

The Drift from Care to Crime: a Legal Aid NSW issues paper

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INTRODUCTION

About Legal Aid NSW

The Legal Aid Commission of New South Wales ("Legal Aid NSW") is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres. Our criminal law practice represents clients in all criminal jurisdictions from the Children's and Local Courts to the High Court.

One of our specialist services is the Children's Legal Service ("the CLS"). Lawyers working with the CLS advise and represent children and young people under 18 involved in criminal cases in the Children's Court. Its aim is to ensure that children and young people have access to professional, face-to-face or telephone advice at all stages of their legal proceedings.

Purpose of this paper

The purpose of this paper is to draw attention to a concerning trend that has been observed by the CLS: the criminalisation of children who live in out-of-home care. Features of this trend include:

- the large number of CLS "high service users" who have a history of out-of-home care;
- the large proportion of these clients who live in residential facilities; and
- the tendency for a child's interaction with the criminal justice system to escalate upon entry to a residential facility.

Outline of this paper

This paper first of all provides a brief summary of the out-of-home care system in New South Wales. Secondly, it sets out the findings of past Australian academic studies that have examined the links between children in out-of-home care and the criminal justice system. Thirdly, the paper looks at more recent Australian academic research on the topic and presents case examples illustrating the drift from care to crime experienced by a number of current CLS clients. Finally, it concludes that the drift from care to crime is a significant issue that government and non-government agencies need to work together to address.

THE OUT-OF-HOME CARE SYSTEM IN NSW

Out-of-home care is overnight care for children and young people under 18 years of age who are unable to live with their parents. It includes foster care, placement with

relatives or kin, and residential care. Residential care is where the placement is in a residential building operated by paid staff.¹

Children can be placed in out-of-home care voluntarily or by way of a court order. Out-of-home care is provided in situations where it is considered to be in the child's best interest. In most cases, children in out-of-home care are on a care and protection order of some kind. Across Australia in 2010 this was the case in relation to 89% of children in out-of-home care.²

Reasons why a child is placed in out-of-home care include:

- the child is at risk of abuse or mistreatment in his or her current accommodation and requires a more protective environment;
- the child's parents are incapable of providing adequate care for the child; and
- the child needs alternative accommodation during a time of family conflict.³

Out-of-home care is considered an intervention of last resort, and there is a current policy emphasis in Australia on keeping children with their families wherever possible. Nearly all children (94%) in out-of-home care at 30 June 2010 were in home-based care (for example, foster or relative/kinship care), reflecting the trend of increased use of these types of placements and decreased use of placements in residential care, which is mainly used for children who have complex needs.⁴ As at 30 June 2010, one in 20 children in out-of-home care across Australia was living in residential care.

Of all jurisdictions, New South Wales currently has the highest rate of children in out-of-home care. The national rate of Indigenous children in out-of-home care is almost 10 times the rate for non-Indigenous children.⁵ In recent years, all out-of-home care systems in Australia, including NSW, have seen a substantial increase in the number of children and young people entering care and a significant increase in the numbers remaining in out-of-home care longer.⁶ The Australian Institute of Health and Welfare reported in January 2011 that between 2005 and 2010, the number of children in out-of-home care Australia-wide rose by 51% (from 23,695 to 35,895).⁷

Not only has the need for out-of-home care services increased, but many of those who enter out-of-home care are presenting with increasingly complex needs and challenging behaviours. In a 2006 Australia-wide study⁸ of such children, almost three quarters came from households with a history of domestic violence or physical abuse; two thirds had parents with substance abuse problems; and almost three in five had been neglected. Half the sample had parents with mental health problems, significant financial problems, or homelessness. The majority of children and young people had suffered physical abuse, sexual abuse and neglect. Almost two thirds of the group (63.1%) had experienced four or more familial or social background factors coinciding with the placement into care. In the *Special Commission of Inquiry into*

¹ Australian Institute of Health and Welfare, *Child Protection Australia 2009-2010*, Jan 2011, p.4

² AIHW report (see Note 1), pp.4, 50

³ AIHW report (see Note 1), p.44

⁴ AIHW report (see Note 1), p.48

⁵ AIHW report (see Note 1), pp. 53, 55

⁶ The Hon James Wood, AO QC, *Report of the Special Commission of Inquiry into Child Protection Services in NSW*, November 2008, p.613

⁷ AIHW report (see Note 1), p.viii

⁸ Alexandra Osborn & Paul Delfabro (2006) 'National Comparative Study of Children and Young People with High Support Needs in Australian Out of Home Care' School of Psychology: University of Adelaide.

