

COMMITTAL OF INDICTABLE AND SERIOUS CHILDREN'S INDICTABLE OFFENCES IN THE CHILDREN'S COURT¹

This paper considers the different means by which indictable offences and serious children's indictable offences can be transferred or committed from the Children's Court to a higher jurisdiction, which are:-

- In the case of an indictable offence, by way of transfer of jurisdiction pursuant to s 31(3) *Children (Criminal Proceedings) Act 1987* (NSW)(referred to as the CCPA) and;
- In the case of a serious children's indictable offence, by way of committal pursuant to the committal provisions contained in the *Criminal Procedure Act 1986 (NSW)* (referred to as the CPA).

This paper aims to assist lawyers who have limited experience with committal matters. It attempts to provide a basic outline of the mechanics of the committal/ transfer provisions and to focus on practical considerations that arise in the carriage of these matters.

PART A: THE TRANSFER OF INDICTABLE OFFENCES PURSUANT TO SECTION 31(3) CCPA

1. The jurisdiction of the Children's Court

An indictable offence is defined in s 3 CPA and means an offence (including a common law offence) that may be prosecuted on indictment. Sections 5 – 8 CPA contain specific provisions in relation to indictable offences.

The Children's Court has jurisdiction to hear and determine indictable offences committed by children to finality or by way of committal proceedings (s 28(1)(a) and (b) CCPA). In practice, the majority of indictable offences committed by children *are* finalised in the Children's Court.

In addition to section 28 CCPA, section 31(1) CCPA creates a presumption that all offences, excluding serious children's indictable offences, are to be dealt with in the Children's Court. Section 31(1) CCPA states that:

If a person is charged before the Children's Court with an offence (whether indictable or otherwise) other than a serious children's indictable offence, the proceedings for the offence **shall** be dealt with summarily.

¹ This paper is based partially on the paper presented at the July 2004 Children's Legal Service Conference by Lester Fernandez and Angela Cook.

This presumption of summary jurisdiction for an indictable offence is a rebuttal presumption² by virtue of the operation of section 31(3) CCPA. Section 31(3) allows a non serious children's indictable offence to be committed to the District Court in certain circumstances.

It is important to note that the presumption of summary jurisdiction in section 31 applies to a person who is *charged before the Children's Court* with an offence. The presumption may not strictly apply to a person who is charged with an indictable offence or presented with an ex officio indictment before a different court (such as the District Court).

This issue was recently considered by the New South Wales Court of Criminal Appeal in *Director of Public Prosecutions (NSW) v PM* [2006] NSWCCA 297. The two important findings of the majority decision on this issue are:

- Section 31 does no more than direct the Children's Court as to the exercise of its jurisdiction. It does not direct the prosecuting authority or limit the jurisdiction of the District and Supreme Courts. It does not stipulate that indictable offences may *only* be heard and determined by way of summary proceedings, nor does it require or demand that indictable offences be dealt with by way of committal hearing.
- An ex officio indictment (for an indictable offence) presented in the District Court is procedurally valid:

The special procedures thought appropriate to an essentially protective jurisdiction such as the Children's Court jurisdiction cannot displace the undoubted power of the DPP to ensure that a person accused of an indictable offence is brought to trial, in circumstances where that accused has been discharged at committal.

In this matter, the High Court has granted special leave to appeal the decision of the CCA. The appeal is scheduled to be heard in the June 2007 sittings. It is hoped that the High Court will adopt the logical and well reasoned approach outlined in the dissenting decision of Basten JA (***NOTE: I will orally expand upon this to some limited extent***).

2. Examples of instances where section 31(3) may be considered

Examples of the types of indictable offences where consideration may be given to transferring the matter to the District Court are:-

- Robbery offences with particularly serious/violent facts, possibly in combination with a significant prior criminal record;
- Offences of drive manner dangerous occasioning death or grievous bodily harm where the "dangerous" aspect of the driving is grave, and

² *JIW v DPP* (NSW) [2005] NSWSC 760 (29 July 2005).

is possibly in combination with a significant prior criminal or traffic record.

- Serious/multiple sexual assault offences that do not fall within the definition of serious children's indictable offences, possibly accompanied by a significant criminal record.

