

Incidental matters and ancillary orders in Children's criminal matters

1. INTRODUCTION

This paper will address the following incidental matters and ancillary orders that are common and topical in the Children's Court criminal jurisdiction:

1. Orders under the *Crimes (Domestic and Personal Violence) Act 2007*.
2. The inconsistency between the *Criminal Records Act 1991* and section 14 *Children (Criminal Proceedings) Act 1987*.
3. Waiving the compensation levy under the *Victim Support and Rehabilitation Act 1996*.
4. Destruction of fingerprints, photographs etc under section 38 *Children (Criminal Proceedings) Act 1987*.

Another very important consideration is the "Sex Offender Register" and the application of the *Child Protection (Offender Registration) Act 2001*. Unfortunately, this talk is not long enough to include this topic so I have attached for your reference a recent paper which addresses Offender Registration.

2. RECORDING CONVICTIONS

There appears to be a significant inconsistency between the provision of section 14 of the *Children (Criminal Proceedings) Act 1987* and the provisions of the *Criminal Records Act 1991*.

Convictions and section 14 Children (Criminal Proceedings) Act 1987

Section 14 of the *Children (Criminal Proceedings) Act 1987* provides:

14 Recording of conviction

(1) Without limiting any other power of a court to deal with a child who has pleaded guilty to, or has been found guilty of, an offence, a court:

- (a) shall not, in respect of any offence, proceed to, or record such a finding as, a conviction in relation to a child who is under the age of 16 years, and
- (b) may, in respect of an offence which is disposed of summarily, refuse to proceed to, or record such a finding as, a conviction in relation to a child who is of or above the age of 16 years.

(2) Subsection (1) does not limit any power of a court to proceed to, or record such a finding as, a conviction in respect of a child who is charged with an indictable offence that is not disposed of summarily.

Convictions and the Criminal Records Act 1991

Somewhat contrary to section 14 *Children (Criminal Proceedings) Act 1987*, section 5 of the *Criminal Records Act 1991* provides that a finding that an offence has been proved, or that a person is guilty, in circumstances where a conviction is not recorded **is** a conviction for the purposes of this Act:

5 Findings and orders treated as convictions for the purposes of this Act

The following findings or orders of a court are treated as convictions for the purposes of this Act:

- (a) a finding that an offence has been proved, or that a person is guilty of an offence, without proceeding to a conviction,
- (b) a finding that an offence has been proved, or that a person is guilty of an offence, and the discharging of, or the making of an order releasing, the offender conditionally on entering into a recognizance to be of good behaviour for a specified period or on other conditions determined by the court,
- (c) in the case of the Children's Court, an order under section 33 of the *Children (Criminal Proceedings) Act 1987*, other than an order dismissing a charge.

The conviction is considered a conviction until the conviction has been spent.

When is a conviction spent?

Section 8 *Criminal Records Act 1991* outlines when a conviction is spent:

8 When is a conviction spent?

- (1) A conviction is spent on completion of the relevant crime-free period, except as provided by this section.
- (2) A finding that an offence has been proved, or that a person is guilty of an offence, without proceeding to a conviction is spent immediately after the finding is made.
- (3) An order of the Children's Court dismissing a charge and administering a caution is spent immediately after the caution is administered.
- (4) A finding that an offence has been proved, or that a person is guilty of an offence, and:
 - (a) the discharging of, or the making of an order releasing, the offender conditionally on entering into a good behaviour bond for a specified period, on participating in an intervention program or on other conditions determined by the court, or
 - (b) the releasing of the offender on probation on such conditions as the court may determine, for such period of time as it thinks fit,is spent on satisfactory completion of the period or satisfactory compliance with the program (including any intervention plan arising out of the program) or conditions, as the case may require.
- (5) A conviction in respect of an offence of a kind which has ceased, by operation of law, to be an offence is spent immediately the offence ceased to be an offence, if the offence is prescribed by the regulations to be an offence to which this subsection applies.
- (6) A conviction which is spent is not revived by a subsequent conviction.
- (7) A reference in subsection (4) (a) (as substituted by the *Crimes Legislation Amendment (Criminal Justice Interventions) Act 2002*) to a good behaviour bond includes a reference to a recognizance to be of good behaviour made before the commencement of the *Crimes (Sentencing Procedure) Act 1999*.

