# APPLICATIONS UNDER SECTION 31(3) *CHILDREN (CRIMINAL PROCEEDINGS) ACT* AND CHILDREN'S COMMITTALS

The Children's Court has a much wider jurisdiction than the Local Court to hear and determine criminal matters to finality. The majority of criminal offences which children are finalised in the Children's Court.

The group of offences that are not finalised in the Children's Court are:

- Traffic offences for child of licensable age, with certain exceptions (s 28(2) *Children (Criminal Proceedings) Act 1987* (NSW)).
- Serious children's indictable offences (s 28(1)(a) *Children (Criminal Proceedings) Act 1987* (NSW)).
- Indictable offences that are committed from the Children's Court to the District Court (s 31(3) *Children (Criminal Proceedings) Act 1987* (NSW)).

This paper considers two 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).

The emphasis of this paper is on s 31(3) *Children (Criminal Proceedings) Act*.

## 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 (s 28(1)(a) CCPA). In practice, the

overwhelming majority of indictable offences committed by children *are* finalised 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.

However, if the Children's Court is of the opinion (after hearing all the evidence for the prosecution) that the evidence is capable of satisfying a jury beyond a reasonable doubt that the person has committed an indictable offence **and** that the matter may not properly be disposed of in a summary manner, the matter may be transferred to the District Court to be dealt with according to law: s 31(3) CCPA.

## 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, typically 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 is usually 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, usually accompanied by a significant criminal record.

## 3. The nature of section 31(3) proceedings

Proceedings under section 31(3) CCPA are not committal proceedings.

Section 31(3) proceedings are 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.*[1]

Given that the proceedings are summary proceedings 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.[2]

## 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 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.

---

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

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

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

- The offence must be an indictable offence.

- 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 it's 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.

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

  There is no legislative or common law guide as to what factors are relevant to this consideration and as such, there is an open scope as to the factors that the Children's Court can take into account.

  These factors could include:

  - A consideration of the objective seriousness of the facts surrounding the offence.
  - The child's criminal record.
  - All factors relevant to the likely penalty.

  Further assistance on the factors relevant to this consideration can be taken from 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.

  These matters are contained in section 18(1A) CCPA and 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 it's own volition in the absence of any application from the prosecution.

In practice, if a s 31(3) application is to be made by the prosecution, the application is ordinarily made by the ODPP as opposed to the police as the police prosecutor has no right of appearance in the District Court. However, there is no legislative prohibition preventing a police prosecutor making a section 31(3) application.

*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. In the case of a plea of guilty, this would involve the tendering of the police Brief of Evidence. In the case of a plea of not guilty, this would involve the giving of oral evidence (evidence in chief and cross examination).

All of the evidence for the prosecution must have been taken prior to considering section 31(3).

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

*A. In the case of a plea of not guilty*

A section 31(3) consideration on a plea of not guilty would proceed in the following sequence:-

- The prosecutor calls all of the prosecution evidence.
- The prosecution evidence is subject to cross-examination.
- The prosecution close their case.
- The Children's Court considers section 31(3)(b)(i) CCPA, that is, does the prosecution evidence at its highest establishes a prima facie case.
- The Children's Court states an opinion as to whether 31(3)(b)(i) has been satisfied.
- If the Children's Court is *not* satisfied that a prima facie case has been made out, the matter is dismissed.
- If the Children's Court *is* satisfied that a prima facie case has been made out, the Children's Court considers section 31(3)(b)(ii), that is, can be charge be properly disposed of in a summary manner.
- The child's antecedents are usually tendered at this point.
- If the Children's Court is of the opinion that the matter *cannot* be properly disposed of in a summary manner, the matter is committed to

the District Court to be dealt with according to law pursuant to section 61 and 62 CPA.

- If the Children's Court is of the opinion that the matter *can* be properly disposed of in the Children's Court, the summary hearing proceeds in the usual manner (the child's antecedents that were tendered for the purpose of the section 31(3) application should be returned to the prosecutor).

