

CHILDREN'S LEGAL SERVICE CONFERENCE 2013 CHILDREN'S COMMITTALS

The paper seeks to be a practical guide for defence lawyers dealing with children's committal matters in the Children's and District Courts. It will not cover ground that has already been dealt with in other papers but will simply refer to those papers. Many of them are readily available on the internet or from Legal Aid NSW, Children's Legal Service (CLS).

This paper will cover the following topics:

1) Committals Practice and procedure

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- 1.4 The right to silence
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1. COMMITTAL PRACTICE AND PROCEDURE

1.1 Identifying a children's committal matter

The jurisdiction of the Children's Court is governed by the *Children's (Criminal Proceedings) Act 1987* (CCPA), s 28:

- (1) The Children's Court has jurisdiction to hear and determine:*
 - (a) proceedings in respect of any offence (whether indictable or otherwise) other than a serious children's indictable offence, and*
 - (b) committal proceedings in respect of any indictable offence (including a serious children's indictable offence),*
if the offence is alleged to have been committed by a person:
 - (c) who was a child when the offence was committed, and*
 - (d) who was under the age of 21 years when charged before the Children's Court with the offence.*
- (2) Notwithstanding subsection (1), the Children's Court does not have jurisdiction to hear or determine proceedings in respect of a traffic offence that is alleged to have been committed by a person unless:*
 - (a) the offence arose out of the same circumstances as another offence that is alleged to have been committed by the person and in respect of which the person is charged before the Children's Court, or*
 - (b) the person was not, when the offence was allegedly committed, old enough to obtain a licence or permit under the Road Transport (Driver Licensing) Act 1998 or any other applicable Act authorising the person to drive the motor vehicle to which the offence relates.*

In particular, whilst the Children's Court does not have jurisdiction to hear/determine substantive proceedings in relation to an SCIO to finality, it does have the jurisdiction to hear/determine committal proceedings in relation to an SCIO. This paper will deal with those committal matters.

It will also address other matters that may be sent to the higher courts via the operation of s 31(3) or s 31(5) of the CCPA .

There are also some indictable offences which can be dealt with summarily but which will be prosecuted by the Office of the Director of Public Prosecutions (DPP), eg sexual offences involving complainants who are children. This paper will also deal with those matters.

Unlike the adult jurisdiction where strictly indictable offences (and some Table 1 and Table 2 offences) are committed to the District Court, the Children's Court has jurisdiction to deal with all indictable matters summarily, *except for* serious children's indictable offences (SCIO): CCPA, s 31(1).

A SCIO is defined by s 3 CCPA:

serious children's indictable offence" means:

- (a) homicide,*
- (b) an offence punishable by imprisonment for life or for 25 years,*
- (c) an offence arising under section 61J (otherwise than in circumstances referred to in subsection (2) (d) of that section) or 61K of the Crimes Act 1900 (or under section 61B of that Act before the commencement of Schedule 1 (2) to the Crimes (Amendment) Act 1989),*
- (c1) an offence under the Firearms Act 1996 relating to the manufacture or sale of firearms that is punishable by imprisonment for 20 years,*
- (d) the offence of attempting to commit an offence arising under section 61J (otherwise than in circumstances referred to in subsection (2) (d) of that section) or 61K of the Crimes Act 1900 (or under section 61B of that Act before the commencement of Schedule 1 (2) to the Crimes (Amendment) Act 1989), or*
- (e) an indictable offence prescribed by the regulations as a serious children's indictable offence for the purposes of this Act.*

A table of the current SCIOs is attached as Annexure 1. The table lists whether the offence is a prescribed sexual offence¹ (so that s 91(8) *Criminal Procedure Act 1986* applies²) or offences involving violence³ (so that s 93 *Criminal Procedure Act 1986* applies⁴). Part 3 of this paper will examine in greater detail some of the more commonly encountered SCIO.

1.2 Police or DPP carriage

The DPP will take carriage of all SCIO. The DPP may also take carriage of other offences which are related to the SCIO (eg stealing the getaway car used in an armed robbery with dangerous weapon) and/or other offences related to the accused (eg other unrelated non-SCIO robberies). However, if they are taking carriage of summary matters they must obtain written consent from the original prosecuting authority.

As mentioned earlier, the DPP will also take carriage of any sexual offence involving child complainants.

Sometimes, the police will refer indictable offences to the DPP, especially serious indictable offences where there is the prospect that the matter will be sent to a higher court pursuant to s 31 CCPA, eg dangerous driving occasioning death/grievous bodily harm or serious robberies. There may be times where the DPP will not accept a referral. There may also be instances where the DPP will

¹ Defined in s 3 *Criminal Procedure Act 1986*

² See below for further discussion about committal proceedings

³ s 94 *Criminal Procedure Act*.

⁴ See below for further discussion about committal proceedings

take carriage in the District Court and the matter is remitted back to the Children's Court. The DPP may hand the matter back to the police (see ss9, 9A and 10 of the *Director of Public Prosecutions Act 1986* for the legislative basis for the DPP to take over prosecutions and hand back prosecutions. See also DPP Guidelines 10 – Taking over Proceedings).

I have witnessed instances where the police have referred a matter to the DPP who have declined to take carriage. The police have then laid a new charge which is a serious children's indictable offence and referred the matter to the DPP again (see DPP Guideline 8 about the DPP making an election).

On the other hand, there have been instances where the police have laid a SCIO and then sought to withdraw it to replace it with a non-SCIO alternative. However, once the SCIO is laid the DPP have carriage and the police do not make the final decision about whether the SCIO is withdrawn.

The police prosecutors and the DPP have different roles and guidelines and these may affect the way that you deal with your prosecutor (see DPP Guidelines 1, 2 and 3 in relation to the role and duties of the DPP and DPP prosecutor and see DPP Guideline 13 about the relationship between the DPP and police).

The role of the DPP and the role of the police and their relationship should be explained to your client.

1.3 Explaining committals to children

Regardless of who the prosecuting authority is at any stage, particular care should be given to advising clients in all children's committal matters. Committal clients require significantly more advice than other Children's Court clients because they are facing the prospect of being dealt with in a higher court under the adult system (ie according to law). The stakes are much higher.

The attached checklist of general committal advice (Annexure 2) is a guide that may be useful to explain relevant matters to clients. You may wish to add or detract from this checklist; you may wish to provide the advice to your client in one conference or at different times depending on when it is appropriate. You may wish to provide the advice in written form (eg via letter or pamphlet). Legal Aid NSW also have pamphlets "Are you facing a committal?".

The attached flowchart (Annexure 3) may also be useful to illustrate the court process to clients.

If you eventually obtain signed written instructions from your client, you may wish to incorporate into them an acknowledgement by your client that they have been given the above mentioned advice.

Finally clients should also be advised about how long a committal matter might take – ie months rather than days or weeks. They and their families need to be prepared for the "long haul".

1.4 The right to silence

It is always necessary to advise child clients of the meaning and the importance of their right to silence. Of course, this is especially important for committal clients where an admission may make

the difference between the matter being dismissed or being committed for sentence to the District Court/Supreme Court; the difference between being free or going to adult gaol for a very long time with a lifelong criminal record.

Many child committal clients will have had some contact with the Legal Aid Youth Hotline, often at the time of their arrest, but sometimes before or after. It is thus important to understand the general advice that is given by the Hotline. The Hotline's general policy is that we will advise a client to exercise their right to silence if the police inform us that they are a suspect to a committal offence. It is vital to not only give the advice but explain the reason for the advice, eg:

- 1) You are facing very serious charges – the police cannot give you a warning, caution or conference if you make admissions;
- 2) You are the one under arrest and the police have indicated that they going to be charging whether you do an interview or not. If you want to tell your version you should wait to tell your lawyer and the court, not tell it to the police who will use it as evidence against you;
- 3) Anything you say may be used not only against you but potentially against any co-accused and you may be labelled a dog and subpoenaed to give evidence against your friends;
- 4) If you do an interview, it will take at least one hour and by the time they have charged you and refused you police bail, it will be too late to take you to court today.

However, even after the advice and explanation has been given it is not enough to stop there. All too often, despite giving advice to a child to “shut up”, the child nevertheless does an ERISP and makes full admissions. The most common reasons given for ignoring the advice are:

- 1) My support person told me to tell the police the truth
- 2) The police just took me into the room and started the interview
- 3) I wanted to give my explanation – i wasn't involved, I was just the look out.

The first point illustrates that it is important to also speak to support persons (where we have the child's permission to do so) to ensure that:

- They understand their role and that the police have provided them with the sheet “Your Role as a Support Person” . Their role at the police station is to ensure that the child's wishes are respected and that the child is treated fairly. This role can sometimes be different/separate from their role as a parent.
- They understand the advice that we have given – many parents will become supportive of their child exercising their right to silence when faced with the advice that doing an interview may assist the police in locking their kid up for up to 25 years and having a criminal record for life.

With regards to the second common reason why children do interviews, there are many children who are simply taken into the interview room and are somewhat uncertain about the fact that an interview is commencing or simply do not have the courage to say “no” to the police. Some children will say at the start of an interview that they do not wish to do one but the police will continue, saying “out of fairness we will now put the allegations to you”. They then commence to put each and every detail to the child and ask them for comment. Invariably the child will make some comment at some stage which will constitute an admission and may be admissible: see *R v Swaffield* (1998) 192 CLR 159.

The NSW Police Force Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence), as well as Police Circular 05/02, indicate that the police have no power to demand that the child record on tape that they do not wish to do an interview. Thus, we regularly advise children to not go into the ERISP room at all. The police will often still nevertheless insist on making a record that an ERISP was offered and declined. One would think that the custody manager could simply record this fact on the custody management record but all too often the police will say that “as a matter of fairness” they need to put the allegations to the child. Hence, Hotline solicitors speak with the police and inform them of the client’s instructions that they will not be making any comments and will not be saying anything on tape. Where possible we send a fax to the police confirming these instructions. Alternatively, we ask the client to write out such instructions on a piece of paper which they can sign, date and time and pass to the police.

Our Hotline advices about exercising the right to silence have become quite comprehensive. I provide advice which is something along the lines of:

The police will want to do an interview with you and ask you questions and record your answers. This can happen in a number of ways :

- *taking you into a room and recording everything on audio/visual tape;*
- *taping what you say on a hand held recording device;*
- *writing down what you say and getting you to sign it (usually in their notebook);*
- *asking you to do a written statement and sign it;*
- *showing you CCTV or photos and asking you to comment about them;*
- *asking you about conversations that they have had with you before hand (eg when you weren’t with a support person) and getting you to agree that you said things earlier.*

Anything you say to the police whilst you are with your support person may be used against you .

Anything you say to a support person may be used against you.

You should say that your lawyer has told you to not say anything or make any comment. Do not make any written or verbal comment.

Furthermore, it should be explained that the child should not say anything to the police but also not make admissions to:

- 1) Support persons (bearing in mind *JB v Regina* [2012] NSWCCA 12);
- 2) Co-accused;
- 3) Family/friends;
- 4) Teachers, youth workers;
- 5) Other inmates;
- 6) Juvenile Justice officers;
- 7) Department of Family and Community Service officers;
- 8) JIRT;
- 9) Counsellors, psychologists/psychiatrists inter alia.

The only conversations which are protected are those that are had with a lawyer or as part of a religious confession.⁵

Where appropriate, clients should be advised of the possibility of telephone intercepts and listening devices. Some clients (especially those who have charged with sexual offences) may wish to undertake counselling or may be referred to counselling by their family. They need to be advised that a counsellor/psychologist/psychiatrist is a mandatory reporter and also may be subpoenaed by the police. Some children may choose to undertake - or be referred (even by you) - to *generic* counselling, eg where they discuss how they are feeling. They should avoid any conversations relating to the alleged offence or other offences and refrain from making any admissions whatsoever. Even those who attend a counsellor but do not discuss the offence may nevertheless still be at risk of making an admission that they are not even aware of – eg a 12 year may not admit to committing a sexual assault but may make admissions and/or demonstrate that he knew that rape was seriously wrong.

Some may claim that there are advantages for a client to do an interview, including:

- they provide a version at the first available opportunity. If the version is good and they stick to it then it makes them a credible witness;
- The provision of a version may mean that they do not need to give evidence because they have already said everything they need to say.

Each matter must be assessed on its own merits. However, generally, I would still err on the side of caution and advise clients to not do an interview anyway because:

- Until the full brief is served it is often difficult to know what the case against your client is, what questions will be asked and what answers they may give in an interview;
- Child clients are more likely to be vulnerable during police questioning (even with a support person present);
- Currently, no adverse inferences can be drawn by failure to do an interview (but see below).

Form of demand and Concealing serious indictable offences

There are some “exceptions” to the right to silence. The police sometimes obtain admissions by using a “Form of demand” (*Law Enforcement (Powers and Responsibilities) Act 2002* (LEPR), s 14) and/or threatening to charge with conceal serious indictable offence (*Crimes Act 1900*, s 316).

If a police officer reasonably suspects that a vehicle is being, or was, or may have been used in or in connection with an indictable offence, the police may make a formal request to a driver, passenger or owner to disclose who the driver and passengers of the vehicle were at the time of the offence.

An answer to this request (known as a “form of demand”) does not have to provide details beyond the identity of the driver and passengers. However, the provision of this information may itself be self incriminatory. Also, accused who answer the form of demand often go on to engage with further police questioning and end up making further admissions.

⁵ *Evidence Act 1995*, s 127

In *R v Abuquta, Haytham* [2011] NSWDC 12, Nicholson J said (at [10]):

There is a further issue to consider. The offender, particularly once cautioned by police, is not obliged to say anything that might incriminate him in a criminal offence. Section 14 of the Law Enforcement (Powers and Responsibilities) Act is about facilitating the investigation of traffic matters. It is not a back door to forcing those being investigated for serious criminal offences to incriminate themselves. On that basis I would have held the offender had a reasonable excuse for refusing to comply with the demand. In any event that is all moot because the summary offence alleged [ie s 14 LEPR] is to be withdrawn. The point I simply make is there was never any basis for laying the charge in my view.

There is no legislative defence of “reasonable excuse” for failure to comply with a form of demand. However, Nicholson J’s obiter remarks may point to a common law defence. Thus, arguably, a client could be advised to not comply with a form of demand if it would incriminate themselves. Even if you were not comfortable in providing such advice, you could advise a client that the maximum penalty for the summary offence of failure to comply with the form of demand is 50 penalty units or 12 months imprisonment, or both (ss 15, 16, 17), compared with what is likely to be a greater maximum penalty for the suspected indictable offence.

Similarly, the offence of conceal serious indictable offence carries a maximum penalty of 2 years imprisonment. Under *Crimes Act 1900*, s 316 a child has a defence if they have a “reasonable excuse”. Where a child is a suspect themselves, it is a reasonable excuse for them to not speak with the police but choose to exercise their right to silence: *The Queen v Lovegrove and Kennedy* (1983) 33 SASR 332; see also *The Queen v King* (1965) 49 Cr. App. R 140; *The Queen v Lucraft* (1966) 50 Cr. App. R. 296.

Recent changes to the right to silence

The *Evidence Amendment (Evidence of Silence) Bill 2013* made changes to the *Evidence Act*, s 89A that impinges on the right to silence for serious indictable offences. Adverse inferences may be drawn if a defendant fails or refuses to mention a fact that they could reasonably have been expected to mention at the time of official questioning and that they subsequently rely on in their defence.

However, s 89A(5) states that the section does not apply to a defendant who, at the time of the official questioning, is under 18 years of age or is incapable of understanding the general nature and effect of a special caution that must be given. A special caution means a caution that is to the effect that :

- (1) The person does not have to say or do anything but it may harm the person’s defence if the person does not mention when questioned something the person later relies on in court, and
- (2) anything the person does say or do may be used in evidence.

I note that s 89A(5) only applies to a defendant who is under 18 at the time of the official questioning. Thus, even though your client may have allegedly committed the offence as a child, s 89A will still apply if the police question him at any time after he turns 18.