3. The nature of section 31(3) proceedings

In the recent case law there appears to be some ambiguity as to the precise nature of section 31(3) proceedings. In cases where the nature of the 31(3) proceedings has not been the issue under consideration, the proceedings have been referred to, or assumed to be, committal proceedings. I am of the view that this is an incorrect assumption.

Whilst the precise nature of the proceeding is somewhat unique, the case law that has specifically considered the precise nature of these proceedings has held that they are not committal proceedings but rather a summary hearing/ summary sentence which:

At the stage of the proceedings after the taking of the evidence for the prosecution, it is open in certain prescribed kinds of cases for the presiding magistrate to form an affirmative opinion that the proceedings thereafter should not proceed as summary proceedings but as committal proceedings.³

Badgery-Parker J⁴ held:

The proceedings will be in the nature of a summary trial at least until the close of the prosecution case, and will continue as such unless at that point the Children's Court forms the opinion that the person should be committed for trial.

In considering an appeal in respect to a section 31(3) order made by a Children's Court magistrate, Sully J⁵ found:

It is apparent from a number of things said by his Worship during the course of the proceedings before him that he approached the proceedings on the basis that he was dealing with a matter on the basis of committal proceedings

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³ *Shane Coleman v M R Rooney & Anor* Supreme Court of NSW, Common Law Division, 15 December 1989, per Sully J.

⁴ *Ritzau v Wheaton and Anor; Ritzau v Godoy and Anor; Ritzau v Cruz and Anor*, Supreme Court of NSW Common Law Division No. 10045 of 1990; No. 10046 of 1990; No. 10047 of 1990 26 June 1990.

⁵ *Shane Coleman v M R Rooney and Anor*, Supreme Court of NSW, Common Law Division, No 12737/89, Friday 15 december 1989

It seems to me necessarily to follow that in the present proceedings the learned Magistrate – and I say it with all proper deference to his Worship who was dealing with new and novel legislation – did misapprehend the true nature of the proceedings.

Given that the proceedings (at the least) commence as a summary hearing rather than committal proceedings, the child's plea is entered in the Children's Court.

The effect of a dismissal amounts to an acquittal of the charges. If the child was charged again or presented with an *ex officio* indictment for the same offence, the child could plead *autrefois acquit*:

The proceedings before the magistrate being a summary trial and not a committal, the effect of the order which his Worship made, unless liable to be and in fact set aside for error of law or denial of natural justice, amounts to an acquittal of the defendants in respect to those charges, so that they could if charged subsequently with the same offence plead autrefois acquit.⁶

4. The section 31(3) test

Section 31 (3) CCPA states that:-

Notwithstanding subsection (1) –

- (a) if a person is charged before the Children's Court with an indictable offence ; **and**
- (b) if the Children's Court states that it is of the opinion, after all the evidence for the prosecution has been taken –
 - (i) that, having regard to all the evidence before the Children's Court, the evidence is capable of satisfying a jury beyond reasonable doubt that the person has committed an indictable offence; **and**
 - (ii) that the charge may not be properly disposed of in a summary manner,

the proceedings for the offence shall not be dealt with summarily but shall be dealt with in accordance with Divisions 2-4 (other than section 60 and 61) of Part 2 of Chapter 3 of the Criminal Procedure Act 1986 in the same way as if a court attendance notice had been issued in

⁶ *Ritzau v Wheaton & Anor; Ritzau v Godoy & Anor; Ritzau v Cruz & Anor* Supreme Court of NSW, Common Law Division, 26 June 1990.

accordance with that Act and as if the Children's Court had formed the opinion referred to in section 62 of that Act (emphasis added).

It is important to note that the section 31(3) test is a *cumulative* test. This means that the Children's Court must be satisfied in respect of the matters referred to in each subsection. More particularly, the Children's Court must be satisfied that subsections 31(3)(a), 31(3)(b)(i) and 31(3)(b)(ii) have **all** been satisfied.

The s 31(3) consideration therefore has these three limbs:

1. The offence must be an indictable offence.
2. The evidence must be capable of satisfying the jury that the child committed an indictable offence.

A Court can commit a child on *any* indictable offence, and not necessarily *the* offence which the Crown has initially charged.

The question in this limb of the test is: Does the prosecution evidence, taken at its highest, establish a *prima facie* case for *an* indictable offence?