*B. In the case of a plea of guilty*

A section 31(3) consideration for a plea of guilty would proceed in the following sequence:-

- The police statement of facts and/or brief of evidence and the child's antecedents are tendered by the prosecution.
- The Children's Court considers section 31(3)(b)(i) CCPA, that is, does the prosecution evidence at it's highest make out a prima facie case.
- The legal representative for the child would usually concede that the Court would be satisfied that a prima facie case has been made out (given that a plea of guilty was entered to the offence).
- The Children's Court states an opinion as to whether 31(3)(b)(i) has been satisfied.
- If a prima facie case has been established the Children's Court considers whether the matter can be properly disposed of in the Children's Court.
- If the Children's Court determines that the matter *can* be properly disposed of in the Children's Court, the Children's Court proceeds to sentence pursuant to the provisions in section 33 CCPA.
- If the Children's Court determines that the matter cannot be properly disposed of in the Children's Court the matter is committed to the District Court.

## 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.

- 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.

- 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.

  Section 6 CCPA states that:

  > A court, in the exercise of criminal jurisdiction with respect to children, shall have regard to the following principles:
  >
  > (a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them;
  > (b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance;
  > (c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption;
  > (d) that it is desirable, wherever possible, to allow a child to reside in his or her own home; that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind.

- 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

The legislation and law that applies to the committal of offences committed (or alleged to have been committed) by adults also applies to children. Accordingly, the committal procedure, considerations and process for offences committed by children is in many respects the same as for adults.

Whilst the legislation and case law is the same for children and adults, there are some special considerations that should be canvassed when appearing for a child in the committal of a serious children's indictable offence.

This section of the paper does not attempt a general discussion on committal proceedings. A detailed discussion of committals is contained in:

1. The 2004 Edition of the paper by Mark Dennis, barrister, Forbes Chambers (Sydney) titled "Contested Committals: A Defence Perspective".

2. The chapter titled "Aspects of Criminal Procedure: Committals" in the Second Edition of *A Practitioner's Guide to Criminal Law* published by the New South Wales Young Lawyers Criminal Law Committee.

Some of the special considerations that should be borne in mind when appearing in a committal matter for a child 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 Part 10A rights. 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.*

    In many cases it is valuable to explore these issues at the committal stage as it may highlight the weaknesses in the prosecution case and can assist in further negotiations with the ODPP or form the basis of a No Bill application.

    Caution should be exercised, as in other cases, exploration of these issues at committal may serve no purpose but may simply put the prosecution on notice of defences and objections that may be raised by the child at trial and allow the prosecution ample time remedy any deficiency in the prosecution case.

- 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 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 in the current climate, 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 all dealings with your child client and in carriage of your child client's matter, you must be familiar with the Representation Principles for Children that were adopted by the Law Society of New South Wales on behalf of the legal profession. Legal practitioners under the umbrella of the Law Society of New South Wales are bound by these Principles. A copy of the Representation Principles can be obtained directly from the Law Society of New South Wales.

- 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.

- The provisions in the United Nations Convention on the Rights of the Child (UNCROC) should be considered. They are referred to in Prosecution Guideline 21 of the Director's Prosecution Guidelines. Of particular relevance are Articles 3.1 and 40.

Article 3.1 of the UNCROC states:

> *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

The Article refers to the "best interests of the child" as being a *primary* consideration as distinct from the *sole* or *paramount* consideration. In any event, as a *primary* consideration, in the majority of matters the "best interests of the child" dictate that the matter be dealt with in the Children's Court if at all possible and appropriate because:

- The Children's Court is a specialist jurisdiction for dealing with children.

- The Children's Court has special safeguards and protections and a sentencing regime that is tailored in accordance with a unique appreciation of the appropriate exercise of criminal jurisdiction in relation to children.

The concept of the "best interests of the child" distinguishes children's committal from adult committal proceedings.

Secondly, Article 40 of the UNCROC relevantly states:

> *40.1 States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner and consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in this society.*
>
> *40.2 To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:*
>
> *(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:*
>
> > *(iii)* ***To have the matter determined without delay*** *by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interests of the child, in particular, taking into account his or her age or situation, his parents or legal guardians (emphasis added).*

The child's "guarantee" to have the matter determined "without delay" is relevant in at least three important respects.

- The diligence of the prosecution serving the complete brief of evidence without delay and, on the other hand, in the legal representative for the child being adequately prepared and ready to progress the committal/ negotiations without delay (particularly if the child is in custody).

- When the court is considering the date that the matter is to be listed.

- Any committal (especially a contested committal) inherently experiences delay. The child's "guarantee" to have the matter determined without delay can be used as a submission to support any negotiations with the prosecution to keep the offences within the Children's Court, to consent to a section 91 CPA direction etc.