Relevantly, a conviction is spent:

- At the completion of the crime-free period.

The definition of the “crime-free period” is outlined in section 10 *Criminal Records Act 1991* as:

10 What is the crime-free period for orders of the Children’s Court?

(1) The crime-free period in the case of an order of the Children’s Court under section 33 of the *Children (Criminal Proceedings) Act 1987* (other than a finding or order referred to in section 8 (2) or (3) of this Act) in respect of a person is any period of not less than 3 consecutive years after the date of the order during which:

- (a) the person has not been subject to a control order, and
- (b) the person has not been convicted of an offence punishable by imprisonment, and
- (c) the person has not been in prison because of a conviction for any offence and has not been unlawfully at large.

(2) The crime-free period may commence before the date of commencement of section 7.

- Immediately upon the court not recording a conviction [after a finding or plea of guilty].
- Upon the offence being dismissed by way of a 33(1)(a) *Children (Criminal Proceedings) Act 1987* dismissal with caution.
- At the expiration of a bond/ probation/ completion of courses/ programs.
- If the offence is abolished, at that time.

Why is it important that a conviction be spent?

The most beneficial consequence of a conviction becoming spent is that the person is not required to disclose for any purpose information concerning the spent conviction: section 12 *Criminal Records Act 1991*.

Unfortunately, there are exemptions to this provision. The exception is outlined in section 15 *Criminal Records Act 1991* and relates to employment in certain occupations:

15 Employment in certain occupations

(1) Section 12 does not apply in relation to an application by a person for appointment or employment as a judge, magistrate, justice of the peace, police officer, prison officer, teacher, teachers aide or a provider of child care services under Part 3 of the *Children (Care and Protection) Act 1987*.

(1A) Section 12 does not apply in relation to an application by a person for employment in child-related employment within the meaning of Part 7 of the *Commission for Children and Young People Act 1998*.

(2) Section 12 does not apply in relation to a conviction of a person for arson or attempted arson if the person seeks to be appointed or employed in fire fighting or fire prevention.

Convictions that cannot be spent

Despite section 8 *Criminal Records Act 1991*, not all convictions are capable of becoming spent. Section 7 of the *Criminal Records Act 1991* provides that

all convictions are capable of becoming spent unless the conviction falls within one of the exceptions:

7 Which convictions are capable of becoming spent?

(1) All convictions are capable of becoming spent in accordance with this Act, except the following:

- (a) convictions for which a prison sentence of more than 6 months has been imposed,
- (b) convictions for sexual offences,
- (c) convictions imposed against bodies corporate,
- (d) convictions prescribed by the regulations.

(2) A conviction may become spent in accordance with this Act whether it is a conviction for an offence against a law of New South Wales or a conviction for an offence against any other law.

(3) A conviction may become spent in accordance with this Act whether it is a conviction imposed before, on or after the date of commencement of this section.

(4) In this section:

"prison sentence" does not include a sentence by way of periodic detention or the detaining of a person under a control order.

"sexual offences" means the following offences:

- (a) the offences under sections 61B-61F, 65A-66D, 66F, 73, 74, 78A, 78B, 78H, 78I, 78K, 78L, 78N, 78O, 78Q, 79, 80, 91A, 91B and 91D-91G of the *Crimes Act 1900*,
- (b) from the date of commencement of Schedule 1 (3) to the *Crimes (Amendment) Act 1989*, the offences under sections 61I-61P of the *Crimes Act 1900*,
- (c) from the date of commencement of Schedule 1 (6) to the *Crimes (Amendment) Act 1989*, the offence under section 80A of the *Crimes Act 1900*,
- (d) the offence under section 5 of the *Summary Offences Act 1988*,
- (e) an offence (such as an offence under section 37 or 112 of the *Crimes Act 1900*) which includes the commission of, or an intention to commit, an offence referred to in paragraph (a), (b), (c) or (d),
- (f) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in paragraph (a), (b), (c), (d) or (e),
- (g) an offence committed:
 - (i) before the date of commencement of this section against a law of New South Wales or a law of a place outside New South Wales, or
 - (ii) after the date of commencement of this section against a law of a place outside New South Wales,
 which constituted or constitutes an offence of a similar nature to an offence referred to in paragraph (a), (b), (c), (d), (e) or (f),
- (h) an offence prescribed by the regulations as a sexual offence for the purposes of this section.

