Legal Aid Criminal Law Conference – 3 August 2018

Children's Court Considerations

Although this paper is entitled *Children's Court Considerations* it will also cover matters relevant to children's criminal matters in other jurisdictions other than the Children's Court. It is hoped that it will be of assistance to lawyers who practice in the Children's Court but also those who only deal with children infrequently in matters such as Local Court traffic matters, District Court appeals, District/Supreme Court trials and sentences, and State Parole Authority proceedings, inter alia.

This paper seeks to provide an update about children's criminal law for the past 1-2 years. It provides updates concerning:

1. Legislation
2. Pending Law Reform
3. Case law
4. Policy and practice
5. Diversion

Rather than re-inventing the wheel, where relevant, I have extracted or attached papers that either myself and/or others have written.

Acknowledgements

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1) LEGISLATION

1.1) Early Appropriate Guilty Pleas (EAGP) for child defendants

The below is extracted from an article in the Law Society Journal, July 2018 written by myself and Anne Whitehead (ODPP). See also the commentary at the end of the *Recent Developments in Children's Criminal Law* paper by Elizabeth Nicholson (attached)

Introduction

The Early Appropriate Guilty Plea (EAGP) reforms make significant changes to the NSW criminal justice system by reforming the way that committals are conducted. The Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017 (the EAGP Act) amended the Criminal Procedure Act 1986 (CPA) the Children (Criminal Proceedings) Act 1987 (CCPA), and the Crimes (Sentencing Procedure) Act 1999 (CSPA) and introduced particular changes to the committal proceedings for children's criminal matters.

Section 31(1) CCPA provides that matters charged before a Children's Court are presumptively dealt with summarily except for two types of matters which may be committed from the Children's Court to a higher court:

1) A serious children's indictable offence (SCIO)
2) A non serious children's indictable offence which is committed pursuant to s 31(2), (3) or (5), CCPA

Only SCIOs are subject to the new EAGP committal process[1]. However, this article will also highlight changes made by the EAGP Act to s 31 and the introduction of the committal provisions in Pt 3, Div 3A of the CCPA.

Do the reforms apply?

The EAGP Act passed on 18 October 2017 and was given assent on 24 October 2017. Its provisions apply to offences charged from 30 April 2018. Hence, any SCIO which was charged before 30 April 2018 will be dealt with under the old committal scheme.

If a court attendance notice issued pre EAGP initially charged a non SCIO but this charge is 'upgraded' to a SCIO after 30 April 2018 the EAGP scheme does not apply. Clause 119A of the Criminal Procedure Regulation 2017 provides that non EAGP matters are those proceedings that "deal with one or more offences if proceedings for *any of those offences* commenced before 30 April 2018". The Children's Court Practice Note 12 also provides that the clauses relating to the EAGP committal process only apply to proceedings that contain at least one SCIO offence where all Court Attendance Notices/offences in the proceedings commenced on or after 30 April 2018[2].

[1] Section 27(2B) of the CCPA
[2] Clause 9.1

Similarly, the new committal provisions within the CCPA relating to s 31 CCPA only apply to criminal proceedings commenced from 30 April 2018.

Therefore, it is possible that a child may have matters dealt with in the following ways:

1) As a SCIO under the old committal scheme
2) As a SCIO under the EAGP committal scheme
3) As a non SCIO under the old CCPA
4) As a non SCIO under the new Pt 3, Div 3A of the CCPA

EAGP committal process

The EAGP committal process for Children's Court matters closely mirrors the procedures in the adult jurisdiction up until sentencing when there is a marked departure.

The EAGP process involves six key stages:

1) EAGP Brief of Evidence
2) Charge certification
3) Case conferencing
4) Possible calling of witnesses
5) Automatic Committal
6) Sentencing discounts

As with adult matters, the brief of evidence served on a young person in an EAGP matter must conform to the requirements of the amended CPA in particular ss 61 to 63. This is a simplified brief of evidence which retains all essential items but which does not require the evidence to be in a particular form. An Agreement between the ODPP and NSW Police sets out in detail the contents of the Brief. The timetable for service mirrors the adult jurisdiction: the brief is to be served 8 weeks after the first mention date[3]; the matter is then adjourned for 6 weeks for charge certification by the ODPP[4] ; upon the filing of the charge certificate the matter is adjourned for 8 weeks for the case conference to occur[5]. An "interests of justice" test applies in the Children's jurisdiction to any application for a departure from the timetable set in the Practice Note[6].

