was made up of representatives from the Police Service, Department of Community Services, Attorney-General's Department, Cabinet Office, Local Government and Shires Association and the Youth Justice Coalition.

2 Report of the Evaluation Committee, Attorney General's Department, New South Wales Government (unpublished) 1996.

rather to amend it in the form of the recently enacted *Children (Protection and Parental Responsibility) Act* 1997 (the 'new Act').

This article will look at the salient features of the Act, concentrating on the provision of wide discretionary powers to police to remove young people from the street. It will be argued that the Act was grossly impractical, led to net widening,[3] did not protect children, was in breach of human rights, and impacts unfairly on young Aboriginal populations. Throughout this discussion it will be shown that although the new Act is an improvement it still carries many of the problems of the Act, and the best response from the government would have been to accept the Evaluation Committee's recommendation and repeal the legislation altogether[4].

The legislation is impractical, leads to net widening and is dangerous for children

In an ideal world the new Act would work something like this:

> *Margaret, aged 15 years, is out on the streets of a country town at 11pm, an hour after curfew. The police approach her and ask her for her name and address (s 27). She willingly gives her details, and the police ask her to hop in the car which she happily does. They could use 'reasonable force' to remove her (s 28) however it is not necessary. On arrival home (s 22(1)), the police knock on the door, and her mother thanks the police for bringing her wayward daughter home. The daughter, a little embarrassed at the trouble she has caused, promises to be good in future, and goes to bed feeling loved by her parents, and with a fresh respect for the police. The police are immediately completely satisfied she will be safe there.(s 22(2)) If her parents are not home, she is taken to an approved*

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3 This is now a common criminological term, which implies an increase of social control. The most common example is where people who normally would not come into formal contact with the criminal justice system are drawn into the 'net' of the system.

4 Although there are some aspects of the new Act that may be worth retaining. See below.

person (s 22(5)), fully trained and paid 24 hours a day by the well resourced Department of Community Services. She willingly stays the requisite period of 24 hours (s 22(6)) and then returns to her loving family upon their return home. If Margaret commits any offences, her parents admit their negligent parenting and willingly pay a fine of up to $1000 (s 11). The family is now close and bonded by their involvement with the criminal justice system.

However, this scenario is far from reality. If Margaret does not co-operate with police she could have been arrested, charged with hindering police, and kept in the cells for the night. If she struggled she could also have faced resist arrest and assault police charges. Swearing would have added to the list of matters eventually to be dealt with by the Children's Court. This is the ultimate example of net widening — thousands more young people each year would appear before the courts.

The police may choose which young people to pick up — they may exercise their power in a totally objective way, although this is a forlorn hope in the light of evidence of entrenched racism within the police service, particularly in country towns as discussed below. They are likely to pick up young people who have had trouble with the police before, and who will not willingly obey orders, particularly when 'other' kids are being left alone.

And home may not be safe. How are the police to assess whether the young person is being returned to an abusive situation? Those who sexually assault or otherwise abuse children are expert at hiding their crimes. Most sexual assault of children does not take place on the streets but in supposedly safe family homes, church groups and scouting jamborees.[5] In the authors' opinion, police will have about thirty seconds to determine safety, a decision which they are not trained or resourced to make. Many young people who choose the street do so for reasons other than fun. For some, the family has failed them and is more

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5 See, for example, Scutt, J (ed), *Even in the best of homes: violence in the family*, 1983, pp 1-8, pp 66-85.

dangerous than the other options. For others, they may be avoiding their own temptations toward violence at home.

Under the Act, if the police determined that it was not safe at home, they had to send the child off to a prescribed 'place of refuge'. One can imagine the scene — "Sorry madam, we do not believe it is safe here, we are now taking Johnny to be detained". This was a recipe for further violence against or by the police.

Naturally, any itinerant or homeless young person could not have been taken home and would go straight to the 'place of refuge'. How these places were to be funded and where they would be located still is a mystery — we suspect that additional funding for specialist places of refuge has not been provided for.