1.5 Bail

Some clients who are charged with a committal matter may have very little chance of obtaining bail and you may advise them to not apply for bail, especially if it is looking likely that the matter will eventually become a custodial sentence.

If you are making a bail application, pay particular care to not make any admissions either in evidence or on submission if no plea is entered. I have seen evidence which was called in a bail hearing that was used later in the trial against the accused.

In the SCIO table, I have noted the currently applicable bail presumptions. *Bail Act 1978*, s 9D applies to many committal clients (see Aaron Tang's paper on Section 9D and various cases about what constitute exceptional circumstances, especially *R v PDR* (NSW Supreme Court, Rothman J, unreported, 1 August 2007) which dealt with a child. See also *R v Gregory William Jacobs* [2008] NSWSC 417 (30 April 2008); *R v Daron John Wright* (NSW Supreme Court, Rothman J, unreported, 7 June 2005); *R v Young* (2006) NSWSC 1499; inter alia).

I note that the *Bail Act 2013* has recently been passed and is due to take effect in 12 month time (after training). The bail presumptions will be replaced with a question about whether the grant of bail will pose an unacceptable risk.

Many committal clients will come before the Children's Court for mention for their committal charge but also for a related AVO application and forensic procedure application. If there is a related AVO application where you ultimately will be consenting to an interim order, it is worthwhile to inform the court of that because it may address any concerns for the safety of the complainant PINOP and thus increase the chances of bail. Similarly, if there is a forensic procedure application (eg for DNA) that will be granted (eg you have no submissions against it), then it may be worthwhile to deal with that application first. Due to the length of time to obtain DNA results from DAL, there will be delays in the service of the brief – a factor which may be used in favour of getting bail.

Advise clients about the restrictions of s 22A of the *Bail Act* and the ability to apply for Supreme Court bail. Note that s 22A may be overcome if there are a change of circumstances, which may include:

- 1) the withdrawal of serious charges (especially those that have a presumption against bail) as a result of negotiations;
- 2) non service of brief items and a prosecution application for an adjournment;
- 3) the provision of a Juvenile Justice Bail Report (which now has to be ordered by the court);
- 4) the provision of a case plan by a Juvenile Justice Officer or other agency working with the child.

1.6 Brief service and adjournments

Section 183 of the *Criminal Procedure Act 1986* states that a brief of evidence must be served upon a plea of not guilty.

Those children who are charged with a SCIO are entitled to a brief and do not need to enter a plea in order to obtain a brief. Thus, the practitioner should simply obtain brief orders rather than enter a

plea of not guilty. If the child subsequently decides to plead guilty, then it is preferable that that is their first plea rather than a change of plea.

Arguably, where a child is charged with a non SCIO offence (eg a indictable offence that may be dealt with summarily, including a “strictly indictable” offence that may be dealt with summarily in the Children’s Court), a plea of not guilty is required before a brief service order will be made.

Contents of a brief

Some police often claim that brief service orders do not include orders for the service of a transcript of the client’s ERISP. Prosecutors often claim that the audio/visual recording has already been served when the client was given a copy after the interview. The practical difficulty with this is that: a) client have sometimes not been given a copy, b) they have lost any copy they were given, and c) you would probably prefer to read the transcript than wade through hours of listening to a recording. You could argue that *Criminal Procedure Act 1986*, s 183 relates to brief service order made upon the plea of not guilty and because the ERISP recording was served *prior* to the plea of not guilty, it does not comply with subsequent brief service orders made *after* the plea of not guilty. Also, if the prosecution seek to rely on a transcript at hearing/trial then they should serve the transcript.

Commonly, the DPP will serve a transcript of the ERISP of any vulnerable witness (eg child witness) but need not serve a copy of the actual audio/visual recording: s 185 *Criminal Procedure Act*, but also see *DPP v SW & Anor* [2009] NSWSC 524, where a magistrate’s decision to order service of the recording was upheld. The recording is usually held by the DPP and/or at the police station/JIRT office and you will have to make arrangements to view it as an exhibit.

Some briefs (especially relating to sexual offences) may also contain sensitive material which the DPP will not release or may only release upon you signing an undertaking to not copy/distribute it and to return it.

Where the DPP are involved in the prosecution of an indictable offence, the police are obliged to disclose to the DPP any relevant information obtained from their investigation that might reasonably be expected to assist the prosecution or the case for the accused⁶. This duty of disclosure is a continuing duty until the prosecution is finalised⁷. Exceptions to this duty apply if the information, document or other thing is subject to a claim for privilege, public interest immunity or statutory immunity.⁸ The police must still inform the DPP of the existence of the information, document or other thing and if the DPP requests the material the police must provide it.⁹

Non service of the brief

Unfortunately, there are often a number of adjournments before the service of a full brief. Whilst there is no legislated case conferencing that applies to committal matters in the Children’s Court, some Children’s Court magistrates consider that case conference can occur during such adjournments.

⁶ s 15A (1), *Director of Public Prosecutions Act 1986*.

⁷ s 15A (2), *Director of Public Prosecutions Act 1986*.

⁸ s 15A (6), *Director of Public Prosecutions Act 1986*.

⁹ s 15A (7), *Director of Public Prosecutions Act 1986*.

There may be instances where you may wish for further adjournments in order to obtain essential brief items or to conduct charge negotiations. At other times, you may wish to proceed to committal quickly, especially if the brief is missing essential elements. If the prosecution realises at a hearing that it does not have sufficient material within its brief, they may make an application for an adjournment and/or an application to waive service requirements. The court will need to balance of the interests of the accused and the public interest in the determination of a serious criminal matter by a hearing on its merits: see *DPP v West* [2000] NSWCA 103, *DPP v Chaouk* [2010] NSWSC 1418 and *DPP v Fungavaka* [2010] NSWSC 917.

If the adjournment is granted, you could apply for costs. The general powers to apply for costs are found in Chapter 4 Pt 2 Div 4 of the *Criminal Procedure Act 1986* and s 118 also specifically allows for costs for adjournments in committal proceedings.

As mentioned above, the non service of brief may also support a bail application.

1.7 Reading the brief

A committal brief should be read with the following factors in mind:

- 1) Does the evidence in the brief support the elements of the offence(s) that need to be proved
- 2) Does the brief reveal other uncharged offences that you need to advise your client about
- 3) Does the brief reveal alternative charges - either more serious or less serious
- 4) What evidence is objectionable
- 5) The strengths and weaknesses of the evidence in the brief
- 6) What the brief reveals about the credibility of witnesses
- 7) What is not in the brief :
 - a) material that is still outstanding that will be served - eg medical certificates or DNA analysis that have been requested but is delayed. Will this material strengthen or weaken the prosecution case and accordingly do you want to wait for it or not. If there is a chance that the prosecution case may be strengthened but not weakened then it may be better to consider making a plea offer before the material is obtained. Expedition of a matter is an appropriate and relevant factor for the DPP to consider.
 - b) material that could be served – eg the brief contains no material rebutting *doli incapax* but once the DPP become aware of this they will be able to readily obtain a statement rebutting *doli* from teachers
 - c) material that they do not intend on serving – eg sexual assault communications
- 8) What the brief may reveal about the attitude of the complainant and officer in charge

As noted above, in some committal briefs there will be exhibits or sensitive evidence that will not be served. This should be viewed at the DPP office or police station. In particular, ERISP of child complainants will be held at DPP or JIRT offices/police stations. Viewing the video footage will not only show any body language but allow you to assess how the child will perform as a witness.

View any CCTV footage rather than just relying on CCTV still photographs. The stills are just the police officer's opinion of the best shots. The actual moving footage may reveal other things; eg the picture may be clearer, there may be the ability to zoom in, it may show your client doing more or less than what is alleged.

View any audio visual recording of identification parade and witness “walk throughs”. The witness will say things on these recordings which may be inconsistent with their statement(s). Sometimes the police fail to serve the audio visual of the identification parade and simply serve the print outs of the parade, selected photo and ID parade questionnaire. You are entitled to receive the audio visual recording.

Check that there is evidence that shows a chain of custody of exhibits.

Where there is fingerprint or DNA evidence, check how the police obtained those fingerprints/DNA and whether there are admissibility issues. Similarly, check where the police may have obtained any photographs of your child for a ID parade.

Check the admissibility of interviews: was the child cautioned? Was there an appropriate support person? Was the Hotline offered? What was the hotline advice? Were the detention after arrest provisions of the LEPR complied with?

Not only in your charge negotiations (see below), but also whilst you are reading the brief and analysing the case against your client, you could also bear in mind the possible attitudes of the parties that you may eventually need to persuade:

- 1) the complainant or complainant’s family;
- 2) the officer in charge;
- 3) the police prosecutor or DPP solicitor with carriage;
- 4) the DPP chain of command (eg Director’s Chambers);
- 5) a Children’s Court magistrate at committal;
- 6) the Arraignment’s Crown;
- 7) the Trial Crown Prosecutor;
- 8) a District/Supreme Court judge and/or jury.

For instance, what might look arguable on paper and maybe even form a doubt in a magistrate’s mind may not be practically very persuasive before a jury.

1.8 Taking instructions

There is still a divergence of opinion amongst practitioners about when exactly is the most appropriate time to obtain instructions from a child who is facing a committal matter.

Some lawyers like to obtain a full brief before obtaining instructions so that the child is aware of all the evidence against them and their instructions can be geared towards responding to that evidence. Sometimes you do not want to take instructions at all if the strongest case can be run purely by putting the Crown to proof and a client’s instructions could restrict your ability to do so because you are bound by those instructions – eg the evidence clearly points to your client being present but not involved in a robbery, but your client instructs that he was in Queensland at the time.

However, there is also much to be said for obtaining some form of instructions early on, particularly if it reveals evidence that needs to be preserved (eg CCTV that needs to be subpoenaed before it is wiped, witnesses who are still contactable, photos/views that need to be taken). Children’s

memories are also particularly fragile. Given that there are often lengthy delays in committal matters, if you wait until the service of a full brief before taking instructions, you may find that the client does not remember much at all, especially if they were also affected by mental health, drugs or alcohol at the time of the alleged offence.

Given the new s 89A of the *Evidence Act*, it is sometimes helpful to have clients provide instructions earlier rather than later so that they are not accused of recent invention when they give evidence in court. One way to have the best of both worlds (taking instructions early AND later) is to have your client write down their version in a letter to you which they sign and date and seal in an envelope marked “confidential – legal professional privilege applies”. They have made an early record, it can assist help to refresh their memories later, but you do not have to take receipt of the letter or open it until you are ready.

Ultimately, I do not think there is a “one size fits all” answer to the question of when to take instructions. Each case will need to be considered carefully and a forensic/tactical decision made

1.9 Defence investigations/evidence

Whether a matter can be resolved before or at committal or whether it is a matter that will have to go to a higher court, it is still helpful to have done more preparation at the committal stage than just reading the brief and relying on the police investigation. As a result of analysing the brief, your client’s instructions, and speaking with witnesses etc, you may wish to conduct your own investigations and/or prepare a defence case. These inquiries may assist you in negotiations, during committal proceedings or at an eventual trial or sentence. Even if the matter will eventually become a trial, a lot of groundwork can be done by the committals lawyer making timely inquiries.

Requisitions

Consider whether information can be obtained via requisitions. Sometimes you can get information from requisition and not have to ask for a committal hearing.

Also, it is sometimes preferable to obtain information from the DPP via requisitions rather than having to subpoena it. It costs nothing and it may focus the DPP’s attention on a relevant point you wish to raise. It may be preferable to make your request to the DPP rather than the officer in charge because you may not wish to disclose certain defences to the officer in charge who you may need to cross examine at a later stage. Also, the DPP have more clear guidelines about disclosure.

The DPP have a continuing duty of disclosure. DPP Guideline 18 states:

Prosecutors are under a continuing obligation to make full disclosure to the accused in a timely manner of all material known to the prosecutor which can be seen on a sensible appraisal by the prosecution:

- *to be relevant or possibly relevant to an issue in the case*
- *to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use and/or*
- *to hold out a real as opposed to fanciful prospect of providing a lead to evidence which goes to either of the previous two situations.*

The Guideline goes on to refer to the substance of s 15A of the *Director of Public Prosecutions Act 1986* referred to earlier – the duty of police to disclose matters to the DPP.

If you make a requisition to the DPP for material that fits within any of the above mentioned three categories mentioned in Guideline 18, the DPP should provide the material if they have it and should attempt to obtain the material to provide if they do not. They may request material that the police possess and the police will have to provide the material upon request, or they may request the police to conduct investigations to obtain the material – eg take statements, obtain CCTV, expert reports. You may not have been able to obtain this material via your own investigations or requests – eg shopping centres will not provide you with CCTV but will readily provide it to the police.

One advantage of requisitions over subpoenas is that the wording of Guideline 18 is quite broad and you may obtain material via requisitions that a court might consider has no forensic purpose justifying a subpoena. On the other hand, subpoenas are legally enforceable whilst requisitions are not, and subpoenas also set a deadline for production.

In my experience, I have found that most DPP solicitors will do their best to answer requisitions. However, recently, some DPP solicitors have argued about whether the defence are entitled to all DPP conference notes with witnesses. There have been instances where the DPP have sought to argue legal professional privilege. I believe that this cannot apply because the DPP's witnesses are not their "client". Fortunately (or perhaps unfortunately), in the instances where the DPP were arguing legal professional privilege, the matter was resolved via negotiated agreement without the need for a judicial ruling.

Subpoenas

Of course, before you issue a subpoena you should consider whether it will assist your case and the risk that it may harm your case. Material produced on a subpoena is produced to the court and you may or may not be granted access. The police /DPP will be granted access if you are.

You also have to know who to issue the subpoena to (eg Facebook is based overseas), what to include in its schedule and when you want the material returnable (eg do you want it returnable on a mention date that you share with the co-accused if you do not want the co-accused to know about your subpoena?).

Note that sexual assault communications privilege also presents several hurdles to issuing subpoenas in sex matters (see *Sexual Assault Communications Privilege: keeps counselling confidential* by Rosie Lambert and *Sexual Assault – Defendants and Victims* by Jason Watts, 30 July 2012 - contact rosemarie.lambert@legalaid.nsw.gov.au of Legal Aid's Sexual Assault Communications Privilege unit with any questions).

Speaking with witnesses

There is no property in witnesses so you may speak with prosecution witnesses. However, care should always be taken to ensure that you are compliant with Law Society Representation Principles and that you do not become a witness in your own case.

Of course, any defence witnesses should be conferenced before being called or referred to the police/DPP. Needless to say, they should be spoken to independently – other potential witnesses and your client should not be present. A proof of evidence should be taken, signed and dated.

All potential witnesses should be told not to discuss the case with each other.

Views

Views provide insights into the layout of a scene, including distances and lighting. Take a camera with you so that you may take photos or videos. These may assist you in remembering the scene and/or may become evidence. However, be aware that if the DPP and/or court do not simply accept that your photos/video represent the scene then the maker of the photos/video may need to be called to give evidence. Thus, unless another lawyer (eg counsel) is going to run the committal hearing/trial where the evidence is called, it is useful to have someone else take the photos/video so that you do not become a witness in your own case.

Some lawyers think that it is helpful to leave views until close to the trial and for the instructing solicitor and counsel to do the view so that they have the scene fresh in their mind and they know what photos to take etc. One downside to this is that there is frequently a lengthy delay between the time of the alleged incident and trial, and the scene may have changed significantly during that time.

Other sources of information

Other helpful sources of information may include:

- a) Obtaining Hotline advices – simply contact the Children’s Legal Service providing your client’s authority to release the advice(s);
- b) Using private investigators – eg to find missing witnesses;
- c) Looking at Facebook/Twitter etc pages of witnesses;
- d) Obtaining your own expert reports.