  In our view, the "guarantee" should only be interpreted in a positive light that is favourable to the child, rather than as any encouragement to "waive" committal or not pursue detailed negotiations/contested committals.

If any Children's Court practitioner would like assistance or advice on the issues raised in this paper, you are welcome to contact the authors of this paper – we would be very happy to discuss matters with you and assist with precedent submissions.

Angela Cook
Legal Aid Commission of NSW

angela.cook@legalaid.nsw.gov.au

Lester Fernandez
Legal Aid Commission of NSW

lester.fernandez@legalaid.nsw.gov.au

26 July 2004

# APPENDIX

## WRITTEN SUBMISSIONS IN THE MATTER OF JOHN SMITH

### Dangerous Driving Occasioning Death

## 1. BACKGROUND TO THE MATTER:-

On [date] the child was the driver of a motor vehicle that was involved in an accident which resulted in the death of the passenger.

The child was issued with a Court Attendance Notice (Future CAN) for two offences to appear at the Wyong Children's Court.

In accordance with a police Protocol (the "Singh Protocol"), the police and/ or police prosecutor referred the matter to the Office of the Director of Public Prosecutions ("ODPP") for consideration.

The ODPP determined that they would not seek to make an "election" (or application under section 31(3) *Children (Criminal Proceedings) Act*) ("CCPA") and that the matter would be referred back to the police prosecutor to be dealt with in the Children's Court.

Upon resumption of the matter, the police prosecutor indicated to the court that despite the decision of the ODPP, the police prosecution propose to make an application under section 31(3) CCPA that the matter be transferred to the District Court to be dealt with according to law.

The matters are listed before [court] on [date] for section 31 application/ summary hearing.

## 2. APPLICABLE LAW AND LEGISLATION:-

### 2.1 The Charges:

The child has been charged with the following offences:-

> **Sequence One** - Dangerous driving occasioning death pursuant to section 52A(1)(c) of the *Crimes Act* 1900 (NSW).
>
> A person convicted of this offence is liable to imprisonment for 10 years.
>
> **Sequence Two** - Negligent driving occasioning death pursuant to section 42(1)(a) of the *Road Transport (Safety and Traffic Management) Act* 1999 (NSW).

> The maximum penalty for this offence is 30 penalty units and/ or imprisonment for 18 months. This matter can only be dealt with summarily.

Sequence Two is a back-up charge to Sequence One.

## 2.2 The jurisdiction of the Court

The present charges do **not** fall within the definition of a serious children's indictable offence: see section 3 CCPA.

Accordingly, the Children's Court has jurisdiction to hear and determine the entirety of the proceedings in respect of the offences:[3] section 28(1)(a) CCPA.

However, if the Children's Court is of the opinion (after hearing all the evidence for the prosecution) that the evidence is capable of satisfying a jury beyond a reasonable doubt that the person has committed an indictable offence **and** that the matter may not properly be disposed of in a summary manner, the matters may be committed to the District Court to be dealt with according to law: section 31(3) CCPA.

It is noted that the District Court has the power to deal with the matter "according to law" or pursuant to the Children's Court sentencing regime, or may remit the matter back to the Children's Court: sections 18 and 20 CCPA.

## 2.3 The nature of section 31 proceedings:

Section 31(1) CCPA provides 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.

Section 31 (3) CCPA further provides that:-

> Notwithstanding subsection (1) –
>
> (c) if a person is charged before the Children's Court with an indictable offence ; **and**

[3] It is noted that, if the back-up offence (being a "traffic offence" and the child being of licensable age), was the only offence with which the child was charged, the matter would ordinarily fall within the jurisdiction of the Local Court. However, because the back-up offence arose out of the same circumstances as the other offence for which the child is charged, the Children's Court does have jurisdiction to deal with the matter to finality. In any event, it is noted that the provisions of section 210 *Criminal Procedure Act* 1986 extend a discretion to the Local Court to utilise the sentencing penalties available in section 33 *Children (Criminal Proceedings) Act 1987.* Furthermore, a Local Court could not impose a sentence of imprisonment on a child found guilty of a traffic offence: section 210 *Criminal Procedure Act 1986.*

(d) if the Children's Court states that it is of the opinion, after all the evidence for the prosecution has been taken –

(iii) 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**

(iv) 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 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).

The section 31 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.