Allowance is made for applications to have prosecution witnesses called under s 82 and 84 of the CPA. A timetable is to be set at the mention when the matter is adjourned for case conference, and unlike in the adult jurisdiction[7], the bringing of such an application is not to delay the case conference[8]. Following the filing of the case conference certificate, assuming that the SCIO offence is proceeding, there is a committal which is automatic.

Due to the unique sentencing considerations which apply to children, the mandatory discount scheme for sentencing of adults under EAGP reforms does not apply to a person who is both under 18 at the time of the offence, and under 21 at the time of charging: s 25A(1)(b) CSPA.

[3] Children's Court Practice Note 12 Clause 9.2
[4] Children's Court Practice Note 12 Clause 9.3
[5] Children's Court Practice Note 12 Clause 9.4
[6] Children's Court Practice Note 12 Clause 5.2
[7] Local Court Practice Note Comm 2 Clause 9.2
[8] Children's Court Practice Note 12 Clause 9.9

DPP involvement

For SCIO matters commenced before 30 April 2018, the ODPP became involved shortly after the charge was referred by police to the ODPP. Under the EAGP process, the ODPP will generally not appear in a matter until after the brief has been served. The matter will be prosecuted by police prosecutors beforehand. A young person who wishes to plead guilty to the charges prior to charge certification will need to obtain the consent of the ODPP[9].

As the ODPP solicitor will be allocated almost immediately upon the brief being served, any defence requests for additional items can be made for that solicitor to consider as soon as possible after the brief has been served.

Case conferencing

The date for the case conference is to be fixed by the court at the charge certification mention. Where the parties are unable to agree upon a date the matter is to be adjourned for a week for agreement to be reached[10]. The CPA requires the case conference to be held in person or via AVL[11] and will predominantly be conducted using AVL via a new system being rolled out at the ODPP and Legal Aid, which is to be made available to private practitioners through Legal Aid.

Section 31 CCPA

Non SCIO are presumptively dealt with summarily in the Children's Court unless one of the following applies:

1) s 31(2) CCPA – the child elects: ie the child informs the Children's Court at any time during or before the close of the prosecution case that they wish to have their matter dealt with at trial according to law;
2) s 31(3) CCPA – the matter is defended and after all the evidence for the prosecution has been taken[12] the Children's Court states that:
    - it is of the opinion that the evidence is capable of satisfying a jury beyond reasonable doubt that the child has committed an indictable offence; and
    - the charge may not properly be disposed of in a summary manner;
3) s 31(5) CCPA – the child pleads guilty at any stage of proceedings and the Children's Court states that it is of the opinion that, having regard to all the evidence before it (including any background report[13]), the charge may not properly be disposed of in a summary manner.

The EAGP reforms were expected to replicate the committal procedures which previously applied for committals under s 31 CCPA. Nevertheless, there were a few changes which the Act introduced.

Section 31(2), CCPA

[9] CPA s 95(2)(a)
[10] Children's Court Practice Note 12 Clause 9.4, 9.5
[11] s 71(2)
[12] ie the close of the prosecution case in a summary hearing
[13] See s 25 of the CCPA

The Children's Court Practice Note 12, cl 8.2 provides that if a child intends to make an election under s 31(2) CCPA he or she must notify the prosecutor and the Children's Court at the earliest opportunity.

The EAGP Act introduced s 31(2A) and (2B) into the CCPA. Section 31(2A) provides that if a child makes an election before the close of the prosecution case, the proceedings are to continue as summary proceedings for the purpose only of completing all of the evidence for the prosecution.

Section 31(2B) provides that the Children's Court must consider all the evidence before the Court and decide whether it is capable of satisfying a reasonable jury beyond reasonable doubt that the person committed an indictable offence. If the court is not so satisfied then it must discharge the child.