1.10 Assistance to authorities

Where applicable, your client should be advised about the pros and cons of providing assistance to authorities. They should be referred to the discount in sentence that is provided under *Crimes (Sentencing Procedure) Act 1999*, s 23 and the criteria for the assessment of that discount listed in s 23(2). Some of the pros and cons of providing assistance may include:

Pros:

- A significant discount may be given by reason of the disclosure of otherwise unknown guilt which will vary depending upon the likelihood of guilt being disclosed and established: *R v Ellis* (1986) 6 NSWLR 603 and *Heard v R* (1987) 11 NSWLR 46;
- Even where the parents of the child have dobbed the child in, this can lead to a reduction in sentence. The court should not deter parents from reporting of crime and the responsible

actions of the parents assist in assessing the child's prospects for rehabilitation: *R v Barlow* [2010] NSWCCA 215;

- The client may receive a discount in their sentence for past assistance and future assistance (eg agreeing to provide evidence). It should be especially clear what the discount is for any future assistance;
- The discount is given as an incentive for others to assist the police but also because such assistance may result in hardship in custody: *R v Perez-Vargas* (1987) 8 NSWLR 559;
- The combined discount for the plea of guilty and assistance should not normally exceed 50%. A discount over 50% should be reserved for exceptional cases: *SZ v R* [2007] NSWCCA and see also *Lewins v R* [2007] NSWCCA;
- The assistance does not have to relate to the offence for which they are being sentenced;
- Police may write an affidavit of assistance which is presented to the court in a sealed envelope: see *R v Cartwright* (1989) 17 NSWLR 243. The Children's Court is a closed court so privacy is doubly ensured. Nevertheless, you could refer to the assistance by just referring to the affidavit or speaking about "section 23" rather than mentioning the word "assistance" (see DPP Guideline 28 about affidavits of assistance);
- In some rare cases, you may be able to negotiate with the DPP for the assistance to lead to the DPP providing indemnity to prosecution (see DPP Guideline 17);
- Alternatively, the police (Superintendent or above) or the DPP (the Director's Chambers) can authorise the taking of an induced statement – ie the statement is taken on the basis that information in the statement is not to be used against the person making the statement (see Guideline 15).

Cons:

- If found out, the client may be labelled "a dog" – this may jeopardise their or their family's safety;
- The client may be subpoenaed to give evidence in court;
- If they do not provide evidence in court they may be resentenced if they had received a discounted sentence for the future assistance;
- If they have provided a false statement or lie in court they could be charged with various offences including perjury.

If a client is prepared to provide assistance, this fact can also be used in charge negotiations. The DPP may more readily accept your plea offer if it involves your child being sentenced expeditiously and then giving evidence against co-accused.

1.11 Giving Evidence

Legal Aid NSW have a "kit" for lawyers who are called upon to give independent advice to witnesses who are at court to give evidence: *Advising Persons who are at court to give evidence*. If your child client is called upon to give evidence, you may be asked to provide such advice. Where appropriate, you may need to provide advice about s 128 *Evidence Act* certificates.

1.12 Withdrawal of charges

DPP Guideline 4 relates to the decision to prosecute. Sometimes, you may wish to make representations for the withdrawal of all charges – a "no bill" application. You should make a no bill

application with caution. You do not want to be revealing too much of your hand (ie defences), especially if the prosecution are able to fix the gaps in their case. Also, if you do not have a strong basis for a “no bill”, and a Crown Prosecution and/or Director’s Chambers rejects it, that decision may bind prosecutors considering any future negotiations. For example, if you ask for a no bill and the Director’s Chamber clearly states that the charge should remain as a SCIO, the DPP may be restricted from accepting a guilty plea to a lesser charge.

On the other hand, there may be instances where it is *you* who are opposing the DPP/police withdrawing a matter. If the prosecutor withdraws a charge then your client is not acquitted of the matter and the prosecution may be entitled to lay the charge again later, especially after they have fixed up their case or garnered a stronger case. Depending on the circumstances in which they seek to withdraw a charge, there may be an argument about whether there is an abuse of process. There may also be an argument about whether the prosecution require leave before they can withdraw a charge. In *Police v DG* [2012] NSWChC 18, the Children’s Court held that leave was not required.

1.13 Charge negotiations¹⁰

It is quite often the case that matters can be reasonably negotiated.

When to negotiate?

The timing with which negotiations commence should be judged on a case by case basis. There is no hard and fast rule. It will depend on your instructions to do so and the nature of the prosecution case.

In some cases, it may be appropriate to commence negotiations as soon as the initial client conference has taken place. An example scenario is where the Police Facts suggest that:

- Identification is not in issue;
- There is clearly a more appropriate and accurate non-SCIO charge to be preferred;
- Where the weapon used is not in issue (eg the child is charged with a dangerous weapon, but it is clearly an offensive weapon);
- Where injuries are not in issue (eg clearly not gbh).

In other instances, it may be prudent to wait for the prosecution brief and write representations in light of the brief and the young person's instructions on the brief. In most cases, this would be the best approach.

However, as mentioned above, be alert to what is contained in the brief, what is not in the brief or what may be coming – will the prosecution case get stronger or weaker. Accordingly, will it be better to make a plea offer now or later, always bearing in mind the public interest in expediting a matter (see DPP Guideline 5).

How to negotiate?

¹⁰ See Nicholas Cowdery AM QC *Negotiating with the DPP*.

DPP Guideline 20 relates to Charge negotiations and agreement , Agreed Facts and Form 1s. Also refer to:

- DPP Guideline 4 – Decision to prosecute
- DPP Guideline 5 – expedition
- DPP Guideline 6 – settling charges
- DPP Guideline 7 – discontinuing prosecution
- DPP Guideline 19 - consulting with child witnesses
- DPP Guideline 21 – Young Offenders

During negotiations, the DPP must consult with the police and their complainant (or complainant's family, especially if the complainant is a child).

The DPP should resolve charges as well as Facts but I find that a two stage process works best – ie negotiate about the charge first (indicating that if your plea offer is accepted you can proceed to negotiate Facts). If you ask for withdrawal of charges as well as amendments to Facts at the same time, then it can become too complex, unwieldy and unpalatable for the DPP and those that they must consult.

Negotiations can occur in a number of fashions – via email, letter, fax, face to face, over the phone. In all scenarios, it is important to keep documented records of all stages of the negotiation process, both for reference and comprehensive file management: see *Loury v R* [2010] NSWCCA 158; *Korbarah v R* [2010] NSWCCA 176. Your notes and/or correspondence may eventually be tendered in court if a questions arise about the timing of a plea offer that affects the discount on sentence.

In your representations, you should state what you want . You may state the reason (supported by evidence or relevant law) or you may chose to not provide all the reasons if you do not wish to reveal defences. You may wish to reference some of the Guidelines referred to above (especially Guidelines 5 and 21). You may refer to your client's subjectives or lack of criminal record if that is helpful. If you are making a plea offer you need to satisfy the DPP that the offence that you are offering (in conjunction with Facts) covers the objective criminality of the matter.

If your client is prepared to provide assistance this can also form part of your negotiations.

Negotiating a SCIO to a non-SCIO

Successfully negotiating a SCIO to a non-SCIO essentially means that a young person's matter/s can be dealt with to finality in the Children's Court (subject to any CCPA s 31 application from the prosecution) – see below.

Sometimes your negotiations will be on the basis that your client will plead guilty to the lesser charge if the DPP withdraw the SCIO. At other times, the matter may be completely defended. It is still worthwhile to seek to withdraw the SCIO. Even if negotiations are successful and the DPP choose to proceed with the non-SCIO, it does not mean that the young person has forgone his/her

right to defend the non-SCIO charge and that can proceed to a defended hearing in the Children's Court. The DPP may remain in the hearing or may refer it back to the police prosecutors.

Minimising the number of charges

This course of negotiation is not dissimilar to negotiation of non-SCIO charges, where the prosecution evidence only substantiates some of the charges and not all. See also the discussion of duplicity below.

Remember to ensure that the facts accurately reflect charges negotiated.

Using Form 1s and s 166 certificates

Wherever possible ask for offences to be taken into account on a "Form 1". A matter may be placed on a Form 1 even for a Children's Court sentence. Section 33 of the *Crimes (Sentencing Procedure) Act 1999* provides for the taking account of matters on a Form 1:

33 Outstanding charges may be taken into account

- (1) When dealing with the offender for the principal offence, the court is to ask the offender whether the offender wants the court to take any further offences into account in dealing with the offender for the principal offence.*
- (2) The court may take a further offence into account in dealing with the offender for the principal offence:*
 - (a) if the offender:*
 - i. admits guilt to the further offence, and*
 - ii. indicates that the offender wants the court to take the further offence into account in dealing with the offender for the principal offence, and*
 - (b) if, in all of the circumstances, the court considers it appropriate to do so.*

There are some who take the view that a matter cannot be placed on a Form 1 if the accused has already pleaded guilty to it. The reasoning behind this is that the court does not impose a conviction for a matter taken into account on a Form 1 (see s 34(1)), but arguably an accused is already "convicted" of the offence if they have pleaded guilty (ie conviction follows the plea of guilty). Also, s 33(2)(a)(i) refers to the offender "admitting" guilt as opposed to "pleading" guilty. The distinction is the same as the distinction between "pleading guilty" and "admitting" an offence under the *Young Offenders Act*. If the court does not accept the matter on a Form 1, the offender could arguably plead not guilty to it.

Of course, the benefits of dealing with matters on a Form 1 are:

- 1) there is no conviction;
- 2) there will be no accumulation of sentences;
- 3) matters are dealt with together.

The DPP do not place traffic matters on a Form 1 because the fact that no conviction is recorded means that disqualification periods do not apply.

Note that despite any agreement between the Crown and defence, the court has a discretion on whether to accept the matters on a Form 1 as appropriate. Guidance is provided by the guideline

judgment *Attorney General 's Application Under s37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002* [2002] NSWCCA 518.

Also, *Crimes (Sentencing Procedure) Act 1999*, s 35A provides:

(2) A court must not take into account offences specified in a list of additional charges under section 32 in relation to an offence, or any statement of agreed facts, that was the subject of charge negotiations unless the prosecutor has filed a certificate with the court verifying that:

- a) the requisite consultation has taken place or, if consultation has not taken place, the reasons why it has not occurred, and*
- b) any statement of agreed facts arising from the negotiations tendered to the court constitutes a fair and accurate account of the objective criminality of the offender having regard to the relevant and provable facts or has otherwise been settled in accordance with the applicable prosecution guidelines.*

If a matter is committed to the District Court (either for sentence or trial), other back-up offences or related charges may also be sent up to the District Court on a s 166 certificate: *Criminal Procedure Act 1986*, s 166. Section 167 provides for how these matters are dealt with in the District Court. Negotiations can be had with the DPP about what matters to include on a s 166 certificate, which ones may be placed on a Form 1, and which matters may be withdrawn.

1.14 Pleading guilty

A guilty plea will attract a utilitarian discount on sentence of up to 25%: *R v Thomson and Houlton* [2000] NSWCCA 309.

This discount may decline once a matter is committed to a District Court/Supreme Court: *R v Robert Borkowski* [2009] NSWCCA 102; see also *Krotiris v R* [2012] NSWCCA 28. Hence, the timing of a guilty plea and/or a plea offer is important. Ultimately, it is up to the court to decide the quantum of discount.

The court is not bound by any agreement between the Crown and defence of an appropriate sentence: *Ahmad v R* (2006) NSWCCA 117; see also *GAS*; *SJK v The Queen* (2004) HCA 22. Also, leave may be granted to an accused to withdraw a plea of guilty or to the Crown to withdraw acceptance of a plea of guilty: *R v Filioemaha* [2003] NSWCCA 37.

1.15 Agreed Facts

In some cases there will come a point where negotiations hinge on an agreed set of facts between the Defence and the Prosecution.

Whether a matter is to be committed for sentence or to remain in the Children's Court for sentence, always ensure that the Agreed Facts Sheet is accurate and comprehensible.

Both parties can at any time draft a proposed set of agreed facts for the other party to consider. You may obtain an advantage if you draft Facts first. Often the DPP (whether because of expediency or

because they need to consult with the police) use the Police Facts as a template and make amendments.

When drafting or considering proposed facts, you should have regard to the following:

1) Whether the proposed facts are in line with the evidence contained in the Brief, and if those facts are "comprehensible."

In *Della-Vedova v R* [2009] NSWCCA 107, Simpson J stated at [14]:

"It is the DPP who undertakes the statutory responsibility of prosecuting offences and presenting, in a comprehensible fashion, the facts and circumstances of the offences on the basis of which the court is asked to sentence."

The facts should be framed so that the court can:

"...discern what is agreed to be fact, and what is merely assertion.." at [11]

At [12]:

"What is entirely unsatisfactory about the manner in which the statement of facts is framed is that it does not distinguish between assertions of fact...and facts accepted as true by both the prosecution and the applicant; it does not identify...the facts upon which the applicant was to be sentenced."

2) Positive information regarding the child should be included

(eg the child handed themselves in, assisted police, made full admissions, was remorseful, was under the influence of drugs/a mental health condition at the time of the offence);

3) Has irrelevant information been extracted;

Do the facts contain unnecessary information that is detrimental to the young person;
Has the appropriate language been used (ie sometimes the Police Facts can be overly descriptive and full of adverse opinion and speculation)

On occasion, the DPP may seek to tender the brief (or parts of the brief) in addition to the Agreed Facts, eg graphic photos of the victim's injuries, CCTV showing the head stomping. The wisdom of such a tender was doubted by the court in *R v H* [2005] NSWCCA at [58]¹¹:

*"In a case in which agreement has been reached on the factual basis on which an offender is to plead guilty following a "plea bargain,"...the wisdom of tendering the entire Crown brief in addition to the agreed statement may be doubted. It runs the risk that the sentence will take into account facts that would aggravate the offence contrary to the principles in *R v De Simoni* (1981) 147 CLR 383..."*

Furthermore, in *R v Crowley* [2004] NSWCCA 256 at [46], Smart AJ said:

"Where agreed facts are presented and the other materials tendered by either side depart from the agreed facts, counsel should draw this to the judge's attention and advise which is to prevail"

¹¹ See also *R v Bakewell* (unrep, 27/6/96, NSWCCA)

and on what facts the offender should be sentenced. If this does not happen and the judge subsequently discovers that there is a difference he should raise it with the parties and not proceed to sentence until the matter is resolved by agreement or otherwise."

Also, in *R v Palu* [2002] NSWCCA 381, Howie J said (at [21]):

"It behoves the parties, especially after a "plea bargain", to ensure that the sentencing court is made aware from the outset of the proceedings whether there is any dispute as to the factual basis upon which the offender is to be sentenced and identify with particularity what matters are in issue. Disputed facts are to be resolved by accusatorial process upon evidence before the court, Chow v DPP (1992) 28 NSWLR 593 at 604-608. If a statement of facts is to be tendered, it should both support the charge for which the offender is to be sentenced and accord with the offence charged. It should not contain facts that would aggravate the offence in breach of the principle in The Queen v De Simoni [1981] HCA 31; (1981) 147 CLR 383. If it purports to be an agreed statement of facts so that it is intended to provide the factual basis upon which the parties wish the court to sentence the offender, the facts should be sufficient to permit the court to exercise its discretion and the Crown should not tender other material which might supplement or contradict the facts set out in the agreed statement. If other material is placed before the court which relates to the facts of the offence, then the parties should understand that the court is not bound by the tendered statement of facts or any agreement made between the parties as to the basis upon which the offender is to be sentenced: Altham (1992) 62 A Crim R 126; Chow v DPP, above at 606. All too frequently, or so it seems to me, uncertainty, confusion and, sometimes, error arises because of the failure of the parties, and in particular the Crown, to clearly identify the material upon which the facts of the matter are to be gleaned by the sentencing court. So it was in the present case."

