THE CRIMINAL JURISDICTION OF THE CHILDREN'S COURT

This paper mostly discusses the Criminal Jurisdiction of the Children's Court and includes minimal discussion of the Care Jurisdiction of the Children's Court.

The *Children (Criminal Proceedings) Act 1987* (NSW) has been abbreviated as "CCPA".

A child is a person under the age of 18 years [see section 3 CCPA]. In this chapter, a reference to a "young person", is a reference to a child.

A. REPRESENTING CHILDREN AND YOUNG PEOPLE

On 19 October 2001, the Law Society of New South Wales adopted on behalf of the profession "Representation Principles for Children's Lawyers". A legal practitioner appearing for young people should be aware of the content of this document. A copy of the document can be obtained direct from the Law Society.

A lawyer acting for a young person acts as a "direct representative" which is defined in the Principles as follows:

> *"A direct representative, regardless of how he or she is appointed, receives and acts on instructions from the child client irrespective of what the representative considers to be the best interests of the child client. A direct representative owes the same duties of undivided loyalty, confidentiality and competent representation to the child as is due to an adult"* (Version 1, 19 October 2001).

The direct representative must act upon the instructions of the young person, not the parent/carer, who may be the person paying the legal fees. The person who pays the legal fees has no authority to direct the legal practitioner in his/her undertaking of the representative role (Principle A1, Version 1, 19 October 2001) unless the young person has provided an express authority to this effect. A practitioner should be cautious to obtain such an express authority.

When criminal proceedings are brought against a young person, the young person has a right to have explained to him/her the nature of the allegations and the elements of the offence/ or facts that must be established before they could be found guilty of an offence. Until those matters have been explained to the child, the court before which the proceedings are brought shall not proceed further [section 12 CCPA]. The Children's Court Practice Direction 10 is relevant on this point.

In communications with the young person, the:

> *"… practitioner should use language appropriate to the age, maturity, level of education, cultural context and degree of language proficiency of the child.*

Preference should be given to face to face communication with the child rather than communication by telephone or in writing" (Principle D6, Version 1, 19 October 2001).

It may be useful to obtain instructions from your client, in the absence of the parent/carer. Often the young person will give a more complete description of the offence, or their involvement in the offence if the parent/carer is not present during the interview time when instructions are initially being obtained.

If you are interested in appearing for a child or young person on a grant of legal aid, you should telephone the Legal Aid Commission NSW, Panels Division to ascertain the requirements of the Legal Aid Children's Court Criminal Panel. These details can be found on the Legal Aid Website: www.legalaid.nsw.gov.au.

B. THE CHILDREN'S COURT

1. Commencement of proceedings

Section 8 of the CCPA provides that criminal proceedings against a child should not be commenced otherwise than by way of summons or court attendance notice ("CAN") ***unless***:

- The offence consists of:-
    - A serious children's indictable offence;
    - Certain offences under the *Drug Misuse and Trafficking Act 1985;* or
    - Any other offence prescribed by the Regulations; ***OR***

- In the opinion of the person commencing proceedings there are reasonable grounds for believing that:
    - The young person is unlikely to comply with a summons or court attendance notice; or
    - The child is likely to commit further offences; ***OR***

- If in the opinion of the person commencing proceedings:
    - The violent behaviour of the young person; or
    - The violent nature of the offence;

  indicates that the young person should not be allowed to remain at liberty.

Additionally, the case law regarding arrest and the commencement of criminal proceedings makes clear that arrest:

- Is inappropriate for minor offences where the defendant's name and address are known, where there is no risk of his departing and there is no reason to believe that the summons will not be effective;
- Is reserved for cases where it is clearly necessary;
- Is inappropriate where summons will suffice.

It is recognised that *"these principles apply all the more when any person suspected of having committed an offence is a child"* [Barr J, *DPP v CAD & Ors* (2003) NSWSC 196 (26 March 2003)].

A case relevant on this issue is *DPP v Lance Carr (2002)* NSWSC 194. Whilst this case does not directly deal with s. 8 of the CCPA, it is relevant in the following ways:-

- The interpretation of s.8 of the CCPA should be strictly applied:

  > *"This court in its appellate and trial divisions has been emphasising for many years that it is inappropriate for powers of arrest to be used for minor offences where the defendant's name and address are known, there is no risk of him departing and there is no reason to believe that a summons will not be effective …. It is time that the statements of this Court were heeded"* [Smart AJ, *DPP v Lance Carr (2002)* NSWSC 194 at 35].

- Where arrest is inappropriate, evidence of further offences that follow (for example, resist police, assault police) should be rejected under section 138 *Evidence Act 1995* (NSW) and the matter(s) ultimately dismissed.

- The fact that a young person was arrested when it was appropriate to summons is relevant to penalty. The appropriate submissions should be made in this regard.

  > *"Arrest is an additional punishment involving deprivation of freedom and frequently ignominy and fear"* [Smart AJ, *DPP v Lance Carr (2002)* NSWSC 194].
  >
  > *" … a suspect suffers a greater penalty by being deprived of his liberty than he could possibly get by going to court and being found guilty".*

- This case can be used as the basis for submitting to the court that bail should be "dispensed with" (rather than "continued") in matters that should have been initiated by way of CAN or summons rather than arrest.

2. Jurisdiction of the court

The Children's Court has a much wider jurisdiction to hear and determine matters than the Local Court.

Section 28 of the CCPA outlines the jurisdiction of the Children's Court. The question of jurisdiction depends on the age of the person (at the time of the alleged offence and at the time of being charged) and whether the offence is a "serious children's indictable offence", traffic offence, or otherwise.