Importantly, the reference to a "prison sentence" in 7(1)(a) does not include control order under section 33(1)(g) *Children (Criminal Proceedings) Act 1987*. The exemption which is most common in the Children's Court is the category of sexual offences. Because sexual offences cannot be spent, it is these offences that will be most problematic for young persons. Following is a summary table of sexual offences that can not be spent.

Legislation	Offence description
61B-61F <i>Crimes Act</i>	Repealed offences
61I-P <i>Crimes Act</i>	Sexual assault, aggravated sexual assault, aggravated sexual assault in company, assault with intent to have sexual intercourse, indecent assault, aggravated indecent assault, act of indecency, aggravated act of indecency, attempt of these offences.
65A <i>Crimes Act</i>	Sexual intercourse procured by intimidation, coercion, non violent threats

66A <i>Crimes Act</i>	Sexual intercourse child <10yo
66B <i>Crimes Act</i>	Attempting, or assaulting w/i to have sexual intercourse child <10yo
66C <i>Crimes Act</i>	Sexual intercourse – child 10-16 yo
66D <i>Crimes Act</i>	Attempting or assaulting w/i to have sexual intercourse child 10-16
66F <i>Crimes Act</i>	Sexual intercourse – intellectual disability
73 <i>Crimes Act</i>	Sexual intercourse – child 16-18 under special care
78A & 78B <i>Crimes Act</i>	Incest & incest attempts
78H, 78I, 78K, 78L, 78N, 78O, 78Q <i>Crimes Act</i>	Repealed offences re: homosexual intercourse
79 & 80 <i>Crimes Act</i>	Bestiality & attempts
80A <i>Crimes Act</i>	Sexual assault by forced self-manipulation
91A & 91B <i>Crimes Act</i>	Various forms of procuring for prostitution
91D-91G <i>Crimes Act</i>	Various forms of promoting, engaging in, benefiting from child prostitution.
5 <i>Summary Offences Act</i>	Obscene exposure
	An offence which includes the commission of or intention to commit one of the above offences
	An attempt, conspiracy or incitement to commit one of the above offences
	Other offences of a similar nature in the circumstances specified in (7)(4)(g) <i>Criminal Records Act</i> 1991, or that is prescribed by the Regulations

The provision in section 14 *Children (Criminal Proceedings) Act* 1987 that prevents a court from recording a conviction, or that allows the court to refuse to record a conviction, seems compromised [at the very least] or pointless in light of the provisions in the *Criminal Records Act* 1991 that deem certain matters convictions and exempt such convictions from becoming spent regardless of whether or not a conviction was recorded.

3. APPREHENDED VIOLENCE ORDERS

The legislative provisions in relation to apprehended violence orders and associated matters are now found in the *Crimes (Domestic and Personal Violence) Act 2007*.

It is worth reading this entire Act as there are some significant variations from the previous legislative provisions. The following are some of the variations which in my recent experience have been raised by the prosecution in the Children's Court.

Compulsory interim apprehended violence orders upon charge for certain offences

Section 40(1) provides that when a person is **charged** with an offence that appears to the court to be a "serious offence", the court **must** make an **interim** order against the defendant for the protection of the person against whom the offence is alleged to have been committed whether or not an application for an order has been made.

Section 40(3) provides that the court need not make the interim order if it is satisfied that it is not required. The section does not provide any guidance as to what factors would assist the court in being so satisfied [however the subsection does provide one example, which is where an apprehended violence order has already been made].