This part of the consideration is identical to the ordinary committal provision in s 62 CPA.

3. A consideration of whether the charge(s) can be properly disposed of in the Children's Court.

There is no legislative guide as to what factors are relevant to this consideration.

In considering the notion of whether a matter can be properly disposed of in the Children's Court, Kirby J outlined two general propositions:

First, offences vary in their nature and seriousness. An index of their seriousness is the maximum penalty prescribed. However, it is not the only index. For some offences, general deterrence will be of greater importance, often because of the widespread nature of the offence. The more serious the offence and the more important general deterrence, the more likely it is that it may be appropriate that the person charged should be dealt with according to law.

Secondly, children brought before the Children's Court will obviously vary in age and maturity. The child's age and level of maturity may, in the context of the particular crime, suggest a nexus between the offending behaviour and the absence of maturity. The younger the child and the more immature, and the

stronger the nexus between the child's immaturity and the crime charged, the more appropriate it may be for the offence to be dealt with in the Children's Court under Pt 3 Div 4 (cf R v KRG [2003]NSWSC 751, per Whealy para 32). The converse is true as a child approaches the age of 18 years and exhibits maturity.⁷

Further assistance on the factors relevant to this consideration can be taken from the matters outlined in section 18(1A) CCPA⁸ which are:-

- The seriousness of the indictable offence concerned.
- The nature of the indictable offence concerned.
- The age and maturity at the time of the offence and at the time of sentencing.
- The seriousness, nature and number of any prior offences committed by the person.
- Such other matters as the court considers relevant.

5. Practical aspects of a section 31(3) application

A. Who makes the section 31(3) application

The prosecution can ask the Children's Court to consider a section 31(3) transfer to the District Court, or the Children's Court can consider the question of transfer of its own volition in the absence of any application from the prosecution.

B. When the section 31(3) application is made

The s 31(3) consideration only arises after the Children's Court has heard all of the evidence for the prosecution. All of the evidence for the prosecution must have been taken prior to considering section 31(3).

C. Notice/ warning of a section 31(3) application

There is no legislative or formal requirement on the prosecution to put the defence or court on Notice that they propose to make an application under section 31(3) CCPA.

There is no requirement on the court to warn the defence that the court is entertaining the notion of a 31(3) transfer of its own volition.

⁷ *JIW v DPP* (NSW) [2005] NSWSC 760 (29 July 2005), Kirby J, para 55.

⁸ Section 18(1A) outlines the matters that the District Court must consider when determining whether to deal with a child (who pleaded guilty or was found guilty of an indictable offence) in accordance with the sentencing provisions of the CCPA or according to law.

Notice or warning that an otherwise summary hearing is potentially to be converted into a 31(3) transfer could significantly affect the way that summary hearing is conducted (and perhaps even whether a plea of guilty or not guilty is entered). A committal type hearing may be conducted on a very different basis to a summary hearing.

6. The structure of a section 31(3) application

A. In the case of a plea of not guilty

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B. In the case of a plea of guilty

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7. Factors to be considered in the District Court if a matter is transferred

These matters are important to note if a child is transferred to the District Court pursuant to s 31(3):

- The District Court has the power to deal with the child according to law or pursuant to the sentencing options set out in s 33 CCPA: section 18 CCPA.

The court must have regard to the matters outlined in section 18(1A) in determining whether a child is to be dealt with according to law or pursuant to the CCPA sentencing regime.

There are distinct advantages for a child to be dealt with by way of a sentence option under the CCPA rather than according to law.

- The District Court can remit a matter to the Children’s Court (provided the person is under 21 years of age) to enable the Children’s Court to impose a penalty: section 20 CCPA.
- Whether the child is being dealt with in the Children’s Court, District Court or Supreme Court, the principles relating to the exercise of criminal jurisdiction with respect to children as outlined in section 6 CCPA *always* apply.
- On sentence, the higher court can take into account that the matter could otherwise have been dealt with in the Children’s Court. In certain circumstances, this may be a matter in mitigation (see *R v Crombie* [1999] NSWCCA 297; *R v FF* [2000] NSWCCA 493).
- If appearing for a child who is being sentenced in the District Court to a term of imprisonment (as opposed to control) consider s 19 CCPA.

This section allows the sentencing court in some circumstances to make an order directing that the whole or any part of the term of the sentence of imprisonment be served in a detention centre (as opposed to an adult correctional centre).