The Children's Court has jurisdiction to hear and determine proceedings in respect of any offence, other than serious children's indictable offences and certain traffic offences. The Children's Court hears committal proceedings in respect *any* indictable offence (including a serious children's indictable offence), if the offence is

alleged to have been committed by a person who:

- Was a child when the offence was committed; and

- Was under the age of 21 years when charged before the Children's Court.

The “Table One” and “Table Two” classification of offences outlined in Division 3 of the *Criminal Procedure Act* 1986 are not relevant to the question of jurisdiction outlined in the CCPA. The classification is relevant to the YOA.

(i). Serious Children’s Indictable offences

The Children's Court does not have jurisdiction to hear and determine proceedings, other than committal proceedings, in respect of serious children’s indictable offence. Section 3 of the CCPA and Regulation 4 outline the definition of a serious indictable offence. A serious children’s indictable offence is dealt with *according to law* (in the District or Supreme Court) as opposed to being dealt with under the Children's Court regime.

Examples of serious children’s indictable offences are:

- Homicide;

- An offence punishable by imprisonment for life or for 25 year, for example, Armed Robbery with a Dangerous Weapon.

(ii). Traffic offences

The Children's Court does not have jurisdiction to hear and determine a traffic offence that is alleged to have been committed by a person unless [section 28(2) CCPA]:

- The traffic offence arose out of the same circumstances as another offence that is alleged to have been committed by the person which is being dealt with by the Children's Court; or

- The person was not of licensable age when the offence is alleged to have been committed. At the time of writing, a person must be at least 16 years of age before they can obtain a motor vehicle learners licence and 16 years and nine months before they can obtain a motorcycle licence [*Road Transport (Drivers Licensing) Regulations* 1999 r.6, 10].

A young person not of licensable age will be dealt with by the Children's Court for a traffic offence. All young persons falling within this category will be under the age of 16 years and consequently the court cannot record a "conviction" against the young person. Ordinarily, the power to disqualify a person from driving only arises where a person has been *convicted* of the offence [sections 24 and 25 *Road Transport General Act 1999].* However, it has been held that section 33(5)(a) of the CCPA provides a power to disqualify a young person from driving who has been found guilty of an offence, even though a conviction cannot or has not been recorded: *HA & SB v The Director of Public Prosecutions* (2003) NSWSC 347, 28 April 2003. Importantly, the application of the power to disqualify a young person from driving in these circumstances is an exercise of discretion rather than an automatic provision of disqualification.

Any young person who is of licensable age, and does not have another Children's Court offence arising from the same circumstances, will be dealt with in the Local Court for a traffic offence. In these circumstances, the Local Court is not a "closed" court [s.10(2) CCPA] and generally utilises the sentencing options available for adults. However, the Local Court *may* exercise the sentencing options outlined in section 33 CCPA when dealing with a child convicted of a traffic offence [section 210 Criminal Procedure Act]. When a solicitor addresses the court regarding sentencing options in these circumstances, submissions that the matter be finalised under section 33 CCPA should be considered.

The Local Court cannot impose a sentence of imprisonment on a child found guilty of a traffic offence [section 210 Criminal Procedure Act]. It is noted however, that the Local Court could impose a period of control (section 33(1)(g) CCPA).

3. Sentencing in the Children's Court as opposed to sentencing at law

A young person shall be dealt with according to law, as opposed to under the CCPA, for a serious children's indictable offence [section 17 CCPA].

Section 31 CCPA indicates 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.

The exceptions to this are:

- If the person charged wishes to take his/her matter to trial [section 31 (2) CCPA]; **or**

- If the person is charged with an indictable offence and the Children's Court is of the opinion, after all the evidence for the prosecution has been taken [section 31 (3) CCPA]:

• Having regard to the evidence, the evidence is capable of satisfying a jury beyond reasonable doubt that the person committed an indictable offence; **and**

• 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 section 41 *Justices Act* (NSW).

Section 18(1A) CCPA says that the court must have regard to the following matters:

- The seriousness of the indictable offence concerned;
- The nature of the indictable offence concerned;
- The age and maturity of the person 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.

Section 18(1A) largely appears to codify the decision in *R v WKR (1993)* 32 NSWLR 447.

A higher court that determines to deal with a young person under the CCPA regime may remit the young person back to the Children's Court to be sentenced [section 20 CCPA].

4. Sentencing principles in relation to young persons

The sentencing principles that apply in the Children's Court are vastly different to the sentencing principles applicable in the adult jurisdiction.

Section 6 CCPA provides that a court that exercises criminal jurisdiction in respect of a child shall have regard to the following principles:

- That whilst children bear responsibility for their actions, they require guidance and assistance because of their state of dependency and lack of maturity;

- It is desirable to allow the education or employment of the young person to proceed uninterrupted;

- It is desirable to allow a child to reside in his/her home;

- The penalty imposed on a young person should be no more than that imposed on an adult for an offence of the same kind.

Generally, when sentencing a child or young person, these principles apply:

- Considerations of punishment and general deterrence, may be given less weight in favour of individual treatment aimed at the rehabilitation of the offender [*R v GDP (1991)* 53 A Crim R 112].

- The proximity of the offender to 18 years of age is relevant (*R v Tran* [1999] NSWCCA 109 at paragraph 12).

- The weight to be given to the element of youth does not vary according to the seriousness of the offence (*R v Hearne* [2001] NSWCCA 37 at paragraph 24).

- There is a qualification to the principle that considerations of punishment and general deterrence are subordinate to that of rehabilitation, which is when young people conduct themselves in ways that adults do (*R v Tran* [1999] NSWCCA 109 at paragraph 10).