Proceedings under section 31(3) CCPA are not committal proceedings. Section 31 proceedings are a summary hearing, 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".*[4]

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.[5]

### 2.4 The child's obligation under the Australian Road Rules:

The child did not have an absolute "right to silence". Australian Road Rule 287(3) required the child to provide the following particulars to the police:-

- The driver's name and address; and
- The name and address of the owner of the driver's vehicle; and
- The vehicle's registration number; and
- Any other information necessary to identify the vehicle.

---

[4] *Shane Coleman v M R Rooney & Anor* Supreme Court of NSW, 15 December 1989, per Sully J.

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

The child complied with this obligation.

### 2.5 Sentencing Principles relating to Children:

The sentencing principles as outlined in section 6 CCPA apply:

> "*The courts must nevertheless have regard to the principles stated in s 6 of the Act to be applicable in every case where criminal jurisdiction is exercised with respect to the persons to whom the Act applies, whatever the nature of the offence".*[6]

Section 6 CCPA provides:

> A court, in exercising criminal jurisdiction with respect to children, shall have regard to the following principles:
>
> (a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them;
> (b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance;
> (c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption;
> (d) that it is desirable wherever possible, to allow a child to reside in his or her own home;
> (e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind.

Generally, when dealing with children, considerations of punishment and general deterrence are given less weight in favour of individualised treatment aimed at rehabilitation. As was held in the Court of Criminal Appeal:

> *The community have a real interest in rehabilitation. The interest to no small extent relates to its own protection … the community interest in respect to its own protection is greater where the offender is young and the chances of rehabilitation for almost all of the offender's adult life, unless he is crushed by the severity in sentence, are high.*[7]

When dealing with children a custodial sentence is only to be imposed as an absolute "last resort". Section 33(2) CCPA provides:

---

[6] *R v WKR* (1993) 32 NSWLR 447.
[7] *R v Webster* Unreported, Court of Criminal Appeal, 15 July 1991.

> The Children's Court shall not deal with a person under subsection (1)(g) unless it is satisfied that it would be **wholly inappropriate** to deal with the person under subsection (1)(a)-(f) (emphasis added).

## 3. THE SECTION 31 TEST:-

This portion of our submissions considers the two limbs of the section 31 test, namely, whether the evidence is capable of satisfying a jury beyond a reasonable doubt that the child committed the offence and whether the charge can be properly disposed of in a summary manner.

### 3.1 Is the evidence capable of satisfying a jury beyond a reasonable doubt that the person has committed an indictable offence?

For the purpose of the current section 31 application before the court, there is no issue taken on behalf of the child with the following:-

- That the child was the driver;
- That there was an impact;
- That the impact occasioned the death of another person.

Issue is taken with the allegation that at the time of the impact, the vehicle was driven by the child in a manner dangerous to another person(s).

The only evidence in the prosecution Brief of Evidence that addresses the quality of the driving and the issue of speed is the section 177 Certificate of Sergeant [name].

There is no other evidence in the police Brief of Evidence that the vehicle was driven by the child in a manner or speed dangerous to other person(s):-

- The statement of the Informant simply examines and describes the relevant particulars of the scene, place of impact, motor vehicle etc. The Informant cannot and does not comment on the manner or speed of driving.

- The statement of Senior Constable [name] does not contain any evidence relevant to the manner or speed of driving.

- The section 177 *Evidence Act* Certificate of Constable [name] states that there was no mechanical defect of the vehicle that could have contributed to the collision but does not address the issue of the manner or speed of driving.

The quality of "dangerous" or even "speed" cannot be inferred from the consequences of the collision:

> *Whilst the immediate result of the driving may afford evidence from which the quality of the driving may be inferred, it is not that result which gives it that quality.*[8]

Furthermore, in the absence of expert evidence, the state of the motor vehicle after the impact cannot infer that the vehicle was driven, at the time of the impact, in a manner or at a speed that was dangerous to other person(s): *R v Saunders* [2002] NSWCCA 362.

For these reasons, the defence submits that the evidence is not capable of satisfying a jury beyond a reasonable doubt that the child committed the offence of driving in a manner dangerous occasioning death. Consequently, the prosecution fail at satisfying the section 31(3)(b)(i) test.

If the above submission is accepted, the argument on the section 31(3) application does not need to proceed further and the charges should be dismissed.