Child Protection Services in NSW Justice Wood stated: "The task of meeting these needs is placing the NSW [out-of-home care] system under considerable pressure."⁹

THE LINK BETWEEN OUT-OF-HOME CARE AND THE CRIMINAL JUSTICE SYSTEM: ACADEMIC FINDINGS

In December 1996 and March 1999 respectively, the New South Wales Community Services Commission¹⁰ ("the CSC") published a discussion paper and report examining the drift of children in the out-of-home care system into the juvenile justice system.¹¹ The CSC found that¹²:

- children in out-of-home care were being readmitted into the juvenile justice system more often than children who were not in out-of-home care (specifically, 70% of children in care re-offended compared to 59% of the general juvenile detainee population);
- a young man in out-of-home care was 13 times as likely to enter a juvenile detention centre than if he was not in out-of-home care; and
- a young woman in out-of-home care was almost 35 times as likely to enter a juvenile justice centre than if she was not in out-of-home care.

While noting that the risk factors that precipitated a young person's entry into care were similar to those that predicted later contact with the juvenile justice system, the CSC noted "increasing concerns that experiences within the care system exacerbate, or at least fail to reduce, these risk factors."¹³

The CSC outlined in its discussion paper a number of potential issues contributing to the drift from care to the juvenile justice system, which it identified through consultations and discussion groups held with representatives of organisations involved in care, advocacy and rights for children. These included¹⁴:

- Problematic behaviour that would be a disciplinary matter in a family home could lead to criminal charges in group homes. Staff would call police after incidents such as malicious damage and assault, and an altercation would take place which then resulted in additional charges of resisting arrest, assaulting police and offensive language.
- When a child's placement broke down, the Department of Community Services sometimes put out a warrant for a child, resulting in their apprehension and detention.
- Incidents were reported where children in care would be returned to a residential facility under bail conditions after a court hearing. These bail conditions could involve keeping to a curfew or staying within a particular facility. If a child breached these conditions, it was possible staff would report the breaches to the police which could then result in detention.

⁹ Wood Report (see Note 6), pp. 621, 590

¹⁰ The CSC no longer exists as a stand-alone body. In December 2002 it was amalgamated with the NSW Ombudsman and a new statutory division, known as the Community Services Division, was established to carry out the community services functions for the Ombudsman: <http://www.ombo.nsw.gov.au/show.asp?id=171> accessed on 9.8.11.

¹¹ Community Services Commission, *The drift of children in care into the criminal justice system: turning victims into criminals*, Dec 1996; Community Services Commission, *Wards and Juvenile Justice*, March 1999.

¹² CSC 1996 Paper (see Note 10), p.8

¹³ CSC 1999 Report (see Note 10), p.14

¹⁴ CSC 1996 Paper (see Note 10), pp.16-20

- Carers were sometimes required to make a statement to the police in order to lodge a claim for victim's compensation, which operated as an incentive for them to contact police in matters of physical aggression or assault.
- Many services had explicit policies about using the police as a 'natural consequence' and as a substitute for imposing their own disciplinary action.
- The staff of some funded services were reportedly simply "not up to it" and as a result sought assistance from the police to deal with the behaviour of young people.

The last-mentioned issue – of carers' inadequate responses to young people with challenging behaviours – was in line with the findings of an Inter-departmental Committee on Juvenile Justice report¹⁵ also published in 1996 that found that service provision was contributing to the problems of young people in care with challenging behaviours because staff were ill-equipped to manage challenging behaviour, in part because of a lack of training. The Inter-departmental Committee report also found that there were inadequate resources to accommodate young people with challenging behaviours and high support needs.

To address these issues the CSC proposed, among other things, that the Department of Community Services draft Best Practice Guidelines covering the issues of:

- behaviour management in residential care;
- conflict resolution;
- when to call the police; and
- the question of whether charges should be laid for assaults and property damage that were a result of emotional disturbance.