Section 40(5) defines a "serious offence" to mean:

- 40(5) In this section, a "serious offence" means:
- (a) attempted murder, or
 - (b) a domestic violence offence (other than murder or manslaughter), or
 - (c) an offence under, or mentioned in, section 33, 35, 61I, 61J, 61JA, 61K, 61L, 61M, 63, 65, 66A, 66B, 66C, 66D, 66EA or 66F of the *Crimes Act 1900*, or
 - (d) an offence of attempting to commit an offence referred to in paragraph (b) or (c), or
 - (e) an offence under section 13, or
 - (f) an offence under the law of the Commonwealth, another State or a Territory or of another country that is similar to an offence referred to in paragraph (a), (b), (c), (d) or (e).

The lack of guidance in the legislation as to what would satisfy the court that an order is not required is open and ripe for creative application.

Compulsory apprehended violence orders upon a plea or finding of guilt

Section 39(1) of the *Crimes (Domestic and Personal Violence) Act 2007* provides that if a person pleads or is found **guilty** of:

- An offence of stalk/ intimidate with intent to cause fear of physical or mental harm [pursuant to section 13 *Crimes (Domestic and Personal Violence) Act 2007*]; or

- A “domestic violence offence”.

the court **must** make an apprehended violence **order** for the protection of the person against whom the offence was committed whether or not an application for such an order has been made.

Section 37(2) of the *Crimes (Domestic and Personal Violence) Act 2007* provides that the court does not need to make such an order if it is satisfied that the order is not required. The section does not provide any guidance as to what factors would assist the court in being so satisfied [however the subsection does provide one example which is where an apprehended violence order has already been made].

The definition of a “domestic violence offence” has a very broad scope. It is defined in section 11 *Crimes (Domestic and Personal Violence) Act 2007* to mean:

11 Meaning of “domestic violence offence”

In this Act, “domestic violence offence” means a personal violence offence committed by a person against another person with whom the person who commits the offence has or has had a domestic relationship.

Importantly, this section does not require that any order under this section be a final order. It is open for the court to make an interim order under this provision. If the protected person is under 16, and potential “working with children check” problems may arise for your client, one option may be to consider an interim order with the view to the order being dismissed after compliance with the interim order.

Discretionary variations to interim and final orders on a plea or finding of guilt for certain offences

Section 75(1) provides that if a person pleads guilty or is found **guilty** of an offence of stalk/ intimidate with intent to cause fear of physical or mental harm or a domestic violence offence, the court **may** vary a final or interim order for the purpose of providing **greater protection** for the person against whom the offence was committed whether or not an application to vary has been made.

Ancillary property recovery orders

A court or authorised officer may, when making an interim or final apprehended domestic violence order, in circumstances where a young person has left personal property at the premises at which the protected person resides, make an ancillary “property recovery order”. The property recovery order may:

37(2) A property recovery order may do any or all of the following:

(a) direct the person who occupies the premises concerned to allow access to the premises to the person who has left the personal property at the premises (and any police officer or person who is authorised by the order to accompany the person) to enable the removal of the property,

- (b) provide that the access to the premises concerned is to be at a time or times arranged between the occupier of the premises and a police officer (whether or not the order requires the person recovering the property to be accompanied by a police officer),
- (c) require the person who has left the personal property at the premises to be accompanied by a police officer when removing the property from the premises,
- (d) provide that the person who has left the personal property at the premises may be accompanied by any other specified person,
- (e) specify the type or types of property to which the order relates.

It may be useful to seek a specific order under this section in appropriate cases.

4. COMPENSATION LEVIES

Upon conviction for offences that are potentially punishable by imprisonment and that are dealt with in the Supreme Court, District Court, Drug Court, Local Court or Children's Court, the person is liable to pay a levy to the state.

The levy is presently \$30 if the person is convicted in a summary court and \$70 if the person is convicted on indictment or pursuant to a committal.

This levy is in addition to any pecuniary penalty or order for compensation.

When dealing with a person under 18 years of age, the court has the option, either at the time of the conviction or any time afterwards, to direct that the young person be exempt from liability to pay the levy.