If the court determines that the 31(3)(b)(i) test has been satisfied, consideration then needs to be given to the test in section 31(3)(b)(ii).

### 3.2 Can the charge be properly disposed of in a summary manner?

The determination of whether the matter can be properly disposed of in a summary manner can include a consideration of the following factors:-

- **Objective seriousness of the offence**

Any section 52A *Crimes Act* offence is serious. However, it is the objective seriousness of the alleged offence that must be considered.

In this respect, the prosecution do not allege any aggravating feature of the child's driving. There is no evidence or allegation of any affect of alcohol/ drugs, competitive driving/showing off, erratic/aggressive driving, sleep deprivation, police pursuit, failing to stop or other abandonment of responsibility.

In this context, the matter must fall within the category of lower moral culpability for section 52A(1)(c) offences.

- **Intent of the Legislature and community expectation**

It has been held that:

> *The law, as enacted by parliament, is taken without question by the courts to reflect contemporary "minimal standards of morality and behaviour."*[9]

[8] *R v Saunders* [2002] NSWCCA 362.

In this respect, an analysis of amendments to the legislation is a relevant consideration as to whether the matter can be properly disposed of in a summary manner.

The case law[10] discussing the history of amendments of the offence of culpable drive to dangerous drive and the consequent increase in the maximum penalty that is available at law is noted. More particularly, in *Slattery* it was held that:

> *The action of the Legislature in almost tripling the maximum sentence for a particular type of offence must be taken by the courts as reflecting community standards in relation to the seriousness of those offences, and the courts are required to give effect to the obvious intention of the legislation that the existing sentencing patterns are to move in a sharply upward manner.*[11]

Despite the quote that is outlined above, it was clearly recognised that:

> *Section 52A of the Crimes Act 1900 (NSW) should not be seen in isolation but as one of the measures Parliament has provided to deal with drink/driving.* ***The section calls for a penalty appropriate to the degree of irresponsibility.*** *Here the drinking and driving must be considered in association with the taking of human life which combine to constitute the gravamen of the offence.*[12] (emphasis added).

In any event, this case law can be distinguished from the present matter in at least the following important respects:-

- Whilst each of the cases involved "young offenders" (being aged 18 and 24 years of age), importantly, neither involved an offender that fell within the ambit of the sentencing principles outlined in section 6 CCPA.

Given that each of these offenders were not within the application of the CCPA sentencing principles a different sentence regime and process of consideration applied.

- The facts in each of the cases involved elements of substantial speed, significant affects from alcohol and a prior record of drink driving (and other traffic) offences. The level of moral culpability and degree of irresponsibility in the facts in those cases is vastly different to the allegation in this particular matter.

---

[9] Ibid 4 at page 465.
[10] *R v Justin Gregory Slattery* (1996) 90 A Crim R 519; *R v Michael Patrick MacIntyre* (1988) 38 A Crim R 135.
[11] *R v Justin Gregory Slattery* (1996) 90 A Crim R 519.
[12] *R v Michael Patrick MacIntyre* (1998) 38 A Crim R 135.

The defence submits that the intention of the Legislature and community expectation that should be most appropriately and properly applied in this matter is a consideration of the history of amendments to the definition of a "serious children's indictable offence" ("SCIO") because, in the ordinary instance, it is the definition of a SCIO that determines whether a matter remains within the Children's Court jurisdiction.

The action of the Legislature demonstrated in the amendments to the definition of a SCIO, are an indicator (and reflection of the community standards) as to the matters that should remain within the ordinary exercise of the jurisdiction of the Children's Court.

Amendments to the definition came into effect as recently as February 2003.[13] The amendments reflected the community concern in relation to firearms.

The previously mentioned case law and the further guideline judgments handed down in the decisions of *Jurisic*[14] and *Whyte*[15] all pre-date the most recent amendment to the definition of SCIO. The guideline judgment in *Jurisic* pre-dates the last three amendments to the definition of SCIO.[16]

Had it been the intention of the Legislature (and expectation of the community) for ordinary matters of drive manner dangerous occasioning death (that are alleged to have been committed by children) to be dealt with according to law, the definition of serious children's indictable offence would have been amended accordingly.

The maximum penalty for the 52A(1)(c) offence is ten years. The offence is not a serious children's indictable offence. The matter would ordinarily remain within the Children's Court jurisdiction.