If the child is not discharged under s 31(2B) the court must then conduct committal proceedings under Pt 3, Div 3A CCPA (see below)

Section 31(5), CCPA

If a prosecutor intends to make a s 31(5) submission they must advise the child and the court at the earliest opportunity[14]. Notice should be given no later than the time that a guilty plea is entered for the offence for which the application relates and the matter is adjourned for a background report. If the court makes a decision under s 31(5) then it must commit the matter for sentence[15].

Section 31(3), CCPA

If the prosecutor intends on making a submission that the Court should exercise its discretion under s 31(3) then the prosecution is to advise the child and the court at the earliest opportunity.[16] Notice should be given no later than the time that the Court adjourns the matter for a summary hearing. If the court makes grants an application under s 31(3) then it must proceed to committal proceedings under Pt 3, Div 3A CCPA.

Division 3A, CCPA

Although the prosecution have already called evidence within the summary hearing, it has the ability to call additional evidence in the committal proceedings under Pt 3, Div 3A. This can be tendered as statements[17]. Subject to any judicial restriction[18], the defence may examine/cross examine witnesses[19] and may also call witnesses[20]. The court must consider any evidence heard under s 31 and 31C and determine whether or not there is a reasonable prospect that a reasonable jury, properly instructed, would convict the accused of an indictable

[14] Children's Court Practice Note 12 cl 8.1
[15] Section 31H of the CCPA
[16] Children's Court Practice Note 12 cl 8.1
[17] s 31C
[18] s 31B(4)
[19] s 31B(3)
[20] s 31B(1)

offence. If so satisfied the court will commit the child[21]. If not, the court will discharge the child[22]. If the prosecution and defence consent the court may commit the child (ie like a waiver)[23]. Also, at any stage during this process, the child may plead guilty and (if the plea is accepted by the court) the child will be committed[24].

Explanations

The court will provide child friendly oral and written explanations of the committal processes both under the EAGP process and under s 31 CCPA[25].

Conclusion

Previously, there have not been many children's matters which have been committed. The majority of committal matters have tended to be resolved via negotiations. It is hoped that these EAGP reforms will continue to facilitate negotiations and the expeditious resolution of children's committals.

Other EAGP considerations

- As referenced in Ms Nicholson's paper, there have been prior discussions about the possibility of conducting face to face case conferencing in conciliation rooms at Parramatta and Surry Hills Children's Courts. Children would be able to attend court so that they could be accessible to their lawyer to provide face to face instructions for the case conference. However, the ODPP have indicated that they will conduct case conferences by AVL and will not make an exception for children's matters.

- Prior to EAGP there were some debates about the operation of s 31(3) CCPA and whether it was sufficient to conduct a s 31(3) on the papers (eg tendering Facts and/or brief and a record) without the need for the prosecution case in a summary hearing. Most courts took the view that a summary hearing was necessary. I am not aware of any authority for the proposition that a s 31(3) could be conducted otherwise.

  As noted in Ms Nicholson's paper, the provisions in the EAGP legislation now provides greater guidance to the fact that s 31(3) proceedings should involve the examination/cross examination of witnesses. Practice Note 12, cl 8.1 refers to notice of s 31(3) application being provided no later than the time that the court adjourns the matter for a summary hearing. Section 31B confers the right of the defence to examine/cross examine witnesses in a Div 3A committal process, which follows the s 31(3) determination.

[21] s 31F(1)
[22] s 31F(2)
[23] s 31F(3)
[24] s 31G and H
[25] Cl 9B of the Criminal Procedure Regulation 2017 and cl 6A of the Children (Criminal Proceedings) Regulation 2016

- Although it does not illustrate children's matters which are dealt with under EAGP the below flowchart may assist to understand the process of committals under s 31 CCPA.
  [insert Childrens' Court committals under s 31 CCPA _Process map]

1.2) Section 31(6) CCPA

It was noted that s 166 certificates were not permissible in the Children's Court. Section 27 CCPA allows for the application of the Criminal Procedure Act to the Children's Court but subject to the provisions within the CCPA, including s 31. As noted above, s 31 requires that all matters be dealt with summarily in the Children's Court other than serious children's indictable matters or matters dealt with under s 31(2), (3) or (5). Hence, s 166 certificates would be inconsistent with s 31 CCPA. This became problematic for both defence and prosecution who might wish to utilise s 166.