- The principles that considerations of punishment and general deterrence are subordinate to that of rehabilitation will not have application to the sentencing process for offences regularly committed by young persons [*R v McIntyre (1998)* 38 A Crim R 135].

- The extent of the regard to be paid to general deterrence depends on the particular circumstances of each case (*R v FQ* (Unreported, Court of Criminal Appeal, 17 June 1998, at page 6).

The Children's Court must take into account that the young person has pleaded guilty and when the young person pleaded guilty or indicated an intention to plead and accordingly reduce any order it would otherwise have made. If the Children's Court does not reduce an order, it must state that fact and the reason(s) for not reducing the order [section 33B CCPA].

5. Sentencing penalties under the CCPA

The Children's Court can utilise the penalties available in the CCPA and the YOA (discussed in Part 5, Chapter 13).

Following is an outline of the penalties available in the CCPA:

- Section 33(1)(a) of the CCPA - Dismissal of the charge, with or without a caution. The court can also dismiss a charge but place a person on a bond.

- Section 33(1)(b) of the CCPA - Good behaviour bond with the conditions that the court sees fit for a period not exceeding two years.

- Section 33(1)(c) of the CCPA - A fine not exceeding the maximum fine (prescribed by the law) or ten (10) penalty units [see section 17 *Crimes (Sentencing Procedure) Act 1999* for the definition of penalty unit], whichever is lesser.

- Section 33(1)(c1) of the CCPA - An order conditional upon compliance with an outcome plan determined at a Youth Justice Conference under the *Young Offenders Act*.

- Section 33(1)(c2) of the CCPA - The court may make an order adjourning proceedings for a maximum period of 12 months (from the date of the finding of guilt) for:

    - The purpose of assessing the young person's capacity and prospect of rehabilitation; or

    - The purpose of allowing the person to demonstrate that rehabilitation has taken place; or

    - Any other purpose the Children's Court considers appropriate in the circumstances.

- Section 33(1)(d) of the CCPA - Both (b) and (c) above.

- Section 33(1)(e) of the CCPA - A probation order with conditions as the court sees fit for a period not exceeding 2 years.

- Section 33(1)(f) of the CCPA - A community service order ("CSO"). Section 13 *Children (Community Service Orders) Act* 1987 outlines the number of hours that a CSO cannot exceed:

    - If the young person is under 16 years old - 100 hours;

    - If the young person is 16 years or older:

        - 100 hours if the maximum period of imprisonment for the offence does not exceed 6 months;

- 200 hours if the maximum period of imprisonment for the offence is greater than 6 months but less than 1 year;

- 250 hours if the maximum period of imprisonment for the offence is greater than 1 year;

- The Children's Court may make more than one CSO run concurrent [section 10 *Children (Community Service Orders) Act* 1987].

- Section 33(1)(g) of the CCPA - Control order subject to the provisions of the *Crimes (Sentencing Procedure) Act* for a period not exceeding 2 years.

  - A control order may be cumulative or concurrent [section 33A CCPA].

  - The Children's Court cannot accumulate more than 2 periods specified in control orders [section 33A(4)(b) CCPA].

  - The Children's Court cannot make a control order or direction that would have the effect of detaining a young person for more than 3 years [section 33A CCPA].

  - When a young person is sentenced to a control order, the Children's Court must record the reason why the matter has been dealt with by way of control and the reason that it would be wholly inappropriate to deal with the young person under section 33(1)(a)-(f) [section 35 CCPA]. The imposition of a control order is clearly a "last resort". This notion is reinforced by Article 37 of the Convention on the Rights of the Child.

  - The Children's Court must obtain a background report from the Department of Juvenile Justice ("DJJ") prior to sentencing a young person to a control order [section 25(2) CCPA].

- Section 33(1B) of the CCPA - Suspended sentence. The Children's Court may make an order "suspending" the execution of an order under section 33(1)(g) for a specified period (not exceeding the term of that order) and release the person on condition that the person enters into a good behaviour bond under section 33(1)(b).

  A breach of a s.33(1B) suspended sentence is dealt with under section 41A CCPA. Section 41A(2) says that the bond is to be terminated unless the court is satisfied that:

  - The breach was "trivial" [s.41A(2)(a)]; or

  - There are good reasons for excusing the failure to comply with the bond [s.41A(2)(b)].

  If the bond is terminated, the suspension of the control order ceases to have effect and Part 4 of the *Crimes (Sentencing Procedure) Act 1999* applies to that order (that is, a parole and non-parole period may need to be fixed): section 41A(3) CCPA.

- The Children's Court may make an order for compensation. The Children's Court must have regard to the young person's means and income if any (not the income of the parent/carer). The maximum compensation that may be awarded is $1,000 [sections 24 and 36 CCPA].

C. SPECIFIC ASPECTS OF THE CRIMINAL LAW RELATING TO YOUNG PEOPLE

1. Criminal responsibility and *doli incapax*

Section 5 CCPA provides that no child under the age of 10 years can be guilty of an offence.

The common law doctrine of *doli incapax* provides a rebuttable presumption that from 10 years of age to 13 years of age (inclusive) a child cannot possess the requisite knowledge to form or possess a criminal intent (*mens rea*). The rebuttal of *doli incapax* is in addition to proving the *actus reas* beyond a reasonable doubt.

Following are some important points when considering the question of *doli incapax:-*

- The prosecution must rebut the presumption of *doli incapax* as an element of the prosecution case. If the presumption is not rebutted, the prosecution's case is not made out at the prima facie level.