Therefore, the particulars of the matter or any prior criminal/ traffic record of the child would need to exhibit some facts or features that take the matter "out of the ordinary run of cases" for a finding that the matter *"may not be properly disposed of in a summary manner"* as required by section 31(3)(b)(ii) CCPA.

The facts in this matter and the child's prior criminal/ traffic record (the child is not known by way of criminal/ traffic record or court alternatives history) do not exhibit any features that would take the matter out of the usual run of cases for this offence type.

- **The likely penalty**

A consideration of the likely penalty (in the event that the offence is proved beyond a reasonable doubt) and subsequently whether the Children's Court

---

[13] *Crimes Legislation Amendment Act* 2002 No 130, Schedule 2.
[14] *R v Jurisic* (1998) 45 NSWLR 209.
[15] *R v Whyte* [2002] NSWCCA 343.
[16] The last three amendments to the definition of SCIO where operational on February 2003, July 2000, and January 2000.

could impose an appropriate penalty is a relevant consideration as to whether the matter can be properly disposed of in a summary manner.

The case law[17] and sentencing guidelines for the 52A *Crimes Act* offence are noted. The *Jurisic* guideline for a "typical" section 52A offence that was reformulated in *Whyte* can be summarised as follows:

- A custodial sentence will usually be appropriate unless the offender has a low level of moral culpability, as in the case of momentary inattention or misjudgement.

- Where the offender's moral culpability is high, a full time custodial head sentence of less than three years (in the case of death) and two years (in the case of grievous bodily harm) would not generally be appropriate.

- In the case of an aggravated version of the offence, an appropriate increment to reflect the higher maximum penalty, and what will generally be a higher level of moral culpability, is required. Other factors, such as the number of victims, will also require an appropriate increment.

This position was recently confirmed by the Court of Criminal Appeal in the decision of *Dandachli.*[18]

In any event, the *Jurisic* and *Whyte* guidelines are not a binding rule or presumption on either the Children's Court or any Higher Court. They are only to serve as an "indicator", "check", "sounding board", or "guide":

> *"…. This court should take particular care when expressing a guideline judgement to ensure that it does not, as a matter of practical effect, impermissibly confine the exercise of discretion. This involves, in my opinion, ensuring that the observations in the original guideline judgment of Jurisic – that a guideline was only an "indicator" – must be emphasised, albeit reiterated in the language of the 2001 Act as a matter to be "taken into account". A guideline is to be taken into account only as a "check", or "sounding board", or "guide" but not as a "rule" or "presumption".*

We have submitted above that the prosecution have not established the necessary quality of "dangerousness" in the child's driving. However, if it is found that the prosecution have established that the child's driving was "dangerous", we then submit that the quality of "danger" must fall at the low end of the scale considering the level of moral culpability involved. In this

[17] *R v Jurisic* (1998) 45 NSWLR 209 and *R v Whyte* [2002] NSWCCA 343.
[18] [2004] NSWCCA 100.

respect, and when combining the principle that a custodial sentence for a child is only to be imposed as a "last resort", it is the defence submission that the child does not fall within the guideline that requires a full-time custodial sentence.

The Judicial Information Research System ("JIRS") can be considered as an indicator of a likely penalty:

- The JIRS has collated the results of outcomes in the Children's Court of section 52A offences from a sample size of five. From this sample, 80% (four out of the five) received a non-custodial sentence. The one child that received the custodial sentence had a prior record. All child offenders with no prior record received a non-custodial sentence.

- The JIRS statistics for the Higher Courts are difficult to apply to this matter in the sense that the only age group comparison that is available is the age group of less than 21 years. There is no specific age group for offenders of less than 18 years of age that fall within the ambit of the CCPA.

The sample size of pre-*Jurisic* offenders who were less than 21 years of age, had one count, no priors and pleaded of not guilty is just two. However, each of these offenders received a non-custodial sentence.

The sample size for the same category of offender, post-*Jurisic* is twenty-five. From this sample, 40% avoided a full-time custodial sentence.

The following features would mitigate any penalty that would be appropriate in this case:-

- **Subjective considerations:**

Given that the sentencing principles outlined in section 6 CCPA apply, a consideration of the subjective features of the child is relevant to an assessment of the likely penalty to be imposed and, in turn, whether the matter can be properly disposed of in the Children's Court.

Most importantly, the child does not have a criminal record and/or court alternates history. The child does not have a traffic record. The child has not received any traffic infringements.