1.16 Written instructions and signed Facts

Written instructions can be used not only when a child is pleading guilty but also when a child is pleading not guilty or instructing you in any other respect. Where you are able to, it is important that you obtain *signed* written instructions and *signed* Facts. The importance of these was highlighted in *Loury v R* [2010] NSWCCA 158, where the court found that in the absence of written instructions and notes confirming the appellants instructions, the appellant's plea was ultimately not a true acknowledgement of guilt. Even though the appellant's legal representative was operating in a fast paced court with limited time, the CCA was critical of the fact that written instructions were not taken.

It is particularly important to obtain written instructions if your client is pleading guilty to an offence that they deny committing or that they cannot remember committing: *Meissner v R* [1995] HCA 41; (1995) 130 ALR 547.

Similarly, where a client has agreed to Facts (or at least agreed to those Facts being the basis for their sentence) you should get the client to sign those Facts to acknowledge that they agree to their use on sentence. The signed copy of the Facts can go on your file.

Some DPP request that your client signs a copy for their file and a copy that is tendered to the court. This is to ensure that the Facts tendered are in fact "Agreed Facts". There is no legal obligation for your client to sign the Facts. There is no legal obligation for you to sign the Facts but you could

always do so on your client's behalf. There is sometimes a fear that if you tender Facts which are signed by your client they may later be used against your client if he/she is called to give evidence against a co-accused. If they diverge from the Agreed Facts, the prosecutor may draw their attention to the Fact sheet that they signed. However, the mere signing of a Fact sheet does not mean that the child agrees with the truth of its contents.

1.17 Preparing for sentence

Most committal matters which proceed to sentence (either as a committal for sentence in the District/Supreme Court or a sentence in the Children's Court to a negotiated non SCIO), will require a background report to be ordered: CCPA, s 25. A background report – mostly a Juvenile Justice Report (JJR) – takes about 6 weeks to complete if the child is in the community and 2 weeks if the child is in custody. Some form of Fact sheet is normally required for Juvenile Justice to write their JJR.

Where facts cannot be agreed or certain aspects are disputed, a disputed Facts hearing may be necessary.

Where there are Agreed Facts, the child should be given a copy of the Agreed Facts and informed that Juvenile Justice will talk to them about the Agreed Facts in order to prepare the JJR. If the child has entered a "Meissner" plea then care should be taken to not traverse the plea within the report.

You may also wish to advise the client about other preparations for sentence:

- obtaining other reports, eg psychologist/psychiatrist reports, medical reports;
- If the child will be sentenced according to law or there is the prospect that they may be sentenced according to law you will need to get evidence of special circumstances for a s 19 CCPA order to be made for the child to serve some or all of their term of imprisonment in a juvenile justice facility. If you are obtaining a psychologist/psychiatrist report you may ask the psychologist/psychiatrist to specifically address the criteria in s 19;
- character references : Legal Aid NSW have guides to writing references;
- building community ties – involvement in pro social activities such as youth groups, religious groups, sports;
- engaging in work or study;
- undergoing rehabilitation courses and/or programs – eg a drug and alcohol course or residential program, sex offenders counselling, the traffic offenders program;
- making reparations – eg paying back money that was stolen – this can be done by passing the money to the police or DPP via you: see *Hyunwook Oh v R* [2010] NSWCCA 148;
- writing an apology letter which is signed and dated. The earlier that this is done, and forwarded to the victim via the DPP, the better. An apology letter written on the day of sentence does not appear as genuine;
- if there is a victim impact statement, the client can read/listen to the statement and reflect upon it;
- consider whether the child gives evidence or anyone else gives evidence on the sentence proceedings.

1.18 Sentencing in higher courts

This paper will not deal in depth with sentences in higher courts (see Judge Andrew Haesler's paper at this CLS conference), except to note:

A non SCIO that is "committed" to the District Court (or an ex officio non SCIO) may be remitted to the Children's Court under CCPA, s 20.

Alternatively, the District Court may sentence the child either under the CCPA or according to law : s 18 CCPA. Section 18(1A) provides the criteria upon which the District Court determines whether to sentence under the children or the adult's scheme.

Children who are sentenced according to law to a term of imprisonment will require a s 19 order in order to serve their time in a juvenile facility. There is a difference of opinion over whether an order is necessary if the term of imprisonment (ie the expiration of a non-parole period) expires within 6 months of the child turning 21 years old.

A section 19 order cannot be made without evidence of special circumstances. A child's age does not constitute special circumstances per se. See the following cases about s 19:

- *JM v R* [2012] NSWCCA 83.
- *R v DGP* [2010] NSWSC 1408;
- *SS v R* [2010] NSWSC 674; *AC v R* [2010] NSWSC 673; *AA v R* [2010] NSWSC 703.

Legal Aid NSW have affidavits from the Department of Education which state what programs are available in juvenile detention that are not available in adult gaol (eg the HSC). Legal Aid NSW also have a psychologist research report which highlights the differences between juvenile detention and adult gaol.

2. COMMITTAL PROCEEDINGS and SECTION 31 APPLICATIONS

2.1 Contested committals and s 31 applications

This paper will not cover in detail contested committals. That topic is very comprehensively covered in Mark Dennis' 2012 paper on *Contested Committals- a Defence Perspective*. Similarly, s 31 applications have been covered by Angela Cook (see *Applications under s 31(3) CCPA and Children's Committals*, 2004; and *Committal of Indictable and Serious Children's Indictable Offences in the Children's Court*, 2007).

This section of our paper will seek to include some other child specific cases about committal proceedings, especially drawing from cases which are published on the Children's Court website:

Unfit to plead

A child must be able to understand their committal proceedings. Section 71 of the *Criminal Procedure Act 1986* provides that committal proceedings be conducted in the presence of the defendant. The High Court has held that the words “conducted in the presence or hearing of the defendant” are to be construed as meaning that the defendant is able to understand what fact and circumstances are being alleged against him or her: *Ebatarinja v Deland* (1998) 194 CLR 444. Thus, where a child is unable to meet the Presser test¹² (ie they are unfit to plea) the committal proceedings should be dismissed: *Police v AR*, Children’s Court, Judge Marien SC on 18 November 2009. Furthermore, where a s 32 of the *Mental Health (Forensic Provisions) Act* is inappropriate and the child is “unfit to plead” it would be unfair to continue: *Mantell v Molyneux* (2006) 68 NSWLR 46 and *Pioch v Lauder* (1976) 13 ALR 266. Of course, the DPP have the ability to lay an ex officio indictment.

Doli incapax committal

The Children’s Court magistrate should consider whether there is a prima facie case and whether all of the elements of the offence are supported by evidence within the brief that is tendered. Note that the rebuttal of doli incapax is an element of any offence committed by a child 10-14 years old. In *RP v Ellis & Anor* [2011] NSWSC 442, the failure to address doli led to the order for committal to be quashed and the matter remitted to the Children’s Court.

Committal proceedings for sex offence involving child complainant

Note that *Criminal Procedure Act 1986*, s 91(8) restricts your ability to call a child complainant of a child sexual assault offence:

(8) A direction may not be given under this section so as to require the attendance of the complainant in proceedings for a child sexual assault offence if the complainant:

(a) was under the age of 16 years:

(i) on the earliest date on which, or

(ii) at the beginning of the earliest period during which,

any child sexual assault offence to which the proceedings relate was allegedly committed, and

(b) is currently under the age of 18 years.

However, note that if the complainant has turned 18 years old at the time of the committal proceeding then the restriction no longer applies.

Other matters which may be relevant to a s 31 application include:

- Whether the court can impose a criminal record. If the child is under 16 years old the Children’s Court cannot impose a criminal record: s 14 *Children (Criminal Proceedings) Act 1987*. The

¹² R v Presser [1958] VR 45

magistrate may send the matter to a high court if they think the offence warrants a record: *DPP v JJM and ALW*, Albury Children's Court, 28 October 2009 at [23] per Lerve CCM.

- If the offence involves a joint criminal enterprise and there is an adult co-accused listed for sentence in the District Court, the Children's Court may wish to send the child to be dealt with by the same sentencing judge. The issue of parity can be properly and more easily considered if each of the offenders are being dealt with together: *DPP v JJM and ALW*, Albury Children's Court, 28 October 2009 at [25] per Lerve CCM.

Ex officio

Of course, even if a matter is successfully discharged at committal, the DPP may always lay an ex officio indictment. Clients should always been given clear advice that a discharge is not an acquittal. In relation to an ex officio of a children's matter – see *PM v The Queen* [2007] HCA 49.

Waiver of committal

Often, you will not have a basis for a committal hearing or may decide to forego a committal hearing. In these circumstances you can consult with the DPP and agree to a waiver of committal. Increasingly, the DPP are asking that the brief of evidence be tendered after the waiver. The court in *Vickers v R* [2006] NSWCCA 60 suggest that any brief tendered in this fashion cannot be used against an accused at trial (utilising s 289 of the *Criminal Procedure Act*). However, if you object to the tender of the brief the DPP may state that they do not consent to the waiver – thus you will need to have a paper committal where the brief is tendered anyway. The DPP have a memo¹³ by Nicholas Cowdery to his staff indicating their position in this regard.

2.2 Drive manner dangerous occasioning death and/or GBH

On occasion, a charge pursuant to section 52A, *Crimes Act* is brought before the Children's Court:

(1) *Dangerous driving occasioning death*

A person is guilty of the offence of dangerous driving occasioning death if the vehicle driven by the person is involved in an impact occasioning the death of another person and the driver was, at the time of the impact, driving the vehicle:

- (a) under the influence of intoxicating liquor or of a drug, or*
- (b) at a speed dangerous to another person or persons, or*
- (c) in a manner dangerous to another person or persons.*

A person convicted of an offence under this subsection is liable to imprisonment for 10 years.

(2) *Aggravated dangerous driving occasioning death*

A person is guilty of the offence of aggravated dangerous driving occasioning death if the person commits the offence of dangerous driving occasioning death in circumstances of aggravation. A person convicted of an offence under this subsection is liable to imprisonment for 14 years.

(3) *Dangerous driving occasioning grievous bodily harm*

A person is guilty of the offence of dangerous driving occasioning grievous bodily harm if the

¹³ Though I am not sure about the date of the memo and whether it is pre *Vickers* or post *Vickers*. In any event, some DPP staff are still referring to it.

vehicle driven by the person is involved in an impact occasioning grievous bodily harm to another person and the driver was, at the time of the impact, driving the vehicle:

- (a) under the influence of intoxicating liquor or of a drug, or*
- (b) at a speed dangerous to another person or persons, or*
- (c) in a manner dangerous to another person or persons.*

A person convicted of an offence under this subsection is liable to imprisonment for 7 years.

By definition, an offence pursuant to section 52A is not a serious children's indictable offence (section 3 CCPA) and accordingly the Children's Court has the jurisdiction to determine such matters to finality.

Charges arising from section 52A are dealt with in accordance with the "Singh Protocol." The police are required to refer the matter to the Office of the Director of Public Prosecutions for consideration. In essence the ODPP consider whether they will seek to make an 'election' (section 31(3) CCPA application) to have the matter dealt with according to law, or whether to refer the matter back to the police prosecutor to be dealt with in the Children's Court.

Even though it is not a SCIO, the offence is often serious enough to warrant a s 31 application probably because of the guideline judgement (see below).

Section 31(1) CCPA provides:

(1) 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;

(3) 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 properly be 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 sections 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.

Section 31 presents a cumulative test. That is, the Children's Court must be satisfied that subsections 31(3)(a), 31(3)(b)(i), and 31(3)(b)(ii) are **all** satisfied.

Even if the ODPP refer the matter back to the police prosecutor, the police prosecutor is not prohibited from making a section 31 application.

'Manner Dangerous'

In general, the live issue will be whether at the time of impact the young person was driving the vehicle in a manner dangerous. Evidence to keep an eye out for include (but not limited to) observations/comment on the manner or speed of the driving, and in the case of police expert evidence, whether the collision was attributable to manner or speed of driving.

In some instances it may be prudent for the defence to obtain their own expert evidence to dispel the assertion that the collision was a direct result of the manner or speed of driving, or to establish a reasonable hypotheses (other than the manner or speed of driving) attributable to the cause of collision.

Be careful not to simply accept that "dangerous," or even "speed" is to 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."*¹⁴

Penalty

The case law¹⁵ and sentencing guidelines for an offence pursuant to section 52A *Crimes Act* are noted.

The *Jurisc*¹⁶ guideline was reformulated in *Whyte* (2002) NSW CCA 343;

"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."

Whyte stipulates that the following factors are to be taken into account:

- (i) extent and nature of the injuries inflicted;
- (ii) number of people put at risk;
- (iii) degree of speed;
- (iv) degree of intoxication or of substance abuse;
- (v) erratic or aggressive driving;
- (vi) competitive driving or showing off;
- (vii) length of journey during which others were exposed to risk;
- (viii) ignoring of warnings;
- (ix) escaping police pursuit.

More particularly, Items (iii) – (xi) relate to the moral culpability of an offender.

¹⁴ *R v Saunders* [2002] NSWCCA 362.

¹⁵ *R v Jurisc* (1998) 45 NSWLR 209 and *R v Whyte* (2002) NSW CCA 343.

¹⁶ (1998) 45 NSWLR 209.

The *Jurisc* 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 judgment 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 Jurisc – 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 taken into account only as a "check" or "sounding board" or "guide" but not as a "rule" or "presumption."*¹⁷

See also Angela Cook's paper on s 31 applications which attaches written submissions in a dangerous driving occasioning death matter.

Also noteworthy is Fred Niles *Zoe's Law* which is currently still before Parliament. It deals with the "death" of unborn foetuses (gbh to the mother), especially in the context of dangerous driving.

3. SERIOUS CHILDREN'S INDICTABLE OFFENCES

This section will deal with some of the commonly encountered SCIO in the Children's Court. It does not cover all the SCIO, in particular firearms and drug offences. It also does not cover Commonwealth offences. Legal Aid has a Commonwealth Committals Unit.

3.1 Homicide

Most children charged with a homicide will eventually end up in the Supreme Court either for trial or for sentence. Very few will have their matter resolved at a committal stage in such a way as to avoid the higher courts. Due to the differing complexities of each homicide matter, this paper will not go into detail about murder committals. What is said below in relation to robberies and assaults will probably have application in most homicide matters.

Nevertheless, it is worthwhile to note a recent change to sentencing children for murder: The *Crimes (Sentencing Procedure) Amendment (Provisional Sentencing for Children) Act 2013* was assented to and commenced on 25 March 2013.

It introduced Pt 4 Div 2A – Provisional Sentencing for child offenders – into the *Crimes (Sentencing Procedure) Act 1999*. Section 60A provides:

- (1) A court that imposes a sentence on an offender for the offence of murder may impose a sentence for that offence as a provisional sentence if:
- (a) the offender was less than 16 years of age when the offence was committed, and
 - (b) the offender is less than 18 years of age when the provisional sentence is imposed, and
 - (c) the sentence proposed to be imposed for the offence is or includes a term of imprisonment, and

¹⁷ *R v Whyte* (2002) NSW CCA 343 at 113

(d) the court is of the opinion that it is not appropriate to impose an ordinary sentence on the offender because the information presently available does not permit a satisfactory assessment of whether the offender has or is likely to develop a serious personality or psychiatric disorder, or a serious cognitive impairment, such that the court cannot satisfactorily assess either or both of the following matters:

(i) whether the offender is likely to re-offend,

(ii) the offender's prospects of rehabilitation.

(2) A court may impose a sentence as a provisional sentence of its own motion or on application of a party to the proceedings.

(3) A reference in this Division to a sentence for the offence of murder includes a reference to an aggregate sentence for the offence of murder and for one or more other offences.

If a provisional sentence is imposed, the court will hold a progress review at least one every two years. At the review the court may transform the provisional sentence to a final sentence which may not be longer than the provisional sentence.