The relevant legislation is set out below in sections 78 and 79 of the *Victims Support and Rehabilitation Act 1996* provides:

78 Application of Part

- (1) This Part applies to all offences that are:
 - (a) punishable by imprisonment, whether or not they are also punishable otherwise than by imprisonment, and
 - (b) dealt with by the Supreme Court, the District Court, the Drug Court, a Local Court or the Children's Court.
- (2) This Part does not apply to an offence merely because it is taken into account (as referred to in Division 3 of Part 3 of the *Crimes (Sentencing Procedure) Act 1999*) on the sentence of a person in respect of some other offence, whether or not that other offence is an offence to which this Part applies.

79 Imposition of compensation levy

- (1) A person who is convicted of an offence to which this Part applies is, by virtue of the conviction, liable to pay to the State a levy of:
 - (a) \$70, if the person is convicted on indictment or pursuant to a committal under Division 5 of Part 2 of Chapter 3 of the *Criminal Procedure Act 1986*, or
 - (b) \$30, if the person is convicted otherwise than as referred to in paragraph (a).
- (2) Such a levy is in addition to, and does not form part of, any pecuniary penalty or order for payment of compensation imposed in respect of the same offence.
- (3) A person who is under the age of 18 years is not liable to pay such a levy if the court by which the person is convicted directs, whether when it convicts the person or at any time afterwards, that the person is exempt from liability to pay the levy.
- (4) Any money paid to the State in respect of an offence to which this Part applies is to be applied towards the discharge of such a levy before it is applied to the discharge of any pecuniary penalty or order for payment of compensation imposed in respect of the same offence.

Exempting a young person from the liability for the compensation levy is particularly important for a young person who has been convicted of multiple offences.

Importantly, this legislation provides that any money paid to the State in respect to an offence is to be utilised to discharge the compensation levy prior to discharging any fine, pecuniary penalty or order for compensation etc. In some cases, this will compound the classic problems associated with unpaid fines.

5. **FINGERPRINTS AND PHOTOGRAPHS**

When a Children's Court finds a person not guilty of an offence, or dismisses a matter under section 33(1)(a) *Children (Criminal Proceedings) Act 1987*, the Children's Court **must** order that photographs, finger/ palm prints, and other prescribed records be destroyed.

When the Children's Court deals with a matter by way of one of the other sentencing options in section 33(1)(b)-(g) **and** the Children's Court is of the view that the circumstances of the case justify it doing so, the Children's Court **may** order that photographs, finger/ palm prints, and other prescribed records be destroyed.

The relevant legislation is set out in sections 32 and 38 of the *Children (Criminal Proceedings) Act 1987*:

32 Application

This Division applies to any offence for which proceedings are being dealt with summarily or in respect of which a person has been remitted to the Children's Court under section 20.

38 Destruction of photographs, finger-prints etc

- (1) When, in relation to an offence to which this Division applies, the Children's Court:
 - (a) finds a person not guilty of the offence, or
 - (b) exercises, in respect of a person, the power conferred on it by section 33 (1) (a), the Children's Court shall order that any photographs, finger-prints and palm-prints, and any other prescribed records (other than records of the Children's Court), relating to the offence be destroyed.
- (2) When, in relation to an offence to which this Division applies, the Children's Court:
 - (a) exercises, in respect of a person, the power conferred on it by section 33 (1) (b), (c), (d), (e), (f) or (g), and
 - (b) is of the opinion that the circumstances of the case justify its doing so, the Children's Court may (whether on the application of the person or otherwise) order that any photographs, finger-prints and palm-prints, and any other prescribed records (other than records of the Children's Court), relating to the offence be destroyed.
- (3) If the Children's Court makes an order under subsection (1) or (2) in respect of a person, it shall cause a copy of the order to be given to the person and, if the person is a child, to a person responsible for the child.

When dealing with a matter that is dealt with by one of the sentencing options in section 33(1)(b)-(g) it is important to consider addressing the court as to whether there are any circumstances that could justify the court ordering that

the photographs, finger/ palm prints, and other prescribed records be destroyed.

Importantly, the young person is entitled to a copy of any order made under this provision. It may be prudent to seek a copy of such an order in all matters.

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