While acknowledging that some services did have guidelines, the CSC argued that it was important that there be a uniform approach to challenging behaviour and the identification of inappropriate practices, particularly given the high level of mobility of young people, the Department's statutory responsibilities and the universality of key principles in behaviour management:

There is a substantial body of research and professional knowledge about effective strategies for dealing with challenging behaviours. However, this knowledge is not always readily available to those providing direct care services. The development of guidelines and a policy framework would be a key way of ensuring that at least some of this knowledge is used in the direct support of young people.¹⁶

In its report the CSC made a number of recommendations including the following¹⁷:

The Department of Community Services should, as part of its behaviour management policy, include specific guidelines about the use of police and criminal charges in behaviour management in substitute care. These guidelines should stipulate:

- conditions under which police may be called;
- the level of authorisation required to call police;
- the obligation of the service to have developed behaviour management plans;
- the obligation for follow-up after police intervention, to minimise the risk of re-occurrence of such incidents; and
- the requirement for staff training in the application of the policy and plans.

¹⁵ Inter-departmental Committee on Juvenile Justice, *State Wards in Juvenile Justice Report*, Sydney 1996

¹⁶ CSC 1999 Report (see Note 10), pp.57, 56

¹⁷ CSC 1999 Report (see Note 10), p.10

This recommendation built upon the observation the CSC made in its discussion paper that calling police after an incident in care should be an option of last resort and used only in exceptional circumstances.

THE CURRENT SITUATION

Recent academic findings

Since the publication of the CSC report in 1999, it appears that little progress has been made in reducing the proportion of children in care that ultimately come into contact with the criminal justice system. In 2008 the *Report of the Special Commission of Inquiry into Child Protection Services in New South Wales* ("the Wood Report") found that 28% of males and 39% of females in juvenile detention had a history of out-of-home care.¹⁸ A report of the Create Foundation in the same year found that one year after leaving care, almost half of the young people will have committed a crime.¹⁹

In a more recent examination of 111 NSW Children's Court files, Katherine McFarlane found that 34% of the young people appearing before the court were, or had recently been, in out-of-home care²⁰, and that children in care are 68 times more likely to appear in the Children's Court than other children.²¹ McFarlane's research also indicates that²²:

- young people in care are still being charged for relatively minor property damage offences that occur in the care environment, despite the fact that they are often residing in homes "engaged by the state to provide professional behaviourist techniques to mitigate the child's allegedly 'challenging' behaviour or psychiatric issues"; and
- the practice of relying on police and the justice system in lieu of adequate behavioural management is still in use.

The experience of CLS clients

The recent findings set out above reflect the experiences of a number of CLS clients. Last year Legal Aid NSW conducted a study of the top users of legal aid services between 2005 and 2010. The study found that 80% of its high service users are under 19 and clients of the CLS, and that one of the typical characteristics of these high service users is a history of out-of-home care.

The clients in out-of-home care who the CLS sees most often are those living in residential facilities. Often these clients have been reported to the police by carers for relatively minor assault offences, property damage offences or "breach of AVO" offences. This has resulted in a criminal charge being laid in relation to behaviour that one might expect would be dealt with as a disciplinary matter if occurring in a family home.

Case Study A (attached) provides a good example. Prior to entering out-of-home care "William", the subject of the case study, had had no interactions with police whatsoever. Since entering out-of-home care, William's contact with the juvenile

¹⁸ Wood Report (see Note 6), p.556

¹⁹ Create Foundation, *Report Card*, 2008

²⁰ K.McFarlane, "From Care to Custody: Young Women in Out-of-Home Care in the Criminal Justice System", *Current Issues in Criminal Justice*, p.346.

²¹ K.McFarlane (see Note 20), p.346.

²² K.McFarlane, (see Note 20), p.347.

justice system has been constant. A glance at William's offence history shows that all of his charges are a result of interactions with carers or other young people also living within the care facility. He has quickly accumulated a lengthy criminal history, including time in custody, despite the fact that most of his offences are ultimately dealt with by way of a s 32 *Mental Health (Forensic Provisions) Act* order²³, in recognition of William's intellectual disability and mental health problems. The incidents that have involved police intervention range from the serious (threats to kill a carer accompanied by physical violence) to the relatively minor (breaking pot plants, punching holes in doors and kicking furniture).