Homeless young people will find the Act a virtual revolving door — youth refuges in country towns are often full where they exist at all.[6] The Young Homeless Allowance is getting tougher to get, and the Federal Government has announced plans to axe unemployment benefits for under eighteen year olds. The beds at the approved 'places of refuge' will soon fill with revolving door cases — where will the other young people be placed?

We believe that young people who for a variety of reasons spend their nights on the street, will be forced to hide in ever more dangerous areas, or to sleep with men for shelter, or to steal for accommodation. Clearly, under these circumstances, the Act represented a threat to the health of these young persons.

This would all be understandable if the Act was in response to a major problem on the streets of country towns. However, there is no evidence of this.[7] Could it be that people in rural New South Wales like their towns to be clean and empty and devoid of reminders that there is major social dislocation? Would they rather their Indigenous populations are locked up in missions again?

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6 Youth Refuge Association, *Annual Report*, Sydney, 1996.

7 Freeman, K, "Young People and Crime" (1996) *Crime and Justice Bulletin* No 32, November, NSW Bureau of Crime and Statistics, Sydney.

The new Act is clearly an improvement over the Act. It provides that if a child cannot be taken to, or left with, their parent/carer, then they can be taken to a close relative nominated by the child (s 22(3)); failing which they are to be taken into the care of the Director-General of the Department of Community Services (s 22(5)(a)) or to an 'approved person' (s 22(5)(b)).[8] However, although these further options are welcome, the questions of funding and finding suitable persons to care for children are still relevant. Another major improvement is Part 4 of the new Act, which calls for the preparation of local crime prevention schemes and safer community compacts. Funding for these initiatives is also to be provided.[9] This is clearly a positive development that will encourage communities to look at constructive ways to prevent crime. Nevertheless, these are not prerequisites for a particular area to be declared as an operational area under the new Act (which brings the police powers to remove children from public areas into force in that area),[10] they are only factors to be taken into account in the Minister's decision.[11] In conclusion, the problems of impracticality, net widening and dangerousness for children have not been removed by the new Act.

The legislation is a breach of international human rights principles

The Evaluation Committee found that the Act contravened a number of International Human Rights Treaties Australia has ratified[12], most importantly the International Covenant on Civil and Political Rights (the 'ICCPR') and the Convention on the Rights of the Child ('CROC'). While some of the provisions of the new Act attempt to redress many of the human rights criticisms of the Act, it is doubtful whether they do so adequately. It may be thus argued that the new Act continues to not be in conformity with international legal principles.

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8 See s 24 of the new Act for a description of how the process of 'approved persons' takes place.

9 According to the second reading speech of the Minister of Police, Mr Wheelan, $1.15 million of recurrent funding has been set aside for the purposes of the Safer Community Development Fund.

10 See Division 1 of Part 3 of the new Act.

11 See s14(3) of the new Act.

12 Duff, C, "The *Children (Parental Responsibility) Act* 1994 (NSW) and the rights of the child", (1997) 22(2) *Alternative Law Journal* 95.

The most significant breach of international law that the Act is alleged to violate is the prohibition against arbitrary detention. This fundamental guarantee relating to the security of the person is found in both Article 7(1) of the ICCPR and Article 37(b) of CROC. Clearly the power of police officers to stop children in the streets, request their name, age and residential address[13] and then remove them to their parents/carers or to a place of 'refuge'[14] constitutes 'detention' of children. However, whether it also constitutes an 'arbitrary' detention is a more complex question, and depends upon the way in which the word 'arbitrary' has been interpreted under international law. A number of factors are relevant, such as the reasons for the detention,[15] the length of the detention[16] and the criteria for the relevant person's (in this case the police officer) discretion. As the purported reasons for detention (to protect the child from 'risk' or to reduce the likelihood of a crime being committed)[17] on their face seem valid, and the maximum period of detention is an acceptable 24 hours by international law standards,[18] the main potential problem with the Act/new Act is that the criteria for the police officer's discretion may be 'arbitrary'.