3.2 Robberies and the application of *Henry*

There are three serious children indictable robbery offences – s 97(2), 96 and 98. A child can be charged with a robbery, an assault with intent to rob or with an attempted robbery. An assault with intent to rob is a *completed* offence as oppose to an attempted robbery. However, I do not think that there is practically much difference between the two. The guideline judgment of *R v Henry* (1999) 46 NSWLR 346 applies to armed robbery offences. It also provides “general guidance” to assault with intent to rob offences: see *R v Stanley* [2003] NSWCCA 233; *R v Ambrosi* [2004] NSWCCA 23; *R v Fepuleai* [2007] NSWCCA 325; *Macdonald v R* [2007] NSWCCA 105. See also *R v Murchie* [1999] NSWCCA 424; *R v Perese* [2001] NSWCCA 478.

The fact that an offender is a child does not exclude the application of *Henry*: *R v SDM* [2001] NSWCCA 158. However, there is a debate about whether *Henry* has any application in the Children’s Court especially when considering a s 31 application.

Henry prescribes a sentencing range of 4-5 years. Now, the Children’s Court can only impose a control order of up to 2 years: CCPA, s 33(1)(g). Does this jurisdictional limit mean that *Henry* has no application in the Children’s Court? I think not. In *R v Doan* [2000] NSWCCA 317 the court commented on how the jurisdictional limit related to the maximum penalty for an offence. It held (at 35) that the jurisdictional limit of the Local Court (2 years) did not substitute for the maximum penalty for an offence. Further, a two year sentence of imprisonment was not reserved for a “worse case”. Similarly, I do not think that the jurisdiction limit imposes a restriction on the application of *Henry*.

If *Henry*’s 4-5 year sentencing guideline applies to offences before the Children’s Court than prima facie the Children’s Court should be sending robbery matters to the District Court for sentence, pursuant to s 31. Yet, the Children’s Court, quite appropriately, regularly deals with all types of robbery matters in its summary jurisdiction. Is *Henry* a relevant consideration in a s 31 application

and, if so, how? One view is that *Henry* may be restricted to the District Court and its relevance for a Children's Court is only to show what an District Court might impose¹⁸.

Even in the District Court, there is a debate about whether *Henry* is applicable when considering a child who is being sentenced for a non SCIO and where the court must decide whether to sentence under the CCPA or according to law : CCPA, s 18. Is *Henry* a relevant consideration for the District Court s 18 decision?

It could be argued that *R v SDM* only applied *Henry* to sentences according to law. *SDM* concerned a sentence for a SCIO. It could be argued that the adult sentencing system and the children's sentencing system are very different and that *Henry* was chiefly meant as a guideline for young adult offenders. Once a child is within the adult system their age does not restrict *Henry*'s application (*SDM*) but whilst they remain in the Children's Court *Henry* should not apply.

Of course, even if this argument is wrong, the facts of a particular case may take it outside the ambit of *Henry* anyway.

3.3 Robbery with dangerous weapon: s 97(2)

When your client is charged with a s 97(2) robbery with a dangerous weapon, you should see whether there is scope to reduce the charge to a s 97(1) robbery with offensive weapon so that the matter may remain in the Children's Court.

According to *Crimes Act 1900*, s 3, "Offensive weapon or instrument" means:

- (a) a dangerous weapon, or
- (b) any thing that is made or adapted for offensive purposes, or
- (c) any thing that, in the circumstances, is used, intended for use or threatened to be used for offensive purposes, whether or not it is ordinarily used for offensive purposes or is capable of causing harm¹⁹.

A dangerous weapon means

- (a) a firearm, or an imitation firearm, within the meaning of the *Firearms Act 1996*, or
- (b) a prohibited weapon within the meaning of the *Weapons Prohibition Act 1998*, or
- (c) a spear gun.

A "prohibited weapon" is defined under *Weapons Prohibition Act 1999*, s 4 to mean anything described in Schedule 1 to the Act, including the prohibited firearms listed in the Schedule. Examples include knuckledusters, butterfly knife, flick knife.

A "firearm" is defined in s 4 of the *Firearms Act* as:

¹⁸ However, note that when a Children's Court is consider s 31 it is not engaging in a balancing act between whether a Children's Court sentence is appropriate of a District Court sentence is appropriate. It is determining whether the Children's Court can properly deal with the sentence.

¹⁹ See *R v Sutton* (1877) 13 Cox CC 648; *Considine v Kirkpatrick* [1971] SASR 73 and *R v Hamilton* (1993) 66 A Crim R 575

A gun, or other weapon, that is (or at any time was) capable of propelling a projectile by means of an explosive and includes a blank fire firearm, or an air gun, but does not include anything declared by the regulations not to be a firearm.

According to *Firearms Regulation 2006*, reg 4, the following are declared not to be firearms for the purposes of the Act:

- (a) an explosive-powered tool within the meaning of Part 9.2 of the Occupational Health and Safety Regulation 2001,*
- (b) a heavy bench-mounted rifle of an approved kind that is used for experimental purposes,*
- (c) a tool designed to be used to split or break rock or concrete by means of the firing of an explosive cartridge, such as the tool known as the "Boulder Buster",*
- (d) an industrial tool designed to be used in the mining and steel industries to remove refractory material (eg slag) from kilns or for other similar purposes, such as the tool known as the "Slag Buster Kiln Gun",*
- (e) a captive bolt gun of the kind designed for use in an abattoir in the humane killing of livestock,*
- (f) any piece of artillery manufactured before 1946:*
 - (i) that has been rendered permanently inoperable, and*
 - (ii) the breech, chamber and barrel of which have been permanently sealed, and*
 - (iii) that is on permanent display in a public place for memorial or commemorative purposes,*
- (g) cannon and field guns:*
 - (i) that have been constructed as pieces of military ordnance, and*
 - (ii) that have a calibre of more than 25 millimetres, and*
 - (iii) that have been rendered permanently inoperable, and*
 - (iv) the breech, chamber and barrel of which have been permanently sealed,*
- (h) a firearm designed to be used for life saving or distress signalling purposes (such as line-throwing guns or the "Very" type of firearm),*
- (i) a firearm designed to be used in film, television or theatrical productions for the purposes of breaking glass or ceramic articles and that is only capable of firing a projectile over a short range (such as the firearm known as the "Trunion" gun),*
- (j) a firearm designed to be used to train dogs by firing retrievable projectiles (such as the firearm known as the "Turner Richards Dummy Launcher"),*
- (k) a tool designed to discharge a nail, spike or other fastener into or through material by means of compressed air or carbon dioxide (such as a nail gun).*

In most cases, the prosecution are not going to be able to prove that the weapon was a firearm/prohibited weapon unless:

- 1) it has been recovered and confirmed by a ballistics expert to be a firearm/prohibited weapon; or
- 2) a witness was an expert and able to tell that it was a firearm/prohibited weapon by their observations; or
- 3) a witness saw the firearm actually being fired; or
- 4) your client (or co-accused) makes admissions about the weapon being a firearm/prohibited weapon

Imitation firearms

Most children's committals do not involve real firearms but "imitation firearms". *Firearms Act 1996* s 4D(3) and (4) provides the definition of an imitation firearm:

(3) In this section,

"imitation firearm" means an object that, regardless of its colour, weight or composition or the presence or absence of any moveable parts, substantially duplicates in appearance a firearm but that is not a firearm.

(4) However, an imitation firearm does not include any such object that is produced and identified as a children's toy.

If the weapon is recovered, a ballistics expert/armourer may be able to provide an expert certificate that says the weapon is an imitation of a particular gun – eg a Glock, a Colt .22. Arguably though, it will be sufficient for the opinion to simply express that the weapon imitates a *class* of firearms (eg a self loading pistol).

There is greater scope to negotiate with the DPP/defend the matter if the weapon is not recovered. In these cases the prosecution will have to rely on witness accounts of the gun and/or the client's admissions (if any). Arguably, even though the definition in section 4(3) is quite broad, the weapon must still substantially duplicate in appearance an actual firearm. It is not enough for a witness to simply say "it looked like a gun".

Regulation 4 exempt firearms:

Arguably, the imitation firearm still needs to imitate an actual firearm within the meaning of s 4. If the weapon was one of the weapons declared by the Regulations to not be a firearm (eg a Boulder Buster), I would argue that it is not an imitation firearm.

Stretching this logic a step further, one could argue that the prosecution need to establish that the weapon was an imitation firearm by also *excluding* the possibility that the weapon was one of those declared by the Regulations. Thus, if the prosecution case relies on a witnesses observation of the weapon, you could seek to call the witness for a committal hearing and proceed to question the witness about:

- 1) their observations of the weapon (eg colour, weight, composition, movement or absence of moving parts)
- 2) their familiarity (or otherwise) with firearms/imitation firearms
- 3) their familiarity with the excluded weapons

If the witness cannot say whether the weapon was a Boulder Buster, flare gun etc then the prosecution have not excluded the possibility that it was a regulation 4 exemption and thus have not proved that the weapon is an imitation firearm.

I note that images of the regulation 4 weapons are readily available on the internet. Those which look the most like a "real firearm" include:

- c) the Boulder Buster
- h) life saving or distress signalling firearm (eg "Very" firearm)
- i) film firearm
- j) Turner Richards Dummy Launcher

Children's toy

Section 4(4) provides that an object that is produced and identified as a children's toy is not an imitation firearm. I would argue that "identified" in this section refers to identification by the producer of the children's toy; ie the subsection does not require the victim to identify it as a children's toy. Hence all children's toy guns will not be imitation firearms.

Most children's toy guns are made of plastic and have bright colours on them (eg Nerf gun). Even those that are silver/grey or black usually will have a red or orange cap on the end of the barrel. However, as far as i could tell, there is no legislation or policy that requires children's toy guns to be clearly identifiable as toys.

Novelty (cigarette) lighters which look like guns also do not appear to be regulated. As far as I am aware there are no laws against selling lighters to children. However, it would be arguable whether a novelty lighter is produced as a "children's toy".

Firearm identification parades

Even if a firearm/imitation firearm is recovered (eg in a search warrant), the prosecution need to prove it was the actual weapon used in the offence. Police have started to use firearm identification parades where they show witnesses a range of different firearms or photos of firearms and ask them to identify which firearm was involved in the offence. Unlike photographic identification parade, as far as I know, there are no legislative safeguards for the conduct of such firearm identification parades. Where appropriate, their admissibility should be challenged.

3.4 Robbery with wounding/GBH: Crimes Act 1900, ss 96 or 98

Section 95: Aggravated robbery

(1) Whosoever robs, or assaults with intent to rob, any person, or steals any chattel, money, or valuable security, from the person of another, in circumstances of aggravation, shall be liable to imprisonment for twenty years.

(2) In this section,

"circumstances of aggravation" means circumstances that (immediately before, or at the time of, or immediately after the robbery, assault or larceny) involve any one or more of the following:

- (a) the alleged offender uses corporal violence on any person,*
- (b) the alleged offender intentionally or recklessly inflicts actual bodily harm on any person,*
- (c) the alleged offender deprives any person of his or her liberty.*

Section 96 : Same (robbery) with wounding

Whosoever commits any offence under section 95, and thereby wounds or inflicts grievous bodily harm on any person, shall be liable to imprisonment for 25 years.

Section 98: Robbery with arms etc and wounding

Whosoever, being armed with an offensive weapon, or instrument, or being in company with another person, robs, or assaults with intent to rob, any person, and immediately before, or at the time of, or immediately after, such robbery, or assault, wounds, or inflicts grievous bodily harm upon, such person, shall be liable to imprisonment for 25 years.

Where no property is taken and the client is charged with assault with intent to rob with wounding/grievous bodily harm, the prosecution needs to prove that there was a specific intent to rob the victim. Moreover, even where property is taken, the offence of robbery requires proof that it was the violence or threat of violence by the offender which caused the victim to part with the property taken. It is not sufficient that the violence is inflicted, or the threat of violence is made, after the property has been taken: *R v Foster* (1995) NSWCCA – see also *R v Emery* [1975] 11 SASR 169.

Thus, in circumstances where your client:

- 1) has been engaged in a fight with the victim causing wounding/GBH;
- 2) the victim's mobile phone has fallen from their pocket during the fight; and
- 3) the accused subsequently picks up the phone ,

they may not have committed an assault with intent to rob or a robbery. Similarly, if the phone is taken before or even during the fight, but there is no nexus between the violence and the taking of the property, there has been no robbery or assault with intent to rob. Rather, the offences are an assault and a separate larceny. You may consider offering a plea of guilty to a reckless wounding (s 35, *Crimes Act 1900*) and a larceny (s 117, *Crimes Act 1900*), in lieu of the s 96 or s 98.

Even if the prosecution can establish a robbery/assault with intent to rob has occurred, they also need to establish a nexus between the injury (the wound/gbh) and the robbery. The wound/gbh must have occurred immediately before, at the time of or immediately after the robbery. If the injury is separate from the robbery you could make a plea offer to a robbery and a separate assault charge.

Meaning of immediately before, during or immediately after

In the recent case of *Hudd v R* [2013] NSWCCA57, the appellant was charged with felony murder. He had committed an armed robbery on a store and then left the store. The victim pursued him with a machete and the appellate shot the victim dead. The Court of Criminal Appeal considered the meaning of the words immediately after in s 18 *Crimes Act 1900* with reference to cases which considered the meaning of the words in s 98 *Crimes Act 1900*.

The court said:

There is no statutory definition of the phrase "during or immediately after". Some guidance, however, has been provided as to the interpretation of the phrase by the cases.

As the appellant pointed out, this Court considered the phrase in R v Hitchins and Elliot. The issue arose because a taxi had been hailed by the offenders at Cammeray and subsequently the body of the taxi driver was found stabbed to death at Hoxton Park. It was not known at what point in the journey the killing had occurred. A submission similar to that made in this appeal was raised by the appellants in that matter. At 324B-E Lee J said:

"The submission of the applicants was thus a submission that if the robbery took place at Cammeray and the killing at Hoxton Park it was not open to the jury to find that the wounding took place immediately after the robbery and that

accordingly his Honour's direction that the jury could so find was erroneous. Although there was no precise evidence given as to the distance from Cammeray to Hoxton Park, it was agreed between counsel before us that it would probably take at least about three-quarters of an hour to drive there from Cammeray.

In my view counsel's submission should not be upheld. What s98 plainly contemplates is that the act of wounding is to have a relationship both in fact and in time to the robbery, and not be regarded as a matter unassociated with that event. But the word "immediately" does not require to be given a meaning which would restrict the application of the section to an event occurring within seconds or minutes of the termination of those particular actions which constituted in law a robbery of the victim. The whole of the circumstances involved in the robbery must be looked at and a decision made against the entire context of the evidence in regard thereto."

What I take from that passage is that there is a temporal component and a contextual component associated with the phrase.

The Court also referred to *R v Attard* (NSWCCA, unrep 20/4/93) and went on to say (at 101):

What emerges from Attard is that the issue of whether or not the act was done during or immediately after the armed robbery is a question of fact for the jury. It is a question of fact in the same way that "grievous bodily harm" has no fixed legal meaning and should be left to the jury. These are situations where there may be no doubt whatsoever as to what the act is, what the injury is, or what the event is, but because these phrases lack a fixed legal meaning their application to the facts of a particular case should be decided by the jury.

3.5 Accessory after the fact

Where appropriate, you may want to offer a guilty plea to your client being an accessory after the fact. Accessories before the fact are tried and punished as principals but there are lesser penalties for accessories after the fact.

- Section 349(1) *Crimes Act 1900*: accessory after the fact to murder – punishable by 25 years imprisonment (which is still a SCIO)
- Section 349(2) *Crimes Act 1900*: accessory after the fact to robbery in company or s 86 kidnapping – 14 years imprisonment (ie not a SCIO).
- Section 350 *Crimes Act 1900*: accessory after the fact to other serious indictable offences – 5 years imprisonment (ie not a SCIO).

Note –the latter two are not SCIO and thus could be dealt with in the Children's Court.