Accordingly, Section 31(6) and (7) CCPA were introduced in early August 2018 prior to the EAGP reforms. The provisions replicate s 166 certificate.

> (6) Notwithstanding subsection (1), when the Children's Court commits to another court for trial or sentence a person who is charged with an indictable offence or a serious children's indictable offence (the "principal indictable offence"):
>
> (a) the prosecutor must, if the person has been charged with any back up or related offence to the principal indictable offence, produce to the Children's Court a certificate specifying the back up or related offence, and
> (b) the Children's Court may transfer to the other court proceedings for any such back up or related offence.
>
> (7) If a back up or related offence is transferred to another court under subsection (6), the proceedings for such an offence are to be dealt with in accordance with sections 167-169 of the *Criminal Procedure Act 1986* . For that purpose, a reference in those sections to the Local Court is to be construed as a reference to the Children's Court.

There have been some instances where the prosecution have expressed reluctance to place matters on a s 31(6) certificate and simply wish to commit non serious children's indictable offences. However, the court cannot commit a matter other than in the ways described above, pursuant to s 31 CCPA. That is, if a non SCIO offence is not subject to a s 31(6) certificate, it can only be committed via s 31(2), (3) or (5) CCPA.

I also note that s 31(6) makes it *mandatory* for the prosecution to place back up or related offences on a s 31(6) certificate – see s 31(6)(a).

1.3) Ex officio indictments

There have been several instances where the DPP have laid ex officio indictments in the District Court, including for matters which have not been subject of committal proceedings in the Children's Court. For example, I was involved in a case where the DPP realised that defended non SCIO offences could not be committed to the District Court without first going through the prosecution case in a summary hearing pursuant to s 31(3) CCPA. Not wishing to potentially put their witnesses (especially their complainant) through giving evidence in a summary hearing and then again at trial, the DPP sought to withdraw the Children's Court charges and laid them ex officio directly in the District Court.

We argued against the withdrawal of the charges in the Children's Court.

The Crown argued that the Children's Court has no supervisory role in the withdrawal of charges, relying on s 208 Criminal Procedure Act and *McNamara v Fenner* [2017] NSWSC 1746. In *McNamara* the court found that, pursuant to s 208 of the Criminal Procedure Act, the prosecution did not require the leave of the court to withdraw charges. However, the court in *McNamara* did say (at 22-23):

> 22…, Mr McNamara's express concerns about whether there has been some abuse of process, unfairness or injustice, inappropriately focuses attention upon the result of the withdrawal of the charges, about which there could be no such complaint, and conflates it with what might be the position if the prosecutor elected to lay the same charges again in fresh proceedings. Only in that context would Mr McNamara's concerns about an abuse of process, or unfairness or injustice, or the need for the court to maintain control over its own process, assume importance….
>
> 23. In short, Mr McNamara's concerns are premature…

As such, our case was somewhat distinguished from McNamara in that the DPP were withdrawing the charges after laying the 'fresh proceeding's via ex officio indictment. Unlike *McNamara,* our concerns were not premature.

We submitted that the court did have the power to prevent a withdrawal of a charge because the court does have a supervisory role in the form of an implied power to prevent an abuse of process. We argued that in the circumstances of the case the court should prevent the DPP from withdrawing charges when the withdrawal would deny the Children's Court the jurisdiction to exercise its summary and/or committal powers with respect to indictable offences. The prejudice for the young person was the removal of his matters from determination and/or oversight by the Children's Court and the more favourable procedural and penal provisions of the Children's Court.