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13 s 12(1) of the Act. This power also exists in the new Act.

14 s 12(2) of the Act. An amended power also exists in the new Act.

15 Where the reasons for the detention are acceptable, such as to prevent an asylum seeker from absconding, then the detention is not arbitrary *per se*. See *A v Australia*, Communication No. 560/1993, UN Doc. CCPR/C/59/D/560/1993, (30 April 1997), at [9.2 and 9.3]. On the other hand, where the reasons are questionable, such as where the exercise of discretion is based on discriminatory or prohibited grounds, then the detention will be considered 'arbitrary'. See Bossuyt, M, J, *Guide to the "Travaux Preparatories" of the International Covenant on Civil and Political Rights*, Marinus Nijhoff Publishers, Netherlands, 1987, pp 198-201.

16 Thus, in the *A v Australia* communication, the United Nations Human Rights Committee (the 'HRC') considered that although the motives for detaining the Cambodian asylum seekers were acceptable, it was the fact that they continued to be detained for four years without adequate explanation that made the detention 'arbitrary' contrary to Article 9(1) of the ICCPR.

17 See the provisions of s12(4) of the Act, set out below.

18 General Comment 8 of the HRC states that any delay in releasing a detainee should not be more than a 'few days'. 24 hour detention is thus well within the standards set by the HRC.

According to the *travaux preparatoies* of Article 9(1) of the ICCPR, in language which is replicated in Article 37(b) of CROC[19], an exercise of discretion is arbitrary:

> "where no guidelines direct the exercise of the discretion and the official exercising it is answerable to no-one for the manner of its exercise; as in the case of unfettered police discretion and unenforceable police guidelines."[20]

Under s 12(4) of the Act, the police officer could remove a child only if "(a) the officer knows or has requested the person's details...and (b) the officer considers that to take that action would reduce the likelihood of a crime being committed or of the person being exposed to some risk". This provision could easily have been seen to be so discretionary as to amount to being 'arbitrary' as defined above—an unfettered police discretion. This is because of the subjective nature of the provision, the fact that the criteria of reducing 'the likelihood of a crime' is vague, as well as the expression 'some risk', which is not defined in the legislation.

The new Act, however, does attempt to provide a less discretionary and a more objective set of criteria. Under s 19(1) "A police officer may remove a person...from any public place in an operational area if the police officer believes on reasonable grounds that the person: (a) is not subject to the supervision or control of a responsible adult, and (b) is in the public place in circumstances that place the person at risk". Unlike the Act, there is now a more detailed definition of when a person is at risk found in s 19(3) of the new Act, such as where the person is in danger of being physically harmed or injured or of being abused, or the person is about to commit an offence. It is submitted, however, that although there is now a plausible argument to suggest that the discretion under the new Act is no longer 'arbitrary', it is still suspect. The assessment of 'not subject to the supervision or control of a responsible person' and 'risk' is still up to the police officer's

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19 See Blagg, H & Wilkie, M, "Young People and Policing in Australia: the Relevance of the UN Convention on the Rights of the Child" (1997) 3(2) *Australian Journal of Human Rights* 134, pp 151-2.

20 See Bossuyt, already cited n 15, pp 198-201

subjective interpretation of the situation. Even though he/she must have 'reasonable grounds' for their belief (suggesting an objective test), there is little real possibility of their decision being reviewed.[21] The definition of the word 'risk' is still too vague—it is always open for police to argue that they thought the child was in danger of physical harm or abuse, or was about to commit a criminal offence. In relation to the latter, prediction of 'dangerousness' to commit a criminal offence is notoriously problematic, even for mental health professionals,[22] let alone police officers.