3.6 Wounding/GBH

A wound is the cutting of the top two layers of skin – the dermis and epidermis. Usually, if stitches were required, the injury will amount to a wound. Care should nevertheless be taken when reading medical evidence that refers to the dimensions of a laceration. The dimensions could relate to the width of the laceration as oppose to the depth.

What constitutes grievous bodily harm is harder to determine. Grievous bodily harm (GBH) includes any permanent or serious disfiguring of the person, the destruction of a foetus and any grievous bodily disease: s 4(1) *Crimes Act 1900*. At common law, the words “grievous bodily harm” are given their ordinary natural meaning. Grievous bodily harm means “really serious injury”: *DPP v Smith* [1961] AC 290 at 334; *R v Perks* (1986) 41 SASR 335; *R v Overall* (1993) 71 A Crim R 170 at 173.

Haoui v R [2008] NSWCCA 209 is the leading case on the definition of GBH. In that case, the appellant was convicted of dangerous driving occasioning grievous bodily harm. The injuries suffered included a “subconjunctival haemorrhage to the right eye and a depressed right malar or cheek fracture”. An operation was necessary to elevate the fractured cheek bone and secure it in place with a titanium plate and screws. The orbital floor fracture had been necessarily coincidental to the cheekbone fracture.

Beazley J in his dissenting judgment in *Haoui* lists a series of injuries which amount to GBH, both at the more serious end of the scale and at the less severe end of the scale. He states [at 139]:

“the fact that the concept of “grievous bodily harm” encompasses a range of injury was recognised in R v Woodland [2007] NSWCCA 29. In that case the victim had sustained significant facial fractures, including a right orbital complex fracture. Simpson J accepted that the victim’s injuries were not “the worst case of grievous bodily harm” but were far from the low end of the range of injuries amounting to “grievous bodily harm”. Other examples include: a fracture to the left orbit received in a violent kicking incident where it was said that the victim was “seriously injured”, that he had suffered “significant injury”, and where the offence was described as involving “gratuitous cruelty”: Singh v Director of Public Prosecutions (NSW) [2006] NSWCCA 333; and facial fractures, including fractures to the victim’s cheekbones and nose which required reconstructive surgery, extending to the insertion of metal plates under the lower eyelid and inside the lining of the mouth the plates to remain in situ permanently : Vann v Palmer [2001] ACTSC 12.”

Beazley went on to find that the injuries did not amount to GBH because it was a fracture of a small bone, which, on any reasonable assessment, is not serious bodily injury. It is actual bodily injury. The surgery did not convert the injury into a more serious injury. The plate was small and was required not because of any really serious nature of the injury, but because it was a facial bone that was fractured.

The majority in *Haoui* (Johnson and McCallum JJ) found that the injuries were “very much at the low end of the scale” of GBH but nevertheless it was open for the jury to find that they constituted GBH: “There is no bright line test for determining whether a particular injury or injuries constitute grievous bodily harm” [at 162]. It is a matter for the tribunal of fact.

As can be seen even from *Haoui*, the fact that the victim has suffered a fracture (even a facial fracture) does not per se make the injury GBH.

Where the prosecution are unable to prove a wound or GBH, alternative charges could include assault occasioning actual bodily harm, common assault or affray. See below for a further discussion about Affray.

See also *AM v R* [2012] NSWCCA 203; *Steven John Adams* [2011] NSWCCA 47 and *Mc Cullogh v R* [2009] NSWCCA 94.

3.7 Wounding/inflicting gbh with intent: s 33

Specific intent

An offence under s 33 is an offence of specific intent: s 428B Crimes Act 1900. Intoxication is relevant:

428C Intoxication in relation to offences of specific intent

(1) Evidence that a person was intoxicated (whether by reason of self-induced intoxication or otherwise) at the time of the relevant conduct may be taken into account in determining whether the person had the intention to cause the specific result necessary for an offence of specific intent.

(2) However, such evidence cannot be taken into account if the person:

(a) had resolved before becoming intoxicated to do the relevant conduct, or

(b) became intoxicated in order to strengthen his or her resolve to do the relevant conduct.

The definition of self induced intoxication is found in s 428A and includes any intoxication except intoxication that is involuntary or results from fraud, sudden or extraordinary emergency, accident, reasonable mistake, duress or force, or results from the administration of a drug for which a prescription is required in accordance with the prescription of a medical practitioner or dentist, or of a drug for which no prescription is required, administered for the purpose, and in accordance with the dosage level recommended, in the manufacturers instructions.

Care should be taken to not confuse the effect of intoxication on the *capacity* to form the requisite specific intent and the formation of that intent. In *R v Makisi* [2004] NSWCCA 333, Barr J said (at [12]):

The crown had to prove that the appellant intended to rob. Evidence of the effect on him of alcohol was relevant to that question. As Hunt J said in R v Coleman, reference to the effect of alcohol on the accused's capacity to form the requisite intent is unnecessary and confusing. Of course, a conclusion that an accused lacked the capacity to form an intent would mean that he did not form the intent. But if the Crown proved that the accused did not lack the capacity to form the intent that would not be proof that he formed the intent.

The fact that your client was intoxicated is just one factor that may be taken into account in determining whether they had the specific intent. It is not determinative per se.

Nevertheless, in a great many cases where offences occur whilst the child offender is intoxicated, the DPP are prepared to accept a lesser charge under s 35.

Recklessly inflict GBH/wound

In 2007, the *Crimes Amendment Act 2007* replaced malicious with intention or recklessness as the fault element in various offences in the *Crimes Act*. In *Blackwell v R* [2011] NSWCCA 93, the court held that the effect of the amendments was that the offence of recklessly inflicting GBH (under s 35) required recklessness as to causing GBH, not just some physical harm, as was the case before the amendments.

Subsequently, the *Crimes Amendment (Reckless Infliction of Harm) Act 2012* provides that a person will be guilty of the offence of recklessly causing GBH and related offences if the person causes GBH and is reckless as to causing actual bodily harm to that or any other person. However, please note

these amendments apply only to offences committed on or after 21 June 2012. Offences before this date may still be subject to the *Blackwell* test.

3.8 Affray

Often section 33 or 35 charges (or other assault charges) will be accompanied by a charge of affray (*Crimes Act 1900*, s 93C). The affray charge is not always considered to be a backup.

However, just because an offence occurs in public or because the prosecution do not have an available victim, does not make what is in essence an assault offence into an affray. An affray requires:

- 1) unlawful violence by one person
- 2) towards another person
- 3) causing fear in another reasonable person (though this could be the hypothetical bystander)

An article by Jane Sanders and Edward Elliott - *Affray: What is it, and what is it not?* (2012) 36 Crim LJ 368 – provides a useful analysis of English and Australian case law and statute about what constitutes affray.

Despite the prosecutorial overuse of the charge of affray, the defence committal lawyer may find that an affray charge can sometimes be a useful tool in their arsenal too. It may provide a way to resolve a matter where there may be multiple victims and multiple offenders and there may be uncertainty about who was involved in doing what. Rather than face multiple assault charges in relation to each victim (where the prosecution could rely on the doctrine of joint criminal enterprise or common purpose), the criminality in respect of all of the victims could be encompassed by a charge of affray.

The superior courts and the Children's Court are increasingly regarding affray as a serious offence. Many affrays conducted by children involve large numbers of offenders and spectators, serious violence (including glassing and head stomping) and in very public places (eg train stations). Perhaps to illustrate the seriousness with which the courts consider affrays, the Children's Court website lists several cases where children were sentenced for affray/assaults in public:

- *R v HEK* [2012] NSWSC 1364;
- *R v HER and SE* [2012] NSWSC 1024;
- *JM v R* [2012] NSWCCA 83;
- *AM v R* [2012] NSWCCA 203.

HEK and *JM* involved charges of affray, but *JM* was really a sentence for inflicting GBH with intent. *AM* was also a sentence for inflicting GBH with intent (there was no affray charge). However, both *JM* and *AM* deal with head stomping /kicking on the street and there are some comments in relation to the seriousness of those types of offences by youth.

HEK of course can be distinguished in that it involved the discharge of firearms in a fight between two "gangs" and where an innocent bystander (a passing motorist) was killed. *HER* and *SE* were co-accused of *HEK* – because of their limited involvement in the affray, they both got bonds.

3.9 Specially aggravated kidnapping

The basic offence of kidnapping is provided for in *Crimes Act 1900*, s 86(1):

- 1) Basic offence: A person who takes or detains a person, without the person's consent:*
(a) with the intention of holding the person to ransom, or
(a1) with the intention of committing a serious indictable offence, or
(b) with the intention of obtaining any other advantage,
is liable to imprisonment for 14 years.

The basic offence is aggravated (s 86(2)) if the offender is:

- 1) In company or
- 2) Occasions actual bodily harm at the time of or immediately before or after the offence.

The offence is specially aggravated (s86(3)) if there is the combination of:

- 1) in company AND
- 2) occasioning of actual bodily harm at the time of or immediately before or after the offence.

Hence, if your client is charged with specially aggravated kidnapping, consider whether the prosecution can prove the elements of:

- 1) Taking or detention
- 2) For advantage
- 3) In company
- 4) Occasioning actual bodily harm
- 5) The actual bodily harm occurring during or immediately after or before (see above discussion).

The meaning of the term "*in company*" in provisions of the *Crimes Act 1900* has been considered: *Markou v R* [2012] NSWCCA 64; *R v Leoni* [1999] NSWCCA 14 at [16]; *R v Villar and Zugecic* [2004] NSWCCA 302 at [68]; *R v Button and Griffen* [2002] NSWCCA 159; 54 NSWLR 455 at [464]. The victim is confronted by the combined force of two or more persons who share a common purpose.

The threshold for "*actual bodily harm*" is relatively low. Injury need not be permanent, but must be more than merely transient or trifling, with bruises and scratches to a victim being typical examples of injuries which constitute actual bodily harm: *McIntyre v R* [2009] NSWCCA 305; 198 A Crim R 549 at 558.

In *R v Speechley* [2012] NSWCCA 130, Johnson J noted (at [62]-[63]):

It will be observed that s.86 does not nominate other circumstances of aggravation, such as the offender being armed with an offensive weapon or instrument at the time of the offence: cf s.105A Crimes Act 1900 and s.112 Crimes Act 1900. Nevertheless, clearly, offences under s.86(1), (2) or (3) may be further aggravated when committed in circumstances which attract one or more aggravating factors contained in s.21A(2) Crimes (Sentencing Procedure) Act 1999 or any other common law factor which may bear upon the objective gravity of the offence itself. In this case, the involvement of a weapon or weapons arises for consideration: s.21A(2)(c) Crimes (Sentencing Procedure) Act 1999.

In *Davis v R* [2006] NSWCCA 392, Howie J provides an analysis of the history of the offence of kidnapping and explains that the offence has moved from one involving ransom to the broader offence involving the obtaining of any other advantage. The case law suggests that a wide range of things could be regarded as an advantage, including psychological satisfaction: *R v Rose* [2003] NSWCCA 411. The victim does not need to be taken AND detained. They can be either taken (asported) or detained. Hence, given this broad range, the prosecution will sometimes charge your client with specially aggravated kidnapping for an offence which is essentially an aggravated robbery (s 95) in company. If the victim is cornered during the robbery or if the victim is made to walk into an alleyway or to the ATM to withdraw cash, the accused could quite easily be found to have committed a specially aggravated kidnapping.

You should also be wary of the situation where the victim receives multiple injuries during a kidnap. If they have suffered bruising as well as a wound /GBH, it is not double dipping for the prosecution to charge the specially aggravated kidnapping AND a ss 33 or 35.

3.10 Specially aggravated break, enter and commit serious indictable offence

The basic offences of break and enter with intent (s 109) or break, enter and commit serious indictable offence (s 112) may be specially aggravated if any or all of the circumstances of aggravation defined in s 105A(1) exists:

"circumstances of special aggravation" means circumstances involving any or all of the following:

- (a) the alleged offender intentionally wounds or intentionally inflicts grievous bodily harm on any person,*
- (b) the alleged offender inflicts grievous bodily harm on any person and is reckless as to causing actual bodily harm to that or any other person,*
- (c) the alleged offender is armed with a dangerous weapon.*

These offences require proof of a "break" and an "entry". Each of the circumstances of aggravation have already been discussed above so i will not repeat them here.

However, it is worth noting that where an aggravating circumstance is not particularised on the court attendance notice/indictment, it may be relied on as an additional aggravating circumstance under s 21A *Crimes (Sentencing Procedure) Act*. The guideline judgment of *R v Ponfield* [1999] NSWCCA 435 applies to break and enter offences and lists a number of aggravating features (at [48]). However, in *Mapp v R* [2010] NSWCCA 269, Simpson J said that *Ponfield* was of "limited utility" and has "largely been overtaken by statute" (at [10]) – ie s 21A. To consider both *Ponfield* and s 21A would risk double counting.

Some possible alternative charges to a specially aggravated break and enter might include:

- Aggravated break and enter only
- Break and enter with no aggravation
- Trespass and larceny/robbery/assault (where there is no break)

- Malicious damages and larceny/robbery/assault (where there is no entry)

3.11 Sexual offences

The table in Anenxure 2 lists the various serious offences which are SCIO. Notably there are a number of sexual offences which are *not* SCIO:

- s 61I – sexual assault
- s 61L – indecent assault
- s 61M – aggravated indecent assault
- s 61N – act of indecency
- s 61O – aggravated act of indecency
- s 61P – attempt to commit offence under ss 61I-61O (except for attempts to commit the SCIOs)
- s 66C – sexual intercourse of child 10-16 years old
- s 66D – attempting or assault with intent to have sexual intercourse with child 10-16 years old
- s66EB – procuring or grooming child under 16 for unlawful sexual purposes
- s 66F – sexual intercourse with person with cognitive impairment whilst under care or whilst taking advantage of the impairment
- s 73 – sexual intercourse with child 16-18 years old under special care²⁰ (though it is highly unlikely that a child will have special care of another child 16-18 years old)
- s 78A – incest
- s 78B – attempted incest
- s 79 – bestiality
- s 80 – attempted bestiality
- s 80D – causing sexual servitude
- s 80E – conducting business involving sexual servitude
- s 80G – incitement to commit sexual offences
- s 81C – misconduct with regard to corpses
- s 91A- Procuring etc for prostitution
- s 91B- Procuring person by drugs etc
- s 91D- Promoting or engaging in acts of child prostitution
- s 91E- Obtaining benefit from child prostitution
- s 91F- Premises not to be used for child prostitution
- s 91G. – using children for the production of child abuse material
- s 91H. Production, dissemination or possession of child abuse material
- s 91J. Voyeurism
- s 91K. Filming a person engaged in private act
- s 91L. Filming a person's private parts
- s 91M. Installing device to facilitate observation or filming

The most common alternatives which are offered in charge negotiations are ss 61L, 61M, 61N, 61O, common assault and offensive behaviour: see also Julianne Elliott *Sex, Lies and Youtube Tapes* paper on sexting and several State and Commonwealth offences listed there.

²⁰ Defined in Crimes Act 1900, s 73(3)

Charges:

The most commonly charged sexual SCIOs are:

- S61J – aggravated sexual assault
- S 61JA – aggravated sexual assault in company
- S 66A - sexual intercourse with child under 10 years old.

61J Aggravated sexual assault

(1) Any person who has sexual intercourse with another person without the consent of the other person and in circumstances of aggravation and who knows that the other person does not consent to the sexual intercourse is liable to imprisonment for 20 years.