Case Study B shows a similar pattern in the case of "Chris", whose contact with the juvenile justice system commenced the very day he was placed in the care of the Minister and has since escalated dramatically, occurring for periods on a daily basis. Since the time of his Community Services placement in March this year, Chris has been charged with numerous offences, has been arrested for breach of bail continuously and has spent a large amount of time in juvenile detention.

It is evident from his personal history that Chris's behavioural issues predate his placement in the care of the Minister. Despite this fact, Chris was not once charged with a criminal offence while living with family. Like William, many of Chris's offences relate to malicious damage occurring within the residential facility where he lives, or anti-social behaviour directed at carers or co-residents.

Case Study C outlines the offence history of "Jessica", and shows another common pattern of police intervention experienced by children in out-of-home care – one involving a combination of bail and AVO breaches. For example, a physical fight with another young person in the TV room of the residential facility in which she was living resulted for Jessica in a breach of bail and charges of common assault and breach AVO. Jessica's offence history also shows that she has spent time in custody as a consequence of breaching curfew conditions and "obey reasonable directions of carer" conditions.

The case of Jessica highlights how bail and AVO conditions are often imposed on juveniles in out-of-home care to control their behaviour, rather than to ensure the safety of the community or attendance at court. The "obey reasonable directions of carer" bail condition is a typical example of this practice. CLS solicitors know of cases where carers have made specific requests to the court for certain bail conditions to be imposed, or have specifically requested charges to be laid in relation to an incident that has occurred in a residential facility. Similarly, solicitors have heard of care workers using occupational health and safety mandates to apply for AVOs against young people as a way of dealing with their behaviour.

It is notable that the lengthy interactions with the juvenile justice system experienced by the subjects of these three case studies – including time in custody – have occurred despite the fact that the court has never ultimately imposed a custodial sentence for any of the offences proven.

²³ S 32 provides that if the defendant is developmentally disabled or suffering from a mental illness or mental condition the Magistrate may make an order dismissing the charge and discharging the defendant: into the care of a responsible person, unconditionally or subject to conditions; or on the condition that the defendant is assessed or receives treatment; or unconditionally.

CONCLUSION

The academic research and CLS case studies demonstrate that the drift from care to crime is a complex issue with multiple causes. Not only is it a trend that has significant consequences for many Legal Aid NSW clients, it's also a growing problem.

In its April 2010 review of the NSW juvenile justice system, Noetic observed:

The increasing number of children and young people involved in the child protection and out-of-home care systems, and well established relationships between these systems and entry into the juvenile justice system, suggests that there will be an increasing number of children and young people at risk of entering the juvenile justice system in coming years.²⁴

It is clear that this is not an issue a single agency can tackle alone. What is required is for both government and non-government agencies to work together to address it. Legal Aid NSW is interested in participating in discussions with other government and non-government agencies that have similar experiences to find solutions to reduce the number of children and young people moving from the out-of-home care jurisdiction to the criminal jurisdiction.

Such solutions may involve:

- improving the quality of residential care for young people with challenging behaviours, such as through an increase in the number of specialised services, changes to policy and practice and the education and training of staff²⁵; and
- promoting alternatives to dealing with the challenging behaviours of young people in out-of-home care that do not involve police intervention. One way of doing this would be to develop uniform best practice guidelines, as recommended by the CSC. Regulating the use of police and criminal charges in relation to young people in out-of-home care through audits and legal prohibitions are also avenues worth exploring.

Annexure B sets out the various forms of regulation of the out-of-home sector that currently exist in New South Wales, and notes the absence of any uniform regulation of the use of police intervention by the sector. Annexure C explores another possible approach that has been used in the United Kingdom: namely, the development of protocols between government, out-of-home care organisations and the police that specifically aim to reduce the prosecution of children in out-of-home care.

As McFarlane says:

If serious attention is not directed towards the development of effective policies that address the causes of young people's involvement with the justice system – for instance care workers' reliance on police and the courts to punish children's behavioural issues – and politicians' perennial denial of 'historical abuse' only, then nothing will change, and the pathway from care to court to prison, will continue unabated.²⁶

²⁴ Noetic Solutions Pty Ltd, *A Strategic Review of the New South Wales Juvenile Justice System: Report for the Minister for Juvenile Justice*, April 2010, p.91

²⁵ In *Keep Them Safe: A Shared Approach to Child Wellbeing*, the NSW Government committed to developing new models of care for young people with challenging behaviours: March 2009, p.83.