There are a number of additional potential breaches of international human rights principles, stemming again primarily from the ICCPR and CROC. As time and space do not permit any examination of each of these, they will only be mentioned briefly. Please note also that this list is by no means intended to be exhaustive. It could first be argued that the Act/new Act represents a violation of a child's right to freedom of association and peaceful assembly as found in Article 15 of CROC, and Articles 21 & 22 of the ICCPR. A second possible breach is that removal of children from public places might be considered an arbitrary interference with their privacy contrary to Article 16(1) of CROC and Article 17(1) of the ICCPR. Thirdly, it may also be argued that such removal is a breach of a child's right to leisure as found in Article 31 of CROC. Finally, there could be circumstances whereby the removal of children may amount to degrading treatment, contrary to both Article 37(a) of CROC and Article 9(1) of the ICCPR.

In view of the above mentioned potential lack of conformity with international human rights principles, it is a pity that at no time during his second reading speech for the new Act did the Minister specifically refer to the Evaluation Committee's negative assessment based upon

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21 It is possible, for example, for people removed to later bring an action for false imprisonment against the police officer, but few children would have the resources and the knowledge to do so, and anecdotal evidence suggests that such actions are in fact rare.

22 See for example, Cocozza, J & Steadman, H, "The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence" (1976) *Rutgers Law Review* 1074. See also the controversy surrounding the *Community Protection Act* 1994 (NSW) and its subsequent invalidation, as described in Zdenkowski, G, "Community Protection Through Imprisonment Without Conviction: Pragmatism Verses Justice" (1997) 3(2) *Australian Journal of Human Rights* 8.

these principles.[23] You may well ask — why should a lack of conformity with international law matter? There are a number of interrelated answers to this question. First, the fact that an Act of Parliament may contravene international law can be a matter of embarrassment and condemnation for the government — this certainly was the case for the Tasmanian Government when the United Nations Human Rights Committee (the 'HRC') found that its former laws criminalising consenting private sexual activity[24] were in breach of the ICCPR.[25] This highlights the second point — the individual petition mechanism available under the First Optional Protocol to the ICCPR could result in individuals launching communications to the HRC alleging a breach of the ICCPR, which again would be embarrassing for the government. If the law is a State or Territory law, this could actually result in its eventual overturning by the Federal Government,[26] which is precisely what occurred in relation to the *Toonen* communication.[27] Thirdly, although it is true that international law is not directly part of the Australian domestic legal system,[28] nevertheless international law can be important during actual cases.[29] Finally, as both the ICCPR and CROC are instruments scheduled to the *Human Rights and Equal Opportunity Commission Act* 1986

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23 See Legislative Assembly, Hansard, 21 May 1997, Terry Wheelan, Minister of Police, pp 10-12.

24 ss 122 and 123 of the *Criminal Code* 1924 (Tas).

25 See HRC Doc. No. CCPR/C/50/D/488/1992, 1 I.H.R.R. 97.

26 The Federal Government could use its external affairs power to implement the section of the Treaty, and due to the presence of s109 of the Constitution, any State/Territory law in conflict would be overridden.

27 Pursuant to the *Human Rights (Sexual Conduct) Act* 1994 (Cth).

28 See Kirby, M, "The Australian Use of International Human Rights Norms: From Bangalore to Balliol — a View from the Antipodes" (1993) 16 *University of NSW Law Journal* 363.

29 For example, it is now well accepted that in cases where a law can be shown to be ambiguous in any way, or there is a 'gap' in the law, international legal principles can be argued as being relevant to the uncertainty, or as filling in the 'gap' in the law. See Kirby, already cited n 28. Thus, a lawyer acting for a parent defending a conviction under s 9 of the Act, or a lawyer acting for a child defending a conviction under s 13(3) of the Act, or bringing an action for false imprisonment against the police, could argue that international law principles apply, as ambiguities or gaps are easily argued. This may undermine the law's effectiveness from the government's point of view.

(Cth),[30] any alleged breaches of these Treaties could result in an inquiry conducted by the Human Rights and Equal Opportunity Commission, something that governments generally prefer to avoid.

The legislation is likely to be applied in a racist way

The Act also represents the most recent example of the state's unceasing desire to intervene in the lives of Aboriginal children.[31] In the past this has been characterised by overt and direct discrimination[32] without reference to the anti-discrimination legislation of the 1970s and '80s.