PART B: THE COMMITTAL OF SERIOUS CHILDREN'S INDICTABLE OFFENCES

This paper does not attempt a general discussion on the mechanics of committal proceedings. A comprehensive discussion of committals is contained in the 2006 edition of the paper by Mark Dennis, barrister, Forbes Chambers (Sydney) titled "Contested Committals: A Defence Perspective". A copy of which has been provided with this paper.

The legislation and law that applies to the committal of offences committed (or alleged to have been committed) by adults also applies to children: see Chapter 3, Part 2 (section 47 through to 120) CPA.

There are some special considerations that should be canvassed when appearing for a child in the committal of a serious children's indictable offence. These include:

- There are specific evidentiary rules that apply to the admissibility of evidence regarding children and doctrines that may raise child-specific defences. These can include:
 - Compliance with section 13 CCPA regarding the admissibility of any admission, confession, statement etc made by a child.
 - Whether the child had access to legal advice prior to participating in a record of interview or providing a statement to the police and other general rights whilst under arrest. In this respect, the importance of contacting the Legal Aid Under 18's Hotline was considered by Dowd J in *R v LT and ME* (Unreported, Supreme Court, 3 October 2002).
 - Whether any forensic material (DNA, photographs, fingerprints) was taken in compliance with the special protections afforded to children in the *Crimes (Forensic Procedures) Act*.
 - The doctrine of *doli incapax*.
- The ODPP Prosecution Guidelines outline special considerations that may apply to the prosecution of children. These are set out Prosecution Guideline 21.

The Guideline refers to whether or not the public interest requires that a matter be prosecuted (Prosecution Guideline 4) and states that the following matters are particularly important:

- The seriousness of the alleged offence;
 - The age, apparent maturity and mental capacity of the child;
 - The available alternatives to prosecution and their likely efficacy;
 - The sentencing options available to the court if the matter were to be prosecuted;
 - The family circumstances and, in particular, whether the parents appear willing and able to exercise effective discipline and control of the child;
 - The child's antecedents, including the circumstances of any relevant past behaviour and of any previous cautions or youth justice conferences; and
 - Whether a prosecution would be likely to cause emotional or social harm to the child, having regard to such matters as his or her personality and family circumstances.
- The sentencing principles as outlined in section 6 CCPA apply to all children whether they are before the Children's Court, District Court or Supreme Court.
 - Whilst Australia's international treaty obligations are not binding on any court, they can be useful as a reference or guide. The provisions in the United Nations Convention on the Rights of the Child (UNCROC) are specifically referred to in Prosecution Guideline 21 of the Director's Prosecution Guidelines. The following international treaty obligations/ rules/ conventions may be of assistance:
 - Article 3 of the UNCROC which emphasises that the "best interests of the child shall be a primary consideration"
 - Article 40 of the UNCROC which emphasises that a child should have their matter determined without delay.
 - Article 37 of the UNCROC which emphasises our legislative position that detention must always be the last resort and in the case where the child does receive a period of detention, such detention should be for the shortest period of time.
 - Rules 10.3 and 17.1 *United Nations 'Standard Minimum Rules for the Administration of Juvenile Justice'* (commonly referred to as the *Beijing Rules*) which emphasises the promotion of the well-being of the juvenile.
 - Rule 5.1 of the *United Nations 'Standard Minimum Rules for Non-custodial Measures'* (commonly referred to as the *Tokyo Rules*) which emphasises the need to divert children from the criminal justice system.

Following are some tips and factors to consider in the carriage of a child's committal matter:

- Some very basic issues to consider in the carriage of a committal matter:
 - A plea does not need to be entered until a complete brief has been served.
 - Be cautious of incidentally disclosing the defence case in the various pre-committal appearances such as bail applications etc.
 - Consider carefully the purpose of any committal proceedings and which committal option (eg. section 91/93 contested committal with witnesses to cross examine, 62/ 64 submissions, waiver of committal) best suits the particulars of your case.
 - Consider carefully what could be achieved at the committal phase.
 - Exhaust all options/ avenues of negotiations with the prosecution whilst the matter is the Children’s Court.
 - Consider noting all correspondence to the prosecution *“Strictly without prejudice and/ or admission”*.