The Crown relied upon *PM v The Queen* (2007) 232 CLR 370 as authority that it was permissible to lay ex officio indictments in the District Court for non SCIOs, despite those offences not having been subject to s 31 CCPA processes. There was no abuse of process. *PM* is discussed in Elizabeth Nicholson's paper (attached) and I will not go into detail about that case here.

However, we noted that in *PM* the High Court had left open the question of what might occur in circumstances where there had been no committal or an irregular committal, with the majority (Gleeson CJ, Hayne, Heydon and Crennan JJ) saying:

> *"30 … [I]f, unlike this case, criminal proceedings against a child were instituted by filing an indictment in the District Court alleging indictable offences unrelated to any charges that had been laid in a court attendance notice and had been the subject of examination in prior committal proceedings in the Children's Court, there may be some question whether the prosecution of that indictment should be stayed …"*[26]

[26] *PM v The Queen* [2007] HCA 49; 232 CLR 370 at [30].

Other cases which deal with similar circumstances follow:

In *R v Stanton* (1991) 52 ACrim R 164, the Court of Criminal Appeal was required to determine the power to stay a prosecution in the context of indictable offences that could have been dealt with by the Children's Court. In *Stanton*, the appellant had erroneously been committed through the Local Court when the proper jurisdiction was the Children's Court. *Stanton* sought a stay. In dismissing the appeal against a refusal to stay the proceedings, Gleeson CJ held that there was a public interest in the prosecution of the accused for a series of indecent assaults[27]. Gleeson CJ also noted that the appellant had been party to committal proceedings, albeit in the wrong jurisdiction[28]. There was, therefore, no practical prejudice in preparing their defence for the trial.

In *Iqbal v R* (2012) NSWCCA 72, the CCA upheld a refusal of a stay application alleging abuse of process where an ex officio was laid in relation to a Local Court charge. Local Court proceedings had already been listed for hearing. The court disallowed an application by the DPP to vacate the hearing so that they could come into the matter and elect for it to go to District Court. The Crown did not appeal the Local Court decision refusing to vacate the hearing/leave to elect but instead laid an ex officio in the District Court. The defendant made an application for stay of the District Court proceedings. This was refused and the defendant appealed. Ultimately, the CCA dismissed the appeal.

Tasmania v MAR [2011] TASSC 56 concerns a children's matter which was committed to the District Court. Then an ex officio charge was laid which could have been dealt with in the Children's Court. An application for a stay was granted and upheld by the Supreme Court. The Supreme Court noted the prejudice in the differences between the adult and children's jurisdictions. Interestingly, this case's circumstances sound similar to *PM* but its result is different. It postdates *PM* but does not refer to it. However, I note that the Tasmanian legislation is different from NSW and the circumstances in which the matter was committed and the ex officio laid was different too (there was an error in the original charge laid). Nevertheless, *Tasmania v MAR* at least provides an authority where a stay was granted for abuse of process due to unfairness in depriving the defendant the benefits of the Children's Court jurisdiction.

See also the paper by Stephen Lawrence *Abuse of Judicial Process in Criminal Proceedings*[29].

Ultimately, in an ex tempore judgment, the Children's Court found against us and allowed the DPP to withdraw the charges.

[27] At 170 (Gleeson CJ, with whom Wood and Grove JJ agreed).

[28] The young person in PM v The Queen (2007) 232 CLR 370 also had the benefit of a committal in the Children's Court

[29] http://criminalcpd.net.au/wp-content/uploads/2017/01/abuse-of-judicial-process-criminal-cle-0117.pdf

1.4) Child Sexual Assault Act 2018

On 20 June 2018 the Criminal Legislation Amendment (Child Sexual Abuse) Act 2018 was passed. The Act amends:

- Crimes Act
- Criminal Procedure Act
- Crimes (Sentencing Proc) Act
- Child Protection (Offender Registration) Act (CPOR)

A copy of the Act is linked https://www.legislation.nsw.gov.au/bills/385964bb-9827-4928-8fa8-d8f28dd6010e.

The Act has not yet received Royal Assent and it is not known when it will commence, although we anticipate that it may be later this year or early next year, following training. We anticipate that there will be some Legal Aid training about the amendments, including some further training concerning the provisions which relate to child defendants.