During the assimilation era (1937-1969) the state could legislate without fear of or reference to the anti-discrimination legislation of recent decades. Thus the *Child Welfare Act* 1939 (NSW), part of a national approach to assimilation of Aboriginal people, enabled the state to remove Aboriginal children from their homes because it was

> "infinitely better to take a child from its mother and put in an institution, where it will be looked after, than allow it to be brought up subject to the influence of revolting conditions."[33]

With the advent of the *Racial Discrimination Act* 1975 (Cth) and *Anti-Discrimination Act* 1976 (NSW), however, directly discriminating against Aboriginal children is no longer possible. Yet the new Act, in effect, places Aboriginal children in an equally hazardous relationship to

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30 See s 47(1) and Schedules 2 and 3 of the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth).

31 Aboriginal children were forcibly used as guides for settlers and explorers in the nineteenth century and were the focus of assimilation policies in the twentieth century. See Gungil Jindibah Centre, Southern Cross University, *Learning from the Past: Aboriginal perspectives on the effects and implications of welfare practices on Aboriginal families in New South Wales*, NSW Department of Community Services, Sydney, 1994.

32 The *Child Welfare Act* 1939 (NSW) typified the uniform approach of Australian States toward assimilation whereby legislation directly discriminated against people on the basis of their Aboriginality.

33 Gungil Jindibah Centre, Southern Cross University, already cited n 31, p 26.

the state with similar dire consequences for Aboriginal families and communities.

The new Act will be discriminatory because of the powers vested in police officers to take action (remove the person) when they have 'reasonable grounds' for believing a juvenile is, among other things, about to commit an offence (ss 18 and 19). This substantially amounts to the same discretionary power found in the Act. Police powers of this nature will invariably forebode ill for Aboriginal juveniles. Whilst it has not been empirically proved that police constantly discriminate in the use of their discretion, Cunneen and McDonald claim that

> "the substantial historical and recent observations in the area from a range of authorities, as well as the ongoing complaints from Aboriginal people themselves lend substantial weight to the conclusion that discretion is used in this regard."[34]

It is the police who largely determine which young children enter the juvenile justice system. In 1994, as the Act commenced, Aboriginal children under the age of 15 years were already 42 times more likely to be placed in Juvenile Detention Centres than non-Aboriginal children.[35] There is good reason to fear that the level of over-representation will increase as a result of the introduction of the new Act.

Police are more likely to intervene with Aboriginal children found in a public place believing that there is a reasonable risk of a crime being committed. In so doing the benign intent of the legislation (escorting the children home or to a place of refuge) will often evaporate in the heat of the moment where police contact with Aboriginal juveniles inexorably leads to charges of swearing, hindering police and resisting arrest.[36]

Police intervene with Aboriginal children for a variety of reasons which have less to do with criminal activity and

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[34] Cunneen, C & McDonald, D, *Keeping Aboriginal and Torres Strait Islander People Out of Custody*, ATSIC, Canberra, 1996, p 46.

[35] Id, p 40.

[36] Known as the 'trifecta', Aboriginal juveniles are most susceptible to this situation. See Cunneen and McDonald, already cited n 34.

more with negative and racist perceptions of Aboriginal people and their culture. Aboriginal social interaction, for example, is often much more visible than that of non-Aboriginal Australians. Cunneen and McDonald have observed that

> "A central problem is whether non-Indigenous criminal justice institutions fail to recognise and value Indigenous methods of social organisation or whether they in effect treat cultural difference as a social pathology and criminalise it."[37]

In the minds of many police officers a group of Aboriginal juveniles on the street at night is likely to commit an offence.[38] It will not be difficult for the police officer to create in his or her mind the 'reasonable grounds' for intervention. It is precisely at this point that the intention and practice of the new Act can diverge.