- The child must know that the act was seriously wrong as opposed to naughty or childish mischief: *R v CRH* (unreported, NSW Court of Criminal Appeal, Smart, Hidden and Newman JJ, 18 December 1996); *C (A Minor) v DPP* [1996] 1 AC 1; *JM v Runeckles* [1984] 79 Crim App R 255.

- Evidence of the prosecution must be strong and clear beyond all doubt and contradiction.

- The act/ offence itself is not sufficient to rebut the presumption however horrifying or obviously wrong the act may be: *R v CRH* (unreported, NSW Court of Criminal Appeal, Smart, Hidden and Newman JJ, 18 December 1996; *DK v Rooney* (Supreme Court of NSW, McInerney J, 3 July 1996).

- The older the child, the easier for the prosecution to prove guilty knowledge.

- An admission in an ERISP does not necessarily rebut the presumption: *R v Whitty* [1993] 66 A Crim R 462; *IPH v Chief Constable of New South Wales* [1987] Crim LR 42.

- Prior criminal history and the court alternatives history may be tendered to rebut the presumption: *Ivers v Griffiths* (NSW Supreme Court, 22 May 1998). However, where prior matters have no bearing on the case, sections 135, 136 and 137 of the *Evidence Act* (NSW) should be used to seek to exclude the record/ history.

- Where the prior matters are of a completely different nature, it is arguable that *doli incapax* has not been rebutted.

- If the prosecution seek to rely upon the delivery of a caution to rebut *doli incapax,* a transcript of the caution or a statement from the person who delivered the caution should be available.

- If the prosecution seek to call evidence from a parent to rebut the presumption, the court must be satisfied that the parent is aware of their right to object to giving evidence: section 18 *Evidence Act* (NSW).

- The prosecution could obtain evidence from a teacher who knows the child well, and/ or use an internal school disciplinary hearing to rebut the presumption: *Graham v DPP* (Queen's Bench, 10 October 1997); *C (A Minor) v DPP* [1996] 1 AC 1.

- Flight alone does not rebut the presumption: *C (A Minor) v DPP* [1996] 1 AC 1; *A v DPP* [1992] Crim LR 34.

- Flight in combination with an admission may rebut the presumption in certain circumstances: *T v DPP* [1997] Crim LR 127; *JM v Runeckles* [1984] 79 Crim App R 255.

- Surrounding circumstances may be used by the prosecution to rebut the presumption: *The Queen v M* [1977] 16 SASR 589; *The Queen v Folling* (Qld CCA, Unreported, 19 May 1998); *LMS* [1996] 2 Cr App R 50.

Doli incapax was recently considered in a committal context in the matter of RP v Ellis and Anorm [2011] NSWCA 442 (19 May 2011). The decision is short (7 pages) and worth the read. Following is a basic summary of the case

RP was 13 years old. He was charged with an offence contrary to section 33 Crimes Act, the maximum penalty of which is 25 years and accordingly is a serious children's indictable offence.

At the committal hearing the DPP sought to tender the brief to establish to the requisite standard that the offence was made out.

To establish the offence, the DPP were required to establish the specific elements of the section 33 offence and that RP knew, at the time of doing the act, that the act was wrong as distinct from an act of mere naughtiness or childish mischief.

There was a deficit in the brief as to any evidence to rebut the presumption of doli incapax. Despite the deficit the Children's Court at Bidura committed RP on the erroneous understanding that doli incapax was an exclusionary objection that was impermissible at committal.

The Supreme Court in RP confirmed that doli incapax was an element of the offence that the prosecution must rebut beyond a reasonable doubt (and is not a discretionary exclusion of evidence). The order of the Children's Court (committing the child) was quashed and the matter was remitted to the Children's Court to be dealt with according to law.

The application and significance of this case extends beyond committal proceedings and should be considered in general matters that are being dealt with in the absence of the child. For example, when a matter is listed for hearing and the issue (perhaps amongst others) is doli incapax (and there is an absence of evidence to rebut same) submissions can be made that the magistrate when dealing with the matter under section 196 Criminal Procedure Act would not be satisfied that the offence is made out. Similar submissions can be made when a child (under 14 years old) does not appear on the first return date and the Statement of Facts do not address the issue of doli incapax in a manner sufficient to rebut same.

2. Admissibility of statements to the police: section13 CCPA

Specific rules apply to the admissibility of statements, admissions or confessions of a young person. These are outlined in section 13 CCPA.

Statements, admissions &/or confessions shall not be admitted into evidence unless the person responsible for the child (or an adult appointed by the person responsible for the child) or an adult/legal representative selected by the child (if the child is over 16 years old) was present at the place and throughout the period of time that the admission, statement or confession was made.

The exception to the above is where the "person acting judicially" is satisfied that there was proper and sufficient reason for the absence of such an adult/person and considers that in the circumstances of the case that the statement, admission or confession should be admitted in evidence in the proceedings. This exception does not effect the court's general discretion to exclude any statement if it's prejudicial effect would outweigh it's probative value [sections 135 and 137 *Evidence Act* 1995] despite compliance with CCPA.

The role of the support person has been outlined as follows:-

> *"to act as a check upon possible unfair and oppressive behaviour; to assist a child, particularly one who is timid, inarticulate, immature, or inexperienced in matters of law enforcement, who appear to be out of his or her depth, or in need of advice; and also to provide comfort that accompanies knowledge that there is an independent person present during the interview. That role cannot be satisfactorily fulfilled if the support person is himself or herself immature, inexperienced, unfamiliar with the English language, or otherwise unsuitable for the task expected, that is, to intervene if any situation of apparent*

unfairness or oppression arises, and to give the appropriate advice if it appears the child needs assistance in understanding his or her rights" [Wood CJ, R v Phung and Huynh (2001) NSWSC 115].