The child was 17 at the time of the alleged offence. The child will be 18 at the time of the section 31 application.

The child lives with his resides with his mother, father and two sisters (aged 16 and 12). The child is currently at [name] High School doing Year 12 studies for the Higher School Certificate ("HSC").

As a result of the car accident, the child was in hospital for two weeks. The child was first in Intensive Care (two days) then transferred to the High Dependency Unit (four days) and later to the Adolescent Ward. The child was discharged from hospital early because his mother is a nurse. The child's mother took seven weeks leave from work to care for the child. The child was in a wheelchair for seven weeks and then on crutches for a few months.

The child sustained the following injuries:

- Broken leg in five places
- A fractured pelvis
- A ruptured spleen
- Head injury
- Other cuts, grazing, bruising and swelling

The child attends physiotherapy once per week. The child remains under the care of the Orthopaedic Clinic. The child's ability to walk is impaired. The child cannot run.

To assist the child to deal with the tragic circumstances of the accident, the child initially attended counselling on a fortnightly basis with a counsellor from the Brain Trauma Clinic attached to the hospital. The child is now participating in grief counselling with a private counsellor.

- **Extra-curial punishment, loss, detriment and contrition**

In determining what sentence is appropriate, a sentencing court is entitled to take into account any extra-curial punishment, serious loss or detriment that the child has suffered as a result of the offence:

> *A sentencing court, in determining what sentence it should impose on an offender, can properly take into account that the offender has already suffered some serious loss or detriment as a result of having committed the offence …. because the court is required to take into account all material facts and is required to ensure that the punishment the offender receives is what in all the circumstances is an appropriate punishment and not an excessive punishment.*[19]

In *R v Howcher*[20] the CCA recently considered the issue of whether the sufferance/psychological burden of responsibility for the death of a close friend is a factor to be taken into account by a sentencing judge. It was held:

> *Rather is it a case that the offender's relationship with the victim may be some indication of extra curial suffering following from the occurrence …I can accept that suffering or the psychological impact on*

[19] *R v Daetz; R v Wilson* (2003) NSWCCA 216 at paragraph 66.
[20] [2004] NSWCCA 179

> *an offender of what he has done may properly be taken into account by a sentencing judge.*

The child has suffered serious loss and detriment in terms of the severe physical and psychological injuries he sustained as a result of the accident and most importantly, the tragic loss of a close friend (the deceased).

This loss and detriment can be taken into account in at least two ways. Firstly, in the form of extra-curial punishment, loss and detriment suffered by the child as a result of the offence. Secondly, it can be taken into account as an indicator of contrition for the consequences that resulted from the accident.

- **Prevalence of offence amongst young drivers & the principle of general deterrence**

As a general principle[21] when dealing with children, considerations of punishment and general deterrence are given less weight in favour of individualised treatment directed at rehabilitation.

The exceptions to this general principle are when children conduct themselves in the way that adults do[22] and for offences that are regularly committed by children.[23]

Importantly however, the extent of the regard to be paid to general deterrence depends upon the particular circumstances of each case.[24]

The case law referred to in these submissions that have considered the weight to be attributed to general deterrence involve vastly different facts than the particulars in this case. The facts in those cases have each involved what could be described as youthful, irresponsible, careless, showing off, competitive driving that *may* be considered to be prevalent amongst young drivers. Each of the cases involved an abdication of responsibility to a significant level.

The particular facts in this matter do not allege this quality of driving and accordingly, this case can be clearly distinguished. This is a case where general deterrence continues to have less weight than rehabilitation.

- **Determination of the DPP and police prosecution**

The Protocol within the New South Wales Police Service is to refer any alleged offence of drive manner dangerous occasioning death and/or grievous bodily harm to the ODPP for consideration.

In accordance with the Protocol, this matter was referred to the ODPP.

---

[21] *GDP* (1991) 53 A Crim R 112.
[22] *R v Tran* [1999] NSWCCA 109.
[23] Id at 11.
[24] *R v FQ* Unreported, Court of Criminal appeal, 17 June 1998, at page 6.

On [date], the police prosecutor made a submission to the court to the effect that the ODPP had determined not to take carriage of the matter and that the section 31 CCPA election provisions do not apply in this matter.