The Act seeks to implement some recommendations from the Child Abuse Royal Commission.

1.4.1) New sexual offences

There are significant changes to sexual offences, in particular child sexual offences. The Act sought to simplify and consolidate sexual offences and aggravating features.

A) There are new offences of 'sexual touching[30]' and 'sexual act[31]' which replace indecent assaults and acts of indecency.
B) There are new child sexual offences:
    a. Assault with intent to have sexual intercourse with child 10-16 years old: s 66D
    b. Sexual touching of child under 10 – s 66DA
    c. Sexual touching of child 10-16 – s 66DB
    d. Sexual act with child under 10 – s 66DC
    e. Sexual act with child 10-16 – s 66DD
    f. Aggravated sexual act with child 10-16 – s 66DE
C) There are new offences which apply for adults but not children:
    a. Grooming a person for unlawful sexual activity with a child under the person's authority – s 66EC
    b. Concealing a child abuse offence – s 316A
    c. Persistent sexual abuse –s 66EA
D) There are new offences which may have a particular application to child defendants:
    a. sexual touching of 16, 17 year olds in special care – s 73A[32]
    b. sexual act for the production of child abuse material, child under 16 – s 66DF

[30] s 61KC and s 61KD

[31] S 61KE and s 61KF

[32] See below in relation to the Inquiry into the adequacy of special care offences

Section 66DF

Section 66DF provides:

> Any person who intentionally:
>
> (a) carries out a sexual act with or towards a child who is under the age of 16 years, or
> (b) incites a child who is under the age of 16 years to carry out a sexual act with or towards the person, or
> (c) incites a child who is under the age of 16 years to carry out a sexual act with or towards another person, or
> (d) incites another person to carry out a sexual act with or towards a child who is under the age of 16 years,
>
> and who knows that the sexual act is being filmed for the purposes of the production of child abuse material, is guilty of an offence.
>
> Maximum penalty: Imprisonment for 10 years

Significantly, there are three main amendments in the Child Sexual Abuse Act which are *beneficial* to child defendants:

1.4.2) Child Protection Register

The Act introduces s 3C of the Child Protection (Offender Registration) Act 2000 (CPOR). This allows a sentencing court the discretion to make an order declaring that a person who was a child at the time of the offence not be treated as a registrable person for the purposes of the CPOR Act, and thus not be placed on the Child Protection Register. The court can make such an order only if:

a) The victim was under 18 at the time of the offence
b) The person has not been previously convicted of a Class 1 or Class 2 offence
c) The court does not impose a sentence of full time detention or a control order (unless it is a suspended sentence)
d) The court is satisfied that the child does not pose a risk to the lives or sexual safety of one or more children or children generally.

Section 3C does not limit the operation of s 3A(2)(c) which provides for other avenues for child offenders to not be placed on the register.

The legislation leaves open for argument the possibility of an application being made to the sentencing court to exercise its discretion under s 3C on a date some time *after* it has already imposed its sentence. However, I'm not sure whether this argument would succeed. I note that the legislation was not designed to have retrospective effect.

In the meantime, if you have any children getting sentenced for matters which will place them on the Child Protection Register you may wish to consider whether it is possible to delay the sentence until after the introduction of s 3C. Section 24A(1)(a) of the Crimes (Sentencing Procedure) Act 1999 provides that a sentencing court cannot take into account as a mitigating factor on sentence the fact that the offender may become a registrable person. This would prevent the court from taking into

account the registration and imposing a lesser sentence or imposing a sentence (such as a s 33(1)(a) CCPA) which would lead to the avoidance of the register. However, s 24A(1)(a) does not provide a prohibition on a sentencing court considering an adjournment to allow for the commencement of s 3C.

See the attached paper on the Child Protection Register.

1.4.3) Similar age defence

Section 80AG provides a similar age defence for certain sexual offences where the complainant is at least 14 years old and there is no more than a 2 year age difference between the complainant and the offender.