The support person must be informed of their role and responsibility and be suitably able to perform the task. Clause 30 of the *Law Enforcement (Powers and Responsibility) Regulation 2005* requires the custody manager to explain to a support person that his/her role is not confined to acting merely as an observer, but also extends to doing the other things specified. The requirement for an informed and appropriate support person to be present should be strictly applied:

> *"the provisions need to be faithfully implemented and not merely given lip service or imperfectly observed. The consequences of any failure to give proper regard to them is to risk the exclusion of any ERISP, or the product of an investigative procedure, which is undertaken in circumstances where there has not been proper compliance with the law" (Wood CJ, R v Phung and Huynh (2001) NSWSC 115].*

Furthermore, the custody manager has a positive obligation to assist a vulnerable person, or child, to exercise their rights [Regulation 25 LEPRA Regulation. It has been held that this obligation includes the obligation to make known to the young person the services offered by the Legal Aid Youth Hotline:

> *"The whole intention of the hotline is that young people would know that it is free, that it is available, and would be able to obtain advice there and then. Failure to make it available is a clear breach of the Act and regulations but, more importantly, in clear breach of the requirement of fairness to the young person" (Dowd J, R v ME , R v LT and R v CE* (Unreported, Supreme Court Common Law Division, 3 October 2002).

Other law and legislation to consider on this point is:

- Part 9 LEPRA, and in particular ss. 114, 115, 118, 122, 123 and 125.
- The Law enforcement (Powers and Responsibilities) Regulation 2005 (and in particular Clauses 26, 25, 27, 28, 36, 30, 32 and 34.
- *Kerry Ann Dunn* NSW CCA 15 April 1992 and *H* (1996) 85 A Crim R 481.

3. Recording convictions and admissibility of prior offences

Section 14 CCPA states that the court shall not record a conviction for a child who is under the age of 16 and has discretion to refuse to record a conviction for a child above the age of 16 years (provided that the matter is disposed of summarily).

In any court other than the Children's Court, the fact that a person has pleaded guilty to an offence, or been found guilty is not to be admitted in any criminal proceedings (including an application for bail) subsequently taken against the person in respect of any other offence if [section 15 CCPA]:

- A conviction was not recorded in respect of the first mentioned offence; and

- The person has not, within the period of 2 years prior to the commencement of the proceedings for the other offence, been the subject of any judgment, sentence or order whereby the person has been punished for any other offence.

Evidence that a young person has been dealt with under the *Young Offenders Act* 1997 ("YOA") is not to be admitted into evidence (in any criminal proceedings subsequently taken against the person) in any court other than the Children's Court [section 15(3) CCPA and section 67 YOA].

When advising a child client it is important to note that, for the purpose of the *Criminal Records Act* 1991 (NSW) **any** order made under section 33 CCPA [other than an order dismissing a charge, that is, section 33(1)(a)] is treated as a "conviction" (even if the court cannot or determines not to record a conviction) [section 5 *Criminal Records Act* 1991 (NSW)]. The conviction remains a "conviction" until it is "spent". Most convictions are capable of becoming "spent", however, some offences are specifically excluded from this provision. For example sexual offences, as defined in section 7 (4) are not capable of becoming "spent". A conviction is considered "spent" [section 8 *Criminal Records Act* 1991 (NSW)]:-

- On completion of the relevant crime-free period, which in the case of an order of the Children's Court under section 33 CCPA, is any period not less than three consecutive years after the date of the order during which:

    - The person has not been subject to a control order; and
    - The person has not been convicted of an offence punishable by imprisonment; and
    - The person has not been in prison because of a conviction for any offence and has not been unlawfully at large [section 10 *Criminal Records Act* 1991 (NSW)].

- Upon a finding that an offence has been proved, or that a person is guilty of an offence, without proceeding to conviction is spent immediately after the finding is made [section 8(2) *Criminal Records Act* 1991 (NSW)].

The class of convictions, as outlined in section 7 of the *Criminal Records Act* 1991 (NSW), that are not capable of becoming spent remain as convictions for the purpose of that Act despite the fact that under the CCPA a magistrate cannot record a conviction or may determine to refuse to record a conviction. This seeming ambiguity should be carefully explained to a child client who falls within the class of offences that are not capable of becoming spent.

4. Early release under the *Children (Detention Centre) Act*

A young person who is serving a control order in a Detention Centre may be released from the Detention Centre prior to the expiration of the control order under s. 24(1)(c) of the *Children (Detention Centre) Act 1987*. This is commonly referred to as either "early release" or "conditional release".

The Director-General of the Department of Juvenile Justice may by order in writing discharge a person who is subject to control from detention if the Director-General has made arrangements for the person to serve the period of detention by way of

periodic detention or made suitable arrangements for the supervision of the person during the period [s.24(1)(c)*Children (Detention Centre) Act 1987*]. Supervision under early release is usually provided by the Intensive Programs Unit ("IPU") of the Department of Juvenile Justice. At the time of writing, the facilities for "periodic detention" for young persons do not exist in New South Wales.

If the conditions of early release are breached, a warrant will be issued and the young person returned direct to the custody of the Detention Centre.

Early or conditional release is only (potentially) available to young persons serving a period of control. It is not available to young persons serving a sentence of imprisonment (for a serious children's indictable offence).

Early or conditional release is a discretionary and administrative function of the Director-General. A sentencing court can **not** ***direct*** or ***authorise*** the Director-General to permit a child to early release. However, the Children's Court will occasionally make a ***recommendation*** that the Director-General consider early release after a specified period of time.