We understand that the matter was considered by the ODPP and resulted in an "arbitrated decision". This is an extensive consideration and consultation process that essentially means that two Senior Solicitors within the ODPP considered the matter. The matter was then referred for final determination by a Deputy Director. The determination was that the election option in section 31(3) CCPA does not apply to this matter, that the ODPP would not take carriage of the matter and that the matter was to remain with the police prosecutor.

It is conceded at the outset that the police and the police prosecutor are not bound in any strict legal sense by the determination of the ODPP. It is conceded that the police prosecutor is entitled to make a section 31(3) CCPA application. Furthermore, it is conceded that the Children's Court of it's own volition could transfer the matter to the District Court to be dealt with according to law in the absence of any prosecution application.

However, as a matter of practicality, procedural fairness and natural justice the court in it's consideration and determination of the section 31 CCPA application, should give significant weight to the determination of the ODPP.

One of the principal functions and responsibilities of the Director of Public Prosecutions is to institute and conduct, on behalf of the Crown, prosecutions for indictable offences in the Supreme Court and District Court: see section 7 *Director of Public Prosecutions Act* 1986 (NSW).

With respect, a police officer and/ or a police prosecutor has no right of appearance or power to prosecute in the District Court.

It is illogical and impractical for the police prosecutor to seek to have a matter transferred to the District Court for prosecution, when the District Court prosecuting authority (the ODPP) has already made a determination that the matter should remain within the summary jurisdiction of the Children's Court.

When determining the original "arbitrated decision", the ODPP was bound by the "Prosecution Guidelines".[25] If determining how the matter should proceed in the District Court, the ODPP will again be bound by the same Policy and Guidelines and in this respect, the position of the ODPP is unlikely to change.

The provisions of sections 18(2) and 20 CCPA that enable the District Court to exercise the functions of the Children's Court and/ or to remit the matter back to the Children's Court are relevantly noted.

[25] The police are also bound by the ODPP Prosecution Guidelines.

- **International Treaty Obligations - The Best Interests of the Child**

The United Nations Convention on the Rights of the Child ("UNCROC") was signed for Australia on 22 August 1990. In Australia, the UNCROC was ratified on 17 December 1990[26] and entered into force on 16 January 1991.

Since January 1991, compliance with the UNCROC has been an international treaty obligation for Australia.

The court is entitled to have regard to our international obligations when considering whether the matter may be properly disposed of in a summary manner.

In this respect, two Articles of the UNCROC are of particular relevance to this matter.

Firstly, Article 3.1 of the UNCROC states:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

It is conceded that the "best interests of the child" is not the *sole* consideration but rather a *primary* consideration. In this matter, the "best interests of the child" dictate that the remain within the ordinary jurisdiction of the Children's Court because:

- The Children's Court is a specialist jurisdiction for dealing with children.

- The Children's Court has special safeguards and protections and a sentencing regime that is tailored in accordance with a unique appreciation of the appropriate exercise of criminal jurisdiction in relation to children.

Secondly, Article 40 of the UNCROC states:

> 40.1 States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner and consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in this society.

[26] The ratification was subject to a reservation to Article 37 of the Convention.

> 40.2 To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
>
> > (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
> >
> > > (iii) **To have the matter determined without delay** by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interests of the child, in particular, taking into account his or her age or situation, his parents or legal guardians (emphasis added).

If the matter is transferred to the District Court for trial there will be a significant delay in the matter being finalised. In light of the physical, mental and psychological impact of the accident that has been experienced by the child, any such delay should be avoided. Delay in finalisation of the matter would be detrimental and have a significant impact on the child's mental health (anxiety and depression) and to the closure and resolution of the matter that the child is working towards with his grief counsellor.

## 4. CONCLUSION:

The defence firstly submits that the prosecution have not satisfied the section 31(b)(i) test. That is, the evidence is not capable of satisfying a jury beyond a reasonable doubt that the child committed the offence of driving in a manner dangerous occasioning death. The charge should be dismissed on this first basis.

If the court finds that the section 31(b)(i) test has been satisfied the court must consider the section 31(b)(ii) test.

In this consideration, for all of the abovementioned reasons, the defence secondly submit that the court would not be satisfied that the matter could not be properly disposed of in a summary manner. The prosecution application for the matter to be dealt with according to law should be dismissed on this second basis.

**ANGELA COOK**
Solicitor for the Child
Children's Legal Service
Legal Aid Commission of NSW