(2) In this section,

(a) "circumstances of aggravation" means circumstances in which:

- i. at the time of, or immediately before or after, the commission of the offence, the alleged offender intentionally or recklessly inflicts actual bodily harm on the alleged victim or any other person who is present or nearby, or*
- ii. at the time of, or immediately before or after, the commission of the offence, the alleged offender threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument, or*
- iii. the alleged offender is in the company of another person or persons, or*
- iv. the alleged victim is under the age of 16 years, or*
- v. the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender, or*
- vi. the alleged victim has a serious physical disability, or*
- vii. the alleged victim has a cognitive impairment, or*
- viii. the alleged offender breaks and enters into any dwelling-house or other building with the intention of committing the offence or any other serious indictable offence, or*
- ix. the alleged offender deprives the alleged victim of his or her liberty for a period before or after the commission of the offence.*

61JA Aggravated sexual assault in company

(4) A person:

a) who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse, and

b) who is in the company of another person or persons, and

c) who:

- (i) at the time of, or immediately before or after, the commission of the offence, intentionally or recklessly inflicts actual bodily harm on the alleged victim or any other person who is present or nearby, or*
- (ii) at the time of, or immediately before or after, the commission of the offence, threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument, or*
- (iii) deprives the alleged victim of his or her liberty for a period before or after the commission of the offence,*

is liable to imprisonment for life.

66A Sexual intercourse - child under 10

(1) Any person who has sexual intercourse with another person who is under the age of 10 years is guilty of an offence. Maximum penalty: imprisonment for 25 years.

(2) Any person who has sexual intercourse with another person who is under the age of 10 years in circumstances of aggravation is guilty of an offence.

Maximum penalty: imprisonment for life.

*(3) In this section, "**circumstances of aggravation**" means circumstances in which:*

(a) at the time of, or immediately before or after, the commission of the offence, the alleged offender intentionally or recklessly inflicts actual bodily harm on the alleged victim or any other person who is present or nearby, or

(b) at the time of, or immediately before or after, the commission of the offence, the alleged offender threatens to inflict actual bodily harm on the alleged victim or any other person who is present or nearby by means of an offensive weapon or instrument, or

(c) the alleged offender is in the company of another person or persons, or

(d) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender, or

(e) the alleged victim has a serious physical disability, or

(f) the alleged victim has a cognitive impairment, or

(g) the alleged offender took advantage of the alleged victim being under the influence of alcohol or a drug in order to commit the offence, or

(h) the alleged offender deprives the alleged victim of his or her liberty for a period before or after the commission of the offence, or

(i) the alleged offender breaks and enters into any dwelling-house or other building with the intention of committing the offence or any other serious indictable offence.

Note that there are many circumstances of aggravation under s 61J(2). If the circumstance of aggravation is s 61J(2)(d) – the victim was under the age of 16 years old – then the offence is not a SCIO. If the circumstance of aggravation is any of the others listed in s 61J(2) then the offence is a SCIO. Hence, it is important to note the particulars of the charge and to advise your client of any possibilities of changes to these particulars – either to make the offence a non SCIO or to make the offence a SCIO.

Similarly, even if your client has not been charged with ss 61JA or 66A you should always pay particular attention to whether there is the prospect of this charge being laid – by the police, the DPP committals solicitor or the Crown Prosecutor who screens the brief and finds and indictment if the matter is committed for trial to the District Court. Section 61JA and s 66A are two of the most serious sexual offences – punishable by life imprisonment.

For example, your client may be charged with an offence under s 61J where the circumstances of aggravation is that the victim was under their authority. This is a SCIO. The victim happens to also be 9 years old. If you write representations asking that the circumstances of aggravation be amended to the victim being under 16 years old (s 61J(2)(d)) – hence making it a non SCIO – you run the risk that the DPP will consider/reconsider the matter and in fact lay a more serious SCIO of either s 61JA or s 66A (noting that s 66A is actually much easier to prove than s 61J).

Because there is such a wide range of sexual offences, it is always important to consider whether the prosecution could have charged your client with other charges

Uncharged acts/incidents

Sometimes the Facts and/or brief will reveal uncharged acts – eg an indecent assault immediately proceeding a sexual assault or many instances of sexual assault where only representative counts are proceeded with. Your client should be advised about

- 1) the possibility of charges being laid in relation to these acts/incidents;
- 2) the possibility of these acts/incidents being used as tendency/coincidence evidence or context evidence;
- 3) these acts/incidents may form part of Agreed Facts to provide context.

Multiple counts

You may find that your client is charged with multiple counts of sexual intercourse relating to the one course of conduct. Alternatively, you may find one charge that relates to several acts (some of which are contended and some of which are agreed). It is thus important to ask for particulars of each charge if they have not already been supplied within the court attendance notice.

As discussed above, your representations will mostly be directed at reducing the number of charges. Some consideration can be given to whether charges are duplicitous.

In *R v Khouzame & Saliba* [1999] NSWCCA 173, one charge under s 61J covered three acts of sexual intercourse (penile vagina, penile oral and object vaginal). There was an issue raised by the jury about duplicity. The CCA found that the charges, as framed, were bad for duplicity (at [90] per Kirby J). The court discussed the pros and cons of having separate multiple counts (at [60]-[65]) and discussed the ambit of the rule of duplicity (at [76]- [81] inter alia):

What, then, is the ambit of the rule against duplicity? In Walsh v Tattersall, Kirby J encapsulated the rule, and its exceptions, in these words: (at 112)

"This Court should adhere to its longstanding insistence that, save for statutory warrant and for the exceptional cases of continuing offences or facts so closely related that they amount to the one activity, separate offences should be the subject of separate charges."

Here, there is no statutory warrant for aggregating in the one count a number of acts of intercourse. Indeed, the statute, it may be thought, clearly signals the reverse. The definition in s 61H(1) of "sexual intercourse" suggests that the Crown must identify each act of penetration, and make it the subject of a separate count (although it has a discretion not to charge every offence).

What is comprehended by the two exceptions, namely those offences which can be characterised as continuing offences, and matters where the facts are so closely related that they amount to the one activity? In respect of continuing offences, in Walsh v Tattersall, Gaudron and Gummow JJ said this: (at 91)

"...it may be observed that the present case is to be contrasted with those dealing with an offence defined in terms of a course of conduct or state of affairs, such as keeping a disorderly house or being a rogue or vagabond (Loftus v Woodworth [1936] VicLawRp 46; [1936] VLR 279). There, upon proof of a series of material facts, guilt of the offence may follow, although no particular fact suffices by itself."

Kirby J, in the same case, provided the following illustrations: (at 107)

"Particular problems arose for the application of the duplicity rule in the case of offences which, of their definition, were constituted by continuous activity. Such offences as keeping a brothel, required proof of particular acts at different times. Similarly, conduct which need not, but in some circumstances might, be constituted by activity over time could quite properly be charged in a single count. Instances where this qualification to the rule against duplicity has been upheld include cases involving charges of harassment (Daly v Medwell (1986) 40 SASR 281) and trafficking in drugs (Giretti and Giretti (1986) 24 A Crim R 112)."

An elaboration upon the other exception (matters which are, in truth, the one activity) was provided by Kirby J in these words: (at 107)

"If, for example, criminal acts occurred within a few minutes of time and in close physical proximity, could they be regarded as components of the one activity, so as to be susceptible to treatment as a single count (Jemmison v Priddle [1972] 1 QB 489)? If the events were seen as part of the one transaction or criminal enterprise this approach has been held to be permissible in England (Director of Public Prosecutions v Merriman [1973] AC 584 at 607). If a precise understanding of the charge laid, although evidenced by multiple acts, is that it represents a single crime, then a single count is permissible (Montgomery v Stewart (1967) CLR 220)."

His Honour added: (at 108)

"Ultimately, what is presented is a question of fact and degree for decision in each case: Eades (1991) 57 A Crim R 151 at 156. Various indicia are proposed to sustain a single count against the charge of duplicity, notwithstanding that it may permit evidence to be adduced of events which, taken individually, could constitute separate offences. The indicia include: (a) the connection of the events in point of time; (b) the similarity of the acts; (c) the physical proximity of the place where the events happened; and (d) the intention of the accused throughout the conduct (Weinel v Fedcheshen [1995] SASC 5216; (1995) 65 SASR 156 at 170 per Perry J."

If your client is facing multiple counts of sexual offences arising out of the same incident or the same course of conduct then you may wish to ask the DPP to only proceed with representative counts and

- 1) withdraw the other charges and all reference to them; or
- 2) withdraw the other charges but still allow reference to them in the Facts (as context); or
- 3) (framed another way) *subsume* the other charges into the representative count. For example the indecent assault (touching the vagina) that occurred immediately before the sexual assault (digital penetration of vagina) is subsumed into the charge and Facts of the sexual assault; or
- 4) place charges on a Form 1.

Even if you are left with a sentence for multiple counts, the sentencing court should be mindful of the totality principles espoused in *Pearce v R* [1998] HCA 57.

Also note –

61U Circumstances of certain sexual offences to be considered in passing sentence

Where a person is convicted of:

- (a) both an offence under section 61I and an offence under section 61K, or*
- (b) both an offence under section 61J and an offence under section 61K, or*

(c) both an offence under section 61JA and an offence under section 61K, whether at the same time or at different times, the Judge passing sentence on the person in respect of the two convictions or the later of the two convictions is required, if it appears that the two offences arose substantially out of the one set of circumstances, to take that fact into account in passing sentence.

Sexual intercourse

Sexual intercourse is defined in s 61H:

"sexual intercourse" means:

(a) sexual connection occasioned by the penetration to any extent of the genitalia (including a surgically constructed vagina) of a female person or the anus of a person by:

(i) any part of the body of another person, or

(ii) any object manipulated by another person,

except where the penetration is carried out for proper medical purposes, or

(b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person, or

(c) cunnilingus, or

(d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).

Section 61S provides that children are not presumed incapable of having sexual intercourse:

(1) For the purposes of any offence, a person is not, by reason only of age, to be presumed incapable of having sexual intercourse with another person or of having an intent to have sexual intercourse with another person.

(2) Subsection (1) does not affect the operation of any law relating to the age at which a child can be convicted of an offence.

It is noteworthy that penetration can be to any extent and penetration to the smallest degree will suffice. Penetration is not necessary for cunnilingus to constitute sexual intercourse. Also note *R v Preval* [1984] 3 NSWLR which discussed penetration in the context of fellatio. It is sometimes difficult to ascertain whether there is penetration where a complainant speaks in terms of sucking the penis or licking the penis. Street CJ said that "penetration of the lips of the mouth is sufficient to amount to sexual intercourse" (at 649).

Because most SCIO are allegedly committed against other (often younger) children, the child complainants do not have the understanding or the language to articulate whether there was penetration or not. If the DPP cannot prove penetration, you could offer a plea to an indecent assault.

Date range and ages

Pay attention to the dates or date range particularised in the Court Attendance Notice(s). The age of the complainant may have changed during the date range and this may affect the charge. Your client's age is also important - if your client was under 14 years old at the time of the offence(s) then *doli incapax* applies. If the client turned 14 years old during the date range then there may be an argument that *doli incapax* applies and needs to be rebutted. However, bear in the mind that the date range is just a particular of the charge and not an element. The prosecution may always been

able to apply to amend the dates – especially if the evidence suggests that the offence occurred after your client's 14th birthday.

If *doli incapax* applies, the prosecution will need to provide evidence rebutting *doli incapax*: see Matthew Johnson's paper on *doli incapax*

It is not enough to rebut *doli* simply by:

- 1) providing evidence that your client was disciplined by parents/teachers/police for non sexual offences; or
- 2) providing the school curriculum which sets out that sexual education classes were offered (there needs to be evidence that your client was actually present during the classes); or
- 3) noting that your client attended sexual education classes (there needs to be evidence about what was taught in the class – often it may only be an anatomy lesson and there is no education about what is appropriate/inappropriate sex or touching)

Consent

Lack of consent and knowledge of the lack of consent are essential elements to some offences (eg s 61J). Section 61HA applies for offences under s 61I, 61J and 61JA and prescribes the meaning of consent and knowledge of lack of consent.

Section 77 provides that consent is not a defence in relation to some offences, including some offences involving child complainants under 16 years old.

The age of consent for sex is 16 years old for both females and males. If your client believed that the complainant was above the age of consent then they can raise a defence of honest and reasonable mistake : *CTM v The Queen* [2008] HCA 25.

Counselling

As mentioned earlier when discussing the Right to Silence, it is important that your client not discuss the alleged offence or previous sexual history/sexuality with counsellors. Generally, accredited sex offender counselling is only available for children who have pleaded guilty to a sex offence. As such, there is sometimes pressure from your client and/or family to enter a plea so that the child can start accessing the counselling that they feel they need. In the meantime, there are some sexual health clinics which provide general sexual health education – eg

- NSW (Department of Health) Sexual Health Clinics - run at various locations. See http://www0.health.nsw.gov.au/publichealth/sexualhealth/sexual_phus.asp or call the Information Line (1800 451 624)
- Livingston Road Sexual Health Clinic – 184 Livingstone Rd, Marrickville, NSW 2204 or call them on 02 9560 3057.
- CHAIN (Community Health for Adolescents In Need) – (02) 4226 5816 – in Wollongong

If your client is going to attend a sexual health clinic and commence rehabilitation they should be very careful to not make admissions.

Two main sex *offender* programs for children in the community are:

- Newstreet : The New Street Adolescent Service program provides a coordinated, consistent, quality response to children and young people aged 10–17 years who sexually abuse. The program also works with the families of the children and young people. Through Keep Them Safe, funding was made available for:
 - enhancement of the two existing services
 - an additional service in a rural location with an Aboriginal focus.NSW Health successfully established the additional service in western NSW (Dubbo), and has enhanced services for Sydney, the Central Coast, and Hunter New England (Newcastle and Tamworth). Rural New Street, Western opened on 12 June 2011. All referrals have been Aboriginal young people aged between 11–13 years
- New Pathways Residential Treatment Program²¹: Fr Chris Riley's Youth off the Streets has a residential facility for youth who have problematic sexual behaviours. The farm is located south of Campbelltown/Minto and participants commit for a minimum of 9 months; their stay is often longer. There are limited spaces in the program and there may be costs involved unless the child is funded by Family and Community Services or Aging Disability and Home Care.

Once a child has pleaded guilty and been referred to Juvenile Justice for a background report, Juvenile Justice can assist with the provision of sex offender counselling.

A list of accredited sex offender counsellors/psychologists (some are private practitioners) is available via the Commission for Children and Young People's website.

AVO

In most sexual offences involving child complainants, the police will have also applied for an AVO. If the offence is proven, the AVO may automatically follow unless the court can be convinced that it is not necessary. If the offence is not proven, the police may still proceed with the AVO application and your client will need to be advised about whether to defend it or simply consent without admissions to an order. Currently, if a final AVO is made involving a PINOP who is under 16 years old, the AVO will appear on a working with children check (see below). Thus, wherever possible, try to avoid a final order. Sometimes the police will be prepared to accept a long interim order which will be withdrawn if its duration passes without incident.

If you cannot avoid a final order being made, then you could at least ask the police to amend their application (or withdraw their application and lay a fresh application) which is consistent with any Agreed Facts that were negotiated in the substantive charge. For example, if the matter originally started as a sexual assault charge with an associated AVO but is then negotiated to a common assault and/or offensive behaviour, the "grounds" in the AVO application should reflect this change.

Criminal records – unspent convictions and working with children check

²¹ See <http://foundation.youthoffthestreets.com.au/page.aspx?pid=278>

Clients should be advised that convictions for sexual offences can never be spent: *Criminal Records Act 1991*, s 7(1)(b) and *Criminal Records Regulations*, reg 17: see table in Aaron Tang's paper *Children's Criminal Records and Convictions*, CLS conference 2010.

Similarly, clients should also be advised about whether their matter will be subject to a working with children check. The working with children check will pick up relevant criminal records and relevant AVOs. As discussed above, a relevant AVO is a final order made for the protection of a child under 16 years old. A relevant criminal record includes sexual offences or offences involving reportable conduct: *Commission for Children and Young People Act 2012*, s 33.