The case law on this point says that whilst a recommendation may be expedient in a particular case, as a general rule it is undesirable (*R v. Sherbon* (CCA(NSW), 5 December 1991, unreported BC9101295).

A recommendation may be considered appropriate when a sentencing court does not find "special circumstances" to vary the usually ratio between the parole and non-parole period.

5. Serving a sentence in a Juvenile Detention Centre as opposed to an adult facility

A young person will serve a control order or term of imprisonment in a Juvenile Detention Centre until the young person turns 18 years old. Previously, a sentencing court could direct that the whole or any part of a term be served in a Detention Centre [the repealed section 19 CCPA]. However, the commencement of the *Children (Criminal Proceedings) Amendment (Adult Detainees) Act* 2001 ("CCPAADA") on 25 January 2002 has significantly changed the situation amending the old section 19 of the CCPA.

Section 19 provides:

> ***19 Court may direct imprisonment to be served as a juvenile offender***
>
> (1) If a court sentences a person under 21 years of age to whom this Division applies to imprisonment in respect of an indictable offence, the court may, subject to this section, make an order directing that the whole or any part of the term of the sentence of imprisonment be served as a juvenile offender.
>
> **Note:** The effect of such an order is that the person to whom the order relates will be committed to a detention centre (see subsection (6)). There he or she will be detained as specified in the order. In certain circumstances, he or she may subsequently be transferred to a correctional centre pursuant to an order under section 28 of the *Children (Detention Centres) Act 1987* .

(1A) In the case of a person of or above the age of 18 years who is serving, or has previously served, the whole or any part of a term of imprisonment in a correctional centre, such an order may not be made unless the court decides that there are special circumstances justifying detention of the person as a juvenile offender.
(2) A person is not eligible to serve a sentence of imprisonment as a juvenile offender after the person has attained the age of 21 years, unless:
(a) in the case of a sentence for which a non-parole period has been set-the non-parole period will end within 6 months after the person has attained that age, or
(b) in the case of a sentence for which a non-parole period has not been set-the term of the sentence of imprisonment will end within 6 months after the person has attained that age.
(3) A person who is sentenced to imprisonment in respect of a serious children's indictable offence is not eligible to serve a sentence of imprisonment as a juvenile offender after the person has attained the age of 18 years, unless:
(a) the sentencing court is satisfied that there are special circumstances justifying detention of the person as a juvenile offender after that age, or
(b) in the case of a sentence for which a non-parole period has been set-the non-parole period will end within 6 months after the person has attained that age, or
(c) in the case of a sentence for which a non-parole period has not been set-the term of the sentence of imprisonment will end within 6 months after the person has attained that age.
This subsection is subject to subsection (2).
(4) A finding of special circumstances for the purposes of subsection (1A) or (3) may be made on one or more of the following grounds, and not otherwise:
(a) that the person is vulnerable on account of illness or disability (within the meaning of the *Anti-Discrimination Act 1977*),
(b) that the only available educational, vocational training or therapeutic programs that are suitable to the person's needs are those available in detention centres,
(c) that, if the person were committed to a correctional centre, there would be an unacceptable risk of the person suffering physical or psychological harm, whether due to the nature of the person's offence, any assistance given by the person in the prosecution of other persons or otherwise.
(4A) In particular, a finding of special circumstances may not be made simply because of the person's youth or simply because the non-parole period of the person's sentence will expire while the person is still eligible to serve the sentence as a juvenile offender.
(4B) A court that makes a finding of special circumstances must make a record of its reasons for making that finding in the particular case.
(5) A person who is subject to an order under this section that ceases or ceased to apply on the person attaining the age of 18 years may apply to the

sentencing court for a further order under this section. Any such application requires the leave of the court.
(6) The warrant of commitment that is issued under section 62 of the *Crimes (Sentencing Procedure) Act 1999* in relation to a sentence of imprisonment the subject of an order under this section:
(a) must indicate that the sentence is the subject of such an order, and
(b) must specify how much of the sentence is to be served as a juvenile offender, and
(c) must, despite the provisions of that section, commit the person to whom it relates to a detention centre.
(7) Nothing in this section, or in any order under this section, limits the operation of section 28 of the *Children (Detention Centres) Act 1987* .
(8) In this section:
"correctional centre" has the same meaning as it has in the *Crimes (Administration of Sentences) Act 1999* .

If the court is sentencing a person under 21 years of age to imprisonment in respect of an indictable offence, the court may make an order directing that the whole or any part of the term of the sentence of imprisonment be served in a Detention Centre [section 19(1) CCPA]. A person is not eligible to serve a sentence in a Detention Centre after the person has attained the age of 21 years unless the non-parole period or term of the sentence of imprisonment will expire within 6 months of attaining the age of 21 [section 19(2) CCPA].

A person sentenced to imprisonment for a serious children's indictable offence is not eligible to serve a sentence of imprisonment in a Detention Centre after the person has attained the age of 18 years unless [section 19(3) CCPA]:

- The sentencing court is satisfied that there are "special circumstances" justifying detention of the person in a Detention Centre; or

- The non-parole period or term of the sentence of imprisonment will expire within 6 months of the person attaining the age of 18.

In determining "special circumstances" the court is to have regard to the specific matters in section 19(4) CCPA. Importantly, there must be evidence to satisfy the court of the section 19(4) matters.

With the leave of the court, a person who is subject to an order that ceases or ceased to apply on the person attaining the age of 18 years may apply to the sentencing court for a further order [section 19(5) CCPA]. This provision gives a young person, whose application is unsuccessful at first instance, a second opportunity to make the application at the time of transfer from a Juvenile Justice Centre to an adult facility.