²⁶ K.McFarlane (See Note 20), p.351.

ANNEXURE A

REMOVED AS CONTAINS SENSITIVE CLIENT INFORMATION

ANNEXURE B

REGULATION OF THE OUT-OF-HOME CARE SECTOR IN NSW

Legislation

Out-of-home care is generally regulated by Chapter 8 of the *Children and Young Persons (Care and Protection) Act 1998*. Its provisions cover areas such as who can provide out-of-home care, when placements can be reviewed, the rights of children and young people in out-of-home care and arrangements that must be made when a child or young person leaves out-of-home care. The Act also covers such areas as when a child or young person in out-of-home care can be physically restrained.

The Act contains no provision about the use of police and criminal charges in relation to children and young people in out-of-home care.

Monitoring bodies

The Children's Guardian

The *Children and Young Persons (Care and Protection) Regulation 2000* provides for accreditation by the Children's Guardian²⁷ of a department or organisation as a designated out-of-home care agency. The Children's Guardian also has powers to impose, vary and revoke conditions of operation, and to remove or suspend an organisation from the out-of-home care sector.

Staff from the Children's Guardian visit designated agencies to:

- assess whether the agency has systems in place that meet the requirements of the Children's Guardian's *NSW Standards for Statutory Out-of-Home Care* (updated in 2010); and
- conduct case file audits to monitor how agency practice complies with the Standards and care and protection legislation. The Children's Guardian generally chooses a different focus for its case audits each year – this year it was education.

The Children's Guardian is able to impose conditions on the accreditation of designated agencies to promote improved performance in delivering services to children and young people in out-of-home care. The Children's Guardian can refer information that gives rise to concerns about a community service provider or about the welfare and well-being of a child or young person in care. The Children's Guardian also publishes guidelines in relation to out-of-home care; for example, "Guidelines for designated agencies for developing a behaviour management policy".

NSW Ombudsman

The NSW Ombudsman handles inquiries and complaints about agencies' delivery of out-of-home care services and undertakes regular monitoring and review of the services. The Ombudsman also occasionally drafts best practice guidelines, and can make findings and recommendations for the relevant Minister to implement as she or he sees fit.

²⁷ The Children's Guardian is an independent body that reports to the Minister for Community Services and the New South Wales Parliament.

Official Community Visitors

Official Community Visitors (OCVs) are appointed by the Ministers for Community Services and Disability Services to visit agencies that provide residential out-of-home care services and observe the standard and adequacy of care. They talk to residents, staff and management, examine service and resident files and where possible, try to resolve any issues they identify directly with services. They can also refer their concerns to the Ombudsman or the Children's Guardian.

Standards, Guidelines and Policies

Below is a list of some of the standards, guidelines and policies that apply to the out-of-home care sector in NSW:

- **NSW Standards for Statutory Out-of-Home Care** developed by the Children's Guardian as optimum standards (referred to above)
- **National Standards for Out-of-Home Care:** Under the *National Framework for Protecting Australia's Children 2009-2020* which was endorsed by the Council of Australian Governments in 2009, a commitment was made to 'develop and introduce ambitious National Standards for Out of Home Care'. In December 2010 the National Standards were finalised. The Standards have been designed "to deliver consistency and drive improvements in the quality of care provided to children and young people. The 13 National Standards focus on the key factors that directly influence better outcomes for those living in out-of-home care."²⁸
- **Child Wellbeing and Child Protection NSW Interagency Guidelines:** these guidelines provide information and guidance to all agencies involved in the delivery of child wellbeing and child protection services in NSW. The guidelines are one of the *Keep Them Safe* mechanisms that support collaborative practice. They apply to government and non-government agencies alike.
- **Charter of Rights for Children and Young People in Out-of-Home Care** developed by the NSW Department of Community Services.
- **Service Provision Guidelines for Out-of-Home Care** developed by the NSW Department of Community Services. These Guidelines "give DoCS and non-government out-of-home care service providers the core policy and operational framework and requirements for delivering out-of-home care services." They cover entry into care, assessment, referral, and case management and closure for children and young people receiving out-of-home care services in NSW. They are described as "a companion resource to be used alongside an agency's own policies and procedures".
- **Various Guidelines developed by the Children's Guardian** including "Guidelines for designated agencies for developing a behaviour management policy" and "Guidelines on the exercise of care responsibility by authorised carers".
- **Agency policies.** Each agency has its own policies in relation to the treatment of children and young people in its care. These policies vary from agency to agency and are generally not publically available.