Also, Information that may be disclosed under this section 33(2) includes:

- (a) information relating to spent convictions, despite anything to the contrary in the *Criminal Records Act 1991*, and
- (b) information relating to criminal charges, whether or not heard, proven, dismissed, withdrawn or discharged, and
- (c) information relating to offences, despite anything to the contrary in section 579 of the *Crimes Act 1900*.

However the *Child Protection (Working with Children Check) Act 2012* was assented to on 27/6/12 and is due to commence on 15/6/13 (see the Working with Children Check information delivered at this 2013 CLS Conference).

Sex offender Register

Clients should also be advised about whether they will go on the sex offenders register. A child will be a registrable person if they are sentenced for a registrable offence and do not fall within an exception under *Child Protection (Offender's Registration) Act 2000*, s 3A. Registrable offences are grouped into Class 1 and Class 2 offences: see s 3. Class 1 child offenders must report for 7 ½ years and Class 2 child offenders must report for 4 years: s 45A.

Child offenders will only avoid the register if:

- they receive a s 10 or s 33(1)(a); or
- have committed only a single offence of certain offences (eg a single offence involving an act of indecency): *Child Protection (Offender's Registration) Act 2000*, s 3A(2)(c)

A single offence means more than one offence of the same kind arising out of the same incident, against the same victim within a 24 hour period: *Child Protection (Offender's Registration) Act 2000*, s 3A(5) and s 3(3).

Thus, wherever possible, you should try to negotiate for indecent assaults or acts of indecency which occur against one victim within a 24 hour timeframe: see Aaron Tang's paper on *Children's Criminal Records and Convictions*. See also *The NSW Child Protection Register: Ongoing consequences of child sex offences and offences relating to non compliance*

CONCLUSION

We hope that this paper has been helpful in providing some practical tips to dealing with children's committal matters. Because of the broad jurisdiction of the Children's Court there are a great many serious offences which fall within a children's committal practice. As such, the Children's Legal Service has a dedicated committals solicitor (Teres Sia). If you have any further questions or wish to discuss issues that arise from this paper please feel free to contact the authors and/or CLS.

Aaron Tang and Teres Sia

1 June 2013

Annexure 1:

Serious Children's Indictable Offences

<i>Section</i>	<i>Offence</i>	<i>Prescribed Sexual Offence</i>	<i>Offences involving violence</i>	<i>Bail Act presumption</i>
CRIMES ACT 1900				
18	Murder, including murder of police officer (s 19B)			Against – s 9C (9D)
22A	Infanticide			Against – s 9C
24	Manslaughter			Neutral – s 9 exception (9D)
26	Conspiring to commit murder			Neutral – s 9 exception (9D)
27	Acts done to persons with intent to murder		X	Neutral – s 9 exception (9D)
28	Acts done to property with intent to murder		X	Neutral – s 9 exception (9D)
29	Certain other attempts to murder (eg poison, drown, strangle, suffocate, shoot)		X	Neutral – s 9 exception (9D)
30	Attempt to murder by other means		X	Neutral – s 9 exception (9D)
32	Impeding endeavours to escape shipwreck			In Favour – s 9
33	Wounding/inflict gbh with intent		X	Neutral – s 9 exception (9D)
33A	Discharge firearm with intent to cause gbh or resist arrest			In Favour – s 9 (9D)
37	Attempt to choke (eg garrotting)			In Favour – s 9 (9D)
38	Using intoxicating substance to commit an offence			In Favour – s 9 (9D)
46	Causing bodily injury by gunpowder etc			In Favour – s 9 (9D)
47	Using etc explosive substance or corrosive fluid etc			In Favour – s 9 (9D)
61J	Aggravated sexual assault (including attempt) except when the aggravation only arises because the victim is under 16 years old	X		Neutral – s 9 exception (9D)
61JA	Aggravated sexual assault in company (with abh, threaten with weapon or depriving liberty)	X		Neutral – s 9 exception (9D)
61K	Assault with intent to have sexual intercourse (or attempt) or s 61B prior to the introduction of s 61K	X		Neutral – s 9 exception (9D)
66A	Sexual intercourse with child under 10 yrs old	X		Neutral – s 9 exception (9D)
66B	Attempt or assault with intent to have sexual	X		Neutral – s 9

	intercourse with child under 10 yrs old			exception (9D)
66EA	Persistent sexual abuse of child	X		In Favour – s 9 (9D)
80A ²²	Sexual assault by forced self manipulation if victim under 10 yrs old.	X		In Favour – s 9 (9D)
86(3)	Specially aggravated kidnapping with violence and in company		X	Neutral – s 9 exception (9D)
93O	Contaminating goods causing or intending to cause death or gbh		X	In Favour – s 9
96	Robbery with wounding/gbh		X	Neutral – s 9 exception (9D)
97(2)	Aggravated robbery with dangerous weapon		X	Neutral – s 9 exception (9D)(8C)
98	Armed robbery or Robbery in company with wounding/gbh		X	Neutral – s 9 exception (9D) (8C)
109(3)	Breaking out of dwelling house after committing or entering with intent to commit indictable offence (specially aggravated)			In Favour – s 9 (9D)(8C)
110	Breaking, entering and assault with intent to murder			In Favour – s 9 (9D)(8C)
112(3)	Specially aggravated break enter and commit serious indictable offence			In Favour – s 9 (9D)(8C)
198	Maliciously damage property with intention to endanger life			In Favour – s 9 (9D)
203B	Sabotage (to public building)			In Favour – s 9
204	Destruction of, or damage to, aircraft or vessel with intent or reckless indifference			In Favour – s 9
208(3)	Threatening to destroy etc to an aircraft, vessel or vehicle and discharging firearm, causing explosion or inflicting wound/gbh			In Favour – s 9
211	Acts to railways with intent to cause death, bodily injury or endanger safety			In Favour – s 9
FIREARMS ACT 1996: offences of manufacture or sale of firearms with 20 yrs imprisonment				
50A	Unauthorised manufacture of prescribed firearm or pistol			Against -8B
51(1A) and (2A)	Non compliance with restrictions on sale of firearms			Against – 8B
51B	Selling firearms on ongoing basis			Against – 8B
DRUG MISUSE AND TRAFFICKING ACT 1985				
24(2A)	Manufacture/production in presence of children or procuring children to supply (see s 33AC(3) and (4))			Against – 8A
33(3)	Offences involving large commercial quantity			Against – 8A

NOTE:

(8C)- There is a presumption against bail if the child is accused of two or more “serious property offences” and has been convicted of a serious property offence in the last two years.

²² Prescribed by Children’s (Criminal Proceedings) Regulation 2011, reg 32

(9D) – Bail will only be granted in exceptional circumstances if the child has previously been convicted of a “serious personal violence offence”.

Annexure 2:

GENERAL ADVICE FOR CHILDREN’S COMMITTAL MATTERS

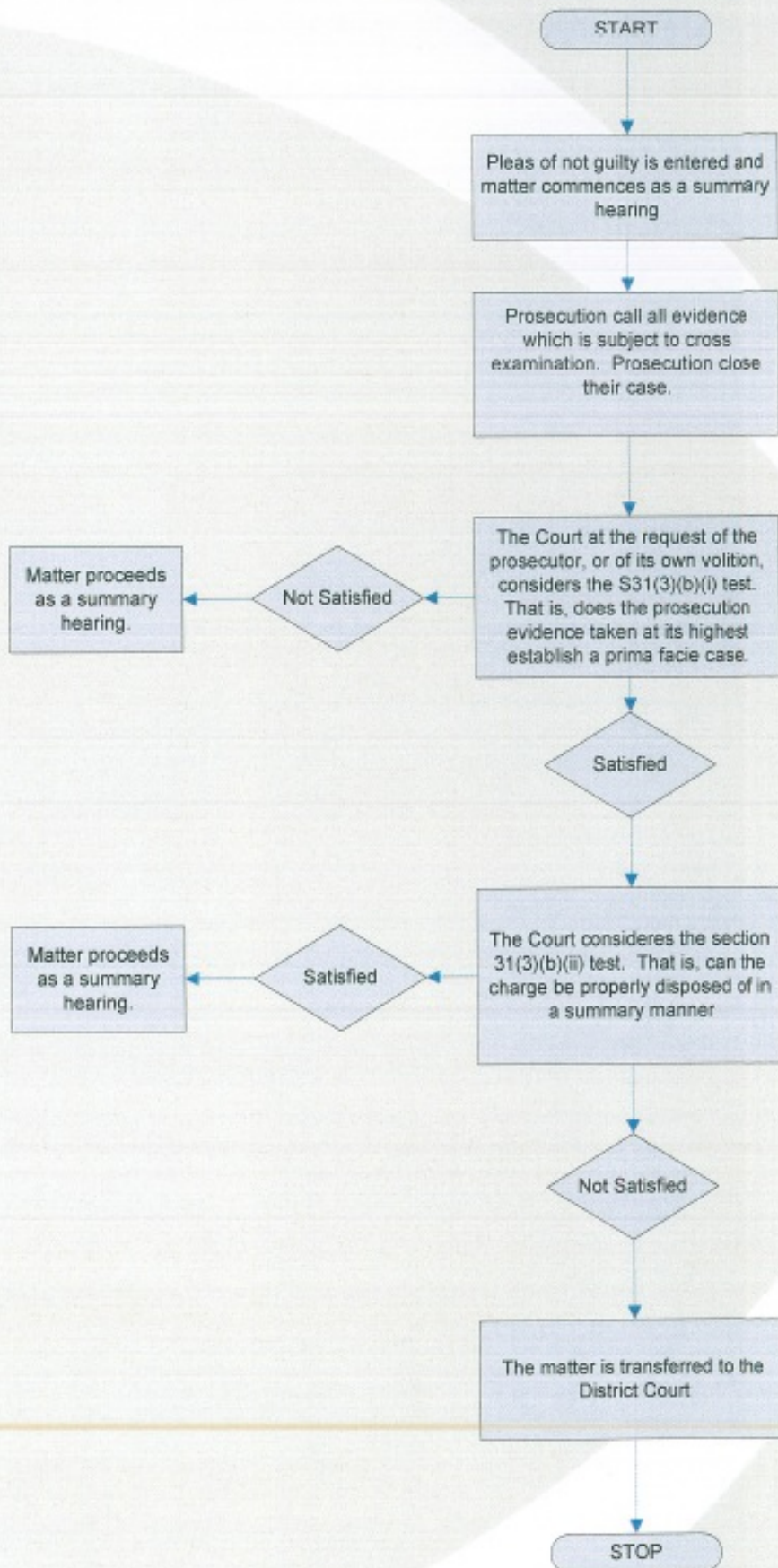
Representation	
<input type="checkbox"/>	Role as children’s lawyer – direct representative
<input type="checkbox"/>	Confidentiality and limits to confidentiality
<input type="checkbox"/>	Duties to the client and duties to the court
<input type="checkbox"/>	Continuity of representation – I will continue to represent in Children’s Court (CC) but there may be different representation (eg counsel) in the District/Supreme Ct.
<input type="checkbox"/>	Explained Legal Aid NSW assignment policy and CC panel.
Police/DPP	
<input type="checkbox"/>	Explained that the DPP have carriage and the role of the DPP: independent but consult with police and complainant(s).
	Explained any role of police prosecutors – eg for associated AVOs
Charges/SCIO	
<input type="checkbox"/>	Explained charges and elements of charges (including doli incapax)
<input type="checkbox"/>	Explained maximum penalties of the charges
<input type="checkbox"/>	Read/outlined the Facts
<input type="checkbox"/>	Explained serious children’s indictable offence (SCIO) – 25 yr max penalty or certain sexual offences. There is no other crime more serious than 25 yr offences except those punished by life imprisonment (eg murder)
<input type="checkbox"/>	A SCIO is too serious to be finalised in the CC. It may be committed to the District Court (DC)/Supreme Court (SC): a higher adult court.
	The CC has a maximum penalty of 2 yrs per offence and 3 yrs altogether. The DC/SC do not have this jurisdictional limit.
<input type="checkbox"/>	Explained committal process – entitled to see full brief and then CC commits to DC/SC.
<input type="checkbox"/>	The committal is not a decision re guilt but rather whether there is a case to send to the DC/SC.
<input type="checkbox"/>	If found guilty or pleading guilty to the SCIO, the maximum penalty available in the DC/SC is _____.
	Are there uncharged acts?
	Are there other charges that the prosecution could lay

Instructions and right to silence	
<input type="checkbox"/>	Police have the onus of proof of guilt beyond a reasonable doubt. They must prove each element of each charge.
<input type="checkbox"/>	We are entitled to see the brief of evidence. No plea needs to be entered at committal.
	Is the client fit to enter a plea?
<input type="checkbox"/>	Where appropriate explained that I will not take instructions now until after we have seen enough of the brief.
<input type="checkbox"/>	Advised about exercising right to silence and to not talk to police, media, family/friends or anyone except lawyers. Anything said can be used against them.
Plea of not guilty (PNG) or Plea of guilty (PG)	
<input type="checkbox"/>	Do not need to enter a plea until we have seen brief of evidence.
<input type="checkbox"/>	If PG then cannot PNG unless there is a traversal of plea (often involving getting another lawyer)
<input type="checkbox"/>	If PNG can always change the plea to a PG at any stage.
	Can PNG because they did not commit the offence OR they did commit the offence but want the police to prove it
<input type="checkbox"/>	Can PG because that agree with having committed offence OR they did not commit the offence but do not wish to defend the matter.
<input type="checkbox"/>	If the yp PG the matter proceeds to a sentence (often after a background report is obtained). There can be scope for negotiations about Facts.
<input type="checkbox"/>	If the yp PNG the matter will proceed to a hearing (in the CC – before a magistrate) or trial (in the DC/SC – before a judge/jury) where it is decided whether they are guilty or not guilty.
Discounts	
<input type="checkbox"/>	Explained if PG then entitled to a discount of up to 25% off their sentence. The discount is for the utilitarian value of the plea. Generally, the earlier the plea the more you can ask for 25%.
<input type="checkbox"/>	Often, still likely to be able to get 25% discount if PG is entered in the CC.
<input type="checkbox"/>	If the PG is entered in the DC the discount may be less (eg 10-15%)
<input type="checkbox"/>	If the PG is entered late or the yp is found guilty then there may be no discount at all.
The brief of evidence	
	Advice about the contents of the brief and the nexus between the contents and the essential elements of the offence(s)

	The strengths and weaknesses of the prosecution case
Defences/diversion	
	What defences are available (eg identification, duress, self defence, claim of right, mental health)?
	Are there mental health diversions available?
	Defence witnesses identified. Requisitions, subpoenas etc
Likely sentence	
<input type="checkbox"/>	If in DC/SC for sentence then the likely sentence is:
	If in CC for sentence then the likely sentence is:
<input type="checkbox"/>	Explained CC max jurisdictional limit of 2 yrs control order per offence and 3 yrs max.
<input type="checkbox"/>	Other possible non custodial sentencing options include:

	What do the JIRS statistic/guideline judgments say about the range of sentences in the CC and DC
	If a custodial sentence is given it is likely that a head sentence and Non parole period will be set. Advise about the statutory ratio and special circumstances
	A s 19 CCPA order is needed for a sentence of imprisonment to be served in a juvenile detention centre. Special circumstances need to be shown.
	Automatic parole if the head sentence is under 3 years (State offences) and 10 years (Cth offences)
Ancillary orders	The following ancillary orders may apply:
	AVO
	Forensic procedure
<input type="checkbox"/>	Criminal record
<input type="checkbox"/>	Unspent conviction
<input type="checkbox"/>	Working with children check
<input type="checkbox"/>	Sex offenders register
<input type="checkbox"/>	Victims compensation
<input type="checkbox"/>	Compensation order
<input type="checkbox"/>	Non association
	Confiscation orders
	Disqualification from driving
Negotiations	
<input type="checkbox"/>	Flagged the possibility of negotiations with police/DPP to keep the matter in the CC.
<input type="checkbox"/>	Possible alternative charges include:

For a Plea of Not Guilty



For a Plea of Guilty