The making of a section 19 order is also relevant to whether any Parole hearing is to be held before the Children's Court Parole jurisdiction or the NSW Parole Board.

6. The Children's Court Parole Jurisdiction

Section 29 *Children's (Detention Centres) Act* states that the Children's Court exercises the parole jurisdiction under Parts 6 and 7 *Crimes (Administration of Sentences) Act* that is otherwise exercised by the Parole Board with respect to adult offenders.

If a young person is alleged by the DJJ or Probation and Parole Service ("PPS") to be in breach of any condition of parole, they will file a report with the Registrar of Bidura Children's Court. The Senior Children's Magistrate (or delegated Magistrate), if satisfied that a young person is in breach of any condition of their parole, will revoke the parole order and further order that a Warrant of Apprehension be issued for the arrest of the young person.

Upon arrest, the young person is detained in a Detention Centre until such time that their matter is listed before the Court in its parole jurisdiction. This is generally 4 weeks after arrest. Following execution of the warrant the DJJ will prepare a Background Report for the Court.

At the parole hearing the Court will confirm the revocation of parole. This can be defended if the young person believes that they have not breached any condition of their parole. If the revocation of parole is confirmed, the Court will order that the balance of the sentence be served in custody (plus any 'street time', that is, the period between the date of revocation of parole and date of arrest on the warrant).

The Court will then consider whether or not to order "fresh parole". If "fresh parole" is granted, the Court can impose different conditions to the original parole conditions.

The Court cannot order a young person be released to fresh parole if they cannot be released from custody within seven (7) days. This may because they are serving a further sentence or are bail refused. The hearing of the application for "fresh parole" may be adjourned.

7. Apprehended violence order proceedings

The child protection legislation has recently been amended to include AVO's on the Working with Children Check. A relevant AVO is an AVO made on the application of a police officer or other public official for the protection of a child. The Commission for Children and Young People will collect and maintain a database of relevant AVO's against any person and named screening agencies conduct the checks with which the AVO will form a part.

7. *Children's (Protection and Parental Responsibility) Act 1997*

This legislation not frequently used in Metropolitan Sydney. However it can be used for sentencing in appropriate circumstances.

The guiding principle of the Act is whether the taking of the action under consideration is in the best interests of the child [section 6(1)]. This is consistent with

Article 3 Convention of the Rights of the Child. Section 6(2) states that the courts must have regard to:

- Relationship of child with parent
- Parent's attitude to responsibilities
- Welfare and status and circumstances of the child

The Act can practically be used in a number of ways

(i) Warrants for parents to attend court [section 7]

Section 7 of the Act allows the court to issue warrants for the attendance of parents at court. Section 7 could be used where the parents are the cause of the non attendance of the child at court.

Example of where warrant used.
A 12 year old child could not attend court. The mother refused to take child to court. The mother kept saying that she had no money. The child did not want to come to court unaccompanied as he lived a significant distance from court. The Magistrate asked Registry to write a letter to the Mother that if she did not attend court, a warrant would issue for her arrest on the next occasion. The mother attended court with child on the next occasion.

(ii) Undertaking by child [section 8]

Section 8 allows the court to finalise a child's criminal matters by way of an undertaking from either the child [section 8]

The conditions of the undertaking by the child can include:

- Submit to parental supervision
- Participate in program/activity
- Reside with parent or other person
- To do such other things as may be specified by the court

The court has the power to take breach action if the undertaking is breached [section 8(4)]. If the undertaking is cancelled, the court has the option of releasing the child or deal with the child by another penalty under C(CP) A. The court may also continue or vary the undertaking.

Examples where undertaking given

- A 15 year old child charged with aggravated robbery. Involvement in offence is minimal. Child participates in an ERISP where he admits that he acted as a lookout. Child has excellent family support. Father extremely disappointed and used to work in the United Nations. Came to Sydney as refugees. The Magistrate gave the child an undertaking that he:
    - Obey reasonable directions of father
    - Attend school or remain in employment

- A 13 year old charged with shoplifting. Child defends matters based on *doli incapax*. Magistrate finds offence proven because the child hides the clothing and lies to the police at the station by using the circumstances surrounding the offence. The Magistrate gave the child an undertaking that
    - Obey reasonable directions of father

- Attend school or remain in employment

The child does not want to appeal the decision of the Magistrate. The child breaches undertaking by not going to school. Magistrate gives a lecture and takes no action on the breach

(ii) Undertaking by parent [section 9]

In certain situations, the court can also require that a parent or carer of a child give undertakings to the court on the finding of guilt of a child. These undertakings are for a period between 6 months and 12 months but in no case extend past the chlld eighteenth birthday [section 9(1)]. Undertakings can include:

- A guarantee of child's compliance with section 8
- Assistance to the child to stop reoffending
- Report at intervals at about child's progress

In appropriate circumstances the court can require the parent with or without security to forfeit an amount of money where the child re-offends [section 9(c)].

Example where parental undertaking given

- The child was 14 years old and picked up for shoplifting on two separate occasions. The child had minimal parental supervision. The Magistrate asked the father how he would ensure the child would not reoffend. The father insisted that this was not his responsibility but that of the government bodies. The Magistrate made the father give an undertaking that if his daughter reoffended within the next 6 months that he would have to forfeit an amount of $500. Outside the court room, the father was heard giving the child very strict curfews and additional supervision.