And when they do take Aboriginal juveniles into custody, there is evidence that this may well lead to abuse by the police themselves. In a study of 171 Aboriginal juveniles in detention centres in New South Wales, Queensland and Western Australia over 85% reported being hit punched kicked or slapped by police. For example, of 36 interviewed at Mt Penang, a detention centre in New South Wales, 15 stated that they had been hit by police with batons.[39]

It is also important to note that the Act, with its ominous implications for Aboriginal juveniles, contravenes numerous recommendations of the *Royal Commission into Aboriginal Deaths in Custody* ("RCIADIC"). Recommendation 62 states:

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37 Id, p 51.

38 Kayleen Hazlehurst, for example, cites a senior NSW Police Officer who observed that police develop negative perceptions of Aborigines, that they view them as 'criminal, drunk and troublemaker[s]'. Other perceptions cited include a 'prevailing attitude that Aboriginal people are all criminals or potential criminals.' See Hazlehurst, K, "Aboriginal and Police Relations" in Moir, P & Eijkman, H, (eds), *Policing Australia: Old Issues, New Perspectives*, Macmillan, South Melbourne, 1992, p 246.

39 Cunneen, C, *"Aboriginal Juveniles in Custody"* Institute of Criminology (NSW), April, 1991.

> "[t]hat governments and Aboriginal organisations recognise that the problems affecting Aboriginal juveniles are so widespread and have such potentially disastrous repercussions for the future that there is an urgent need for governments and Aboriginal organisations to negotiate together to devise strategies designed to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice systems and, in particular, to reduce the rate at which Aboriginal juveniles are separated from their families and communities, whether by being declared to be in need of care, detained, imprisoned or otherwise."[40]

While the new Act does require a community to develop a local crime prevention plan it is not mandatory for the plan to include provisions relating to Aboriginal community development.[41] Had the new Act made mandatory the inclusion of Aboriginal community development strategies (where applicable) there would be less concern for its operation.

Applied in conjunction with Recommendation 188 (self-determination), Recommendation 236 and Recommendation 238 (community based Aboriginal youth programs), Recommendation 62 offers a clear alternative to the further criminalisation of Aboriginal juveniles. The development of programs designed to enrich life experiences and offer alternatives to the cycle of oppression in which many Aboriginal families exist is not only likely to reduce the numbers of Aborigines in custody, but also greatly enrich the shared community experience in a way that this legislation cannot.

RCIADIC found strong links between the directly discriminatory and assimilationist policy of the past with the current over-representation of Aboriginal people in custody. The introduction of the Act suggests that, in terms of Aboriginal people and the state, it is 'business as usual', albeit in a less direct and more covert manner.

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40 Johnston, E, *National Report, Royal Commission Into Aboriginal Deaths in Custody*, AGPS, Canberra, 1991.

41 See s 33 of the new Act.

Singer, in a recent article, raised an interesting and salutary question regarding the 'stolen children' of our recent past.

> "Now, we tell ourselves, we know better and it won't happen again. Probably it won't. But people living in the '50s also 'knew better', in some respects, than the generations before them. The difficult question we should be asking ourselves is: what is it we think ourselves justified in doing today that will create scandals for the next generation to look back on with horror?"[42]

Perhaps the *Children (Protection and Parental Responsibility) Act* 1997 will provide such an opportunity.

Conclusion

The deprivation of liberty is the ultimate punishment of our criminal justice system, until now exclusively reserved for those who are sentenced by the courts or refused bail with judicial oversight. The legislation discussed in this article sets a new precedent. In our opinion, children who have committed no crime are now subject to state detention at the whim of individual police, possibly to satisfy political and often racist agendas. The Act's problems of impracticality, net widening, danger to children, human rights and probable racist applicability have not been solved by the new Act. Thus, the new Act should be repealed.[43] The punitive approach of this type of legislation is fundamentally unjust and is bound to ultimately fail in the light of the present social and economic conditions that many young people in our society face. This is particularly true in rural New South Wales, where this legislation is specifically targeted. We owe our young people much more than this.

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[42] Singer, P, "Research babies: another case of the stolen children", *Sydney Morning Herald*, 11 June 1997.

[43] However, the Local Crime Prevention (Part 4) aspects of the new Act could be retained in some form.