- Initial advice given at the committal phase is an extremely important step in the decision making process as to the plea to be entered. Attached to this paper is a “checklist” or guide of matters to be considered/ addressed.

- The unique regime established by section 31(3) CCPA can, in some particular instances, assist with the negotiations. If a serious children’s indictable offence is negotiated to a charge that can remain to finality in the Children’s Court, the prosecution have the “fall back” position that if the court is of the view that the matter cannot be properly disposed of in a summary manner, the matter will be committed to the District Court to be dealt with according to law.

The advantage to the defence is that the majority of indictable offences remain to finality in the Children’s Court. However, the increase in jurisdiction (regarding the length of sentences that can be imposed in the Local and Children’s Courts) of the Court is relevantly noted.

- In the Children’s Court, a conviction can not be recorded for a child under the age of 16 years and there is discretion to record a conviction if the child is 16 years or older and under 18 years: section 14(1) CCPA. It is important to note that section 14(1) does not limit the power of a court to record a conviction if dealing with a child (of any age) for an indictable offence that is not disposed of summarily: section 14(2) CCPA.

- Consider the impact of section 19 CCPA and submissions to address a finding of special circumstances to make a section 19 order.
- Be aware of any guideline judgement and the application of same to your child client.
- Be aware of any standard non parole period and the application of same to your child client.
- If dealing with more than one offence, consider whether any matters that could be placed on a Form One or section 166 Certificate.
- Be aware of the recent decision of the Supreme Court Common Law Division in *LAL v R; PN v R* [2007] NSWSC 445 in respect to the timing of the plea and the discount to be attributed for same (in particular paragraphs 72-75).

The court in this matter held that a plea of guilty to manslaughter when it was first offered by the Crown in the Supreme Court was not regarded as a plea of guilty at the first available opportunity as a plea to the charge was not indicated in the Local Court. A discount in the order of 15% was allocated for the plea.

- Be aware of the provision of section 206 CPA which allows for the granting of a certificate that a matter has been dismissed. Once such a certificate is granted, the certificate appears to prevent any later proceedings for the same matter against the same person:

206 Effect of certificate that a matter has been dismissed

A certificate certifying that a matter has been dismissed, if produced and without any proofs being required, prevents any later proceedings in any court for the same matter against the same person.

If any Children's Court practitioner would like assistance or advice on the issues raised in this paper, you are welcome to contact the author of this paper. I would be happy to discuss matters with you.

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CHECKLIST OF ADVICE IN A COMMITTAL MATTER

- ✚ The offence and elements.
- ✚ The maximum penalty for the offence (whether dealt with in the Children's or District Court).
- ✚ Any defences that may be available (eg. duress, claim of right).
- ✚ Is there a standard non parole period for the offence?
- ✚ Is there a guideline judgement applicable to the offence?
- ✚ Is there a guideline judgement applicable to any relevant issues (such as the plea, matters on a Form One)?
- ✚ The contents of the brief of evidence.
- ✚ The nexus between the contents of the brief and the essential elements of the offence that the prosecution are required to establish.
- ✚ The options in respect to the plea: guilty, not guilty, or some form of mental health diversion.
- ✚ Is the client fit to enter a plea?
- ✚ Are there any suitable alternate charges that could be negotiated? Preferably charges that could be disposed of in the Children's Court?
- ✚ Advice in respect to discounts for a plea and the timing of same. The distinction between the discount for the utilitarian value of the plea as opposed to contrition and remorse.
- ✚ Advice in respect to any discount for assisting the police. Is a Letter of Assistance appropriate?
- ✚ What are the potential sentence options and what do the JIRS statistics/ guideline judgements/ standard non parole period legislation suggest is range of sentence that is available to the court.
- ✚ The usual ratio between the head sentence and non parole period and any circumstances to support a finding of special circumstances to vary this usual ratio.
- ✚ Automatic parole if the sentence is under X years.
- ✚ The effect of section 19 CCPA and whether there is any material to support a finding of special circumstance to warrant a section 19 order.
- ✚ Any potential defence evidences/ witness that is essential to secure at an early stage.
- ✚ Other ancillary orders such as:
 - Placement on the Sex Offender Register.
 - Disqualification from driving.
 - Automatic AVO.
 - Whether any conviction can be spent.