(ii) Use of Operational Areas

There are four operational areas are Orange, Ballina, Moree, Coonamble with regards to police powers to picking up children and taking home. The operational areas in force till end 2003. AG Crime Prevention to be contacted as to whether further operational areas to be declared [section 14]. Once an area is declared operation police have additional powers in relation to children who they believe to be under 16 [section 18]and are in a public space

Police have specific and additional powers within this act [Division 2]:

- Police can take the child from the streets back home or place in the care of DOCS [section 22]Police ask for name, age and address [section 27]
- Police have limitation with powers. They can not leave the child at a police station [section 23]
- Police can use reasonable force to remove a person from a public space [section 28]
- Police can remove concealed weapons and do a frisk search [section 29]

D. PRACTICAL TIPS ON APPEARING IN THE CHILDREN'S COURT

Following are some basic and practical tips when appearing in the Children's Court:-

- The Children's Court is a "closed" court. This essentially means that any person "not directly interested in the proceedings" is to be excluded from the

proceedings. The young person's family/support person(s) are usually present during proceedings. The media are entitled to be present during proceedings (unless the court directs otherwise). Any "family victim" is also entitled to be present [see section 10 CCPA].

- Whilst the media are "entitled" to be present, the publication and broadcasting of young persons names (both child offenders and child victim/witnesses) are subject to the provisions of section 11 CCPA. The provisions of section 11 extend the prohibition on publishing names to those who were children when they were witnesses etc even if the person is no longer a child at the time of broadcasting.

- All practitioners and the police prosecutor remain seated at the bar table. You do not stand up when you address the Magistrate.

- Your client is referred to as the "child" or "young person" as opposed to the "defendant" or "prisoner".

- When appearing in the Children's Court for a young person who is over 16 years old and under 18 years old, always address the court on exercising the discretion in section 14 CCPA to refuse to record a conviction.

- A report regarding the sentencing options for a young person is usually a Juvenile Justice Background Report prepared by the DJJ, not a Pre-Sentence Report ("PSR") prepared by the Probation and Parole Service.

- In the Children's Court, the prosecutor will usually tender the young person's Criminal History and "Court Alternatives History". The legal representative does not refer to an entry on the Court Alternatives History as a "record".

- Section 10 of the *Crimes (Sentencing Procedure) Act* does not apply to children (unless the young person is being dealt with according to law).

- A young person is sentenced by the Children's Court to a "control order", not a term of imprisonment (unless the young person is being sentenced according to law).

- When a young person is dealt with in the Local Court for a traffic offence, the court does not need to be a "closed" court [section 10(2) CCPA]. The Local Court cannot sentence a young person to a term of imprisonment for a traffic offence and can utilise any sentence option under the CCPA [*section 210 Criminal Procedure Act]*.

- Be aware of the maximum penalties and compensation that can be awarded and advise the young person accordingly. Whilst the maximum compensation that a court can award against a young person is $1,000, the young person is *potentially* open to civil proceedings or a Victims Compensation Claim for an amount greater than $1,000. Note that any "admission" made in accordance with a matter being finalised under the YOA, is not admissible in other proceedings [section 67 YOA].

- If a young person is being sentenced for an offence of "escape custody", the Children's Court is not required to accumulate the sentence (as is the case with adults). The sentence (if by way of a control order) may be concurrent. The maximum penalty for escape is three (3) months [section 33(1) *Children (Detention Centre) Act* 1987].

- When appearing for a young person, whom a court has convicted of an offence, an application should be made to the court to direct that the young person be exempt from paying a "compensation levy". The court has power to make this direction under section 79 *Victim Support and Rehabilitation Act* 1996.

- When the Children's Court deals with a matter under section 33(1)(a) or finds a young person not guilty of an offence the Children's Court shall order the fingerprints etc to be destroyed. When the Children's Court exercises the powers conferred on it by section 33(1)(b)-(g) and is of the opinion that the circumstances of the case justify it's doing so, the Children's Court may order that the fingerprints etc be destroyed [section 38 CCPA]. A legal representative should make the appropriate submissions regarding this issue.

- When appearing for a young person with a traffic offence in the Children's Court, Local Court or on a District Court appeal, consider the age of the child, whether any conviction can be recorded, whether the young person is to be/ has been disqualified from driving for the traffic offence (especially if a further period of disqualification would accumulate).

- When appearing for a young person who committed or is alleged to have committed a sexual offence against another child, be aware of the operation of the *Child Protection (Offender Registration) Act* (NSW) ("CP(OR)A") as the consequences of the CP(OR)A are applicable to juvenile offenders. The Intensive Programs Unit of the Department of Juvenile Justice conduct a specific program, *"The Sex Offender Program",* to assist such offenders.

- Be familiar with the application of the *Crimes (Forensic Procedures) Act 2000* (NSW) ("C(FP)A") to your child client. The C(FP)A is particularly significant in the Children's Court because a child (or adult on behalf of the child) cannot consent to the taking of a forensic sample. All forensic procedures (in regard to Final Orders) taken from a child must be by way of order from the court.

- When appearing for a young person charged with a Commonwealth offence under the *Crimes Act (1914)* (Commonwealth), note that section 26 of the Commonwealth Act provides that the State sentencing options apply.

- The Legal Aid Youth Hotline (1800 10 18 10) is a legal advice telephone service available for children and young persons under 18 years old. The Hotline is open each weekday from 9.00am to midnight and 24 hours public holidays and from Friday 9.00am through to Sunday. This service is increasingly important in light of the decision of Dowd J that was discussed in this chapter in the section regarding "admissibility of statements to the police". With the client's consent, details of the advice that was given the to child could be sought from the Children's Legal Service, Legal Aid Commission of NSW.