²⁸ http://www.fahcsia.gov.au/sa/families/pubs/nat_std_4_outofhomecare/Pages/default.aspx. Accessed on 10.8.11.

None of the abovementioned publically available documents specifically cover the use of police and criminal charges in relation to children and young people in out-of-home care.

In 2008 the Wood Report recommended that a common case management framework for children and young people in out-of-home care across all providers be developed.²⁹ The Government supported this recommendation and in its *Keep Them Safe* Report, committed to undertaking a feasibility study of potential models, with the aim of introducing a common case management framework across NSW within 3-5 years.³⁰ Such a case management framework has yet to be introduced.

²⁹ Recommendation 16.11, Wood Report (See Note 6)

³⁰ NSW Government, *Keep Them Safe: A Shared Approach to Child Wellbeing*, March 2009, p.83.

ANNEXURE C

USE OF PROTOCOLS: UK CASE STUDY

In many local authorities in the United Kingdom, protocols between residential care homes, the police and the Crown Prosecution Service have been established that aim to reduce the criminalisation of problem behaviour of out-of-home care children and young people. The Adolescent and Children's Trust reported in 2009 that such protocols have been largely successful in reducing the need for formal police involvement in resolving minor offences that occur in an out-of-home care context.³¹

Some of the protocols set out appropriate responses depending on the type of incident (for example, criminal damage within the home, theft from the home, disorder in and around the home, possession of weapons, substance misuse etc) and the factors to be considered when making a decision (for example, severity of any injury sustained, wishes of the victim, effectiveness of police/court action, future best interests of both parties etc). Some require a restorative justice conference to be used as an alternative to arrest.

Examples of the types of directions such protocols contain include:

- "It is important to question whether police involvement is the most effective/appropriate response".³²
- "It is important to avoid any unnecessary reporting of incidents to the police."³³
- "A criminal justice disposal, whether a prosecution, reprimand or warning, should not be regarded as an automatic response to offending behaviour by a looked after child, irrespective of their criminal history. This applies equally to persistent young offenders and adolescents of good character. A criminal justice disposal will only be appropriate where it is clearly required in the public interest."³⁴
- "The fact that staff report an incident does not mean that the Police will follow pre-decided action, or in some cases any action at all. Wherever possible, the most appropriate response will be decided following discussions with all interested parties. Particular weight will be given to the views of the victim."³⁵

Aims of such protocols include:

- "To ensure that children and young people are not unduly criminalised while within the public care setting and that they are given sufficient opportunity to address issues around offending behaviour whenever possible both prior to and in response to such behaviour".³⁶

³¹ The Adolescent and Children's Trust, *Care Experience and Criminalisation: an Executive Summary*, p.3, 8 September 2009

³² *Protocol between Bradford Police, Youth Offending Team and Children's Social Care as at January 2010*.

³³ *A Joint Protocol to Reduce the Prosecution of Looked After Children, Staffordshire County Council, Staffordshire Police and the Crown Prosecution Service, July 2007*

³⁴ *Joint Protocol for reducing reoffending of looked after young people and their entry into the criminal justice system*. A partnership between: Bedfordshire Youth Offending Service, Luton Youth Offending Service, Bedfordshire Police, Crown Prosecution Service Bedfordshire, Bedfordshire County Council, Luton Borough Council, FOCUS Ltd, St Christopher's, Oct 2007

³⁵ Bedfordshire Joint Protocol (See Note 34).

³⁶ Bradford Protocol (See Note 32).

- "To strike a balance between the rights and needs of the children and young people looked after, the rights of staff and the Local Authority's/private sector's decision to instigate police action."³⁷

³⁷ Bedfordshire Joint Protocol (See Note 34).