Section 80AG Crimes Act provides:

> (1) It is a defence to a prosecution for an offence under section 66C (3), 66DB, 66DD, 73 or 73A if the alleged victim is of or above the age of 14 years and the age difference between the alleged victim and the accused person is no more than 2 years.
>
> (2) In any criminal proceedings in which the application of this section is raised, the prosecution has the onus of proving, beyond reasonable doubt, that the alleged victim was less than 14 years of age or that the difference in age between the alleged victim and the accused person is more than 2 years.

The defence applies to:

- sexual offences (sexual intercourse, sexual touching, sexual act) against children 10-16 years old; and
- sexual offences (sexual intercourse and sexual touching) against children 16 and 17 years old who are under special care

Notably, the defence does *not* apply to an:

- offence against s 66D (Assault with intent to have sexual intercourse with a child 10-16). This is probably not included because the similar age defence implies consensual sex (see further discussion about this below) and the element of assault within s 66D would preclude it from the intention of the defence.
- offence against s 66DE (aggravated sexual act with a child 10-16 years). The fact that s 66DE is not included is curious given that it has a lesser maximum penalty (5 years) than some of the offences which are included (eg s 66C and 66DB). There are several circumstances of aggravation listed within s 66DE(2). Some of them would imply the offence is 'non consensual' (eg deprivation of liberty, assaults). However, there are some circumstances of aggravation which could arise in an underage 'consensual' sexual relationship: eg the offence was committed in company[33] or the child was under the authority of the offender[34].

  Hence, the defence would be available for a 17 year old music tutor who has sexual intercourse with a 16 year old student and is charged under s 73 and the defence would be available to the same tutor who has sexual intercourse with a 15 year old and is charged

[33] s 66DE(2)(c)
[34] s 66DE(2)(d)

under s 66C. However, the defence would not be available for the same 17 year old tutor who asks to see the breasts of the 15 year old student and is charged under s 66DE(2)(d). It would also not be available if the child defendant engages in a consensual threesome and is charged under s 66DE(2)(c).

- offences involving child abuse material (ss 66DF, 91H and 91G). The defence arguably does not apply because the sexting defences (outlined below) are available.
- of course, the defence cannot apply to Commonwealth child pornography offences.

As discussed above, the intention of the legislation is to provide a defence for those who engage in consensual sexual activity with their peers. It is noteworthy however that s 80AG does not require the defence to raise or establish that the sexual activity was consensual. The defence simply requires proof of age. This avoids the having to deal with questions about whether the activity was consensual in circumstances where the law states that the child is too young to consent (at least for those offences where the child is under 16).

NSW Police currently have an internal policy which provides for police to consider taking no action for underage consensual sexual offences where children involved are both under 16[35]. It is unknown whether this policy will be amended to take into account s 80AG.

Although police have often claimed that they do not prosecute for consensual underage sex, Legal Aid have in fact represented clients who have been prosecuted for such sexual activity. This often occurs where the family of one of the children opposes the sexual activity. Also, even where police do not lay charges, it is not uncommon for police to seek to deal with consensual underage sexual activity via Young Offenders Act cautions. However, whilst not 'criminal records' in the general sense, these cautions become police records on the COPS system and also become records which may affect a child's job prospects[36] and may be taken into account in working with children checks for the rest of their lives.

1.4.4) Defences/exceptions for children involved in sexting offences

With the introduction of s 66DF (above) there will be three NSW child abuse material offences for which children may face charges relating to consensual sexting:

a) s 66DF – sexual act for production of child abuse material
b) s 91G - children not to be used for the production of child abuse material
c) s 91H – possession, production and dissemination of child abuse material

A child who takes a naked photo of their 15 year old girlfriend/boyfriend could be committing an offence under any of the three provisions.

[35] I understand that a copy of the policy is not publicly available.
[36] See s 68, YOA.

The defence/exception introduced by the Child Sexual Abuse Act seeks to decriminalise some consensual sexting offences by children. They follow, though only to a degree, similar provisions in Victoria.

- Sections 91H(3) and 91G(6) provide that there is a requirement for DPP approval before prosecution of a child under s 91G or s 91H of the Crimes Act[37]. However, I note that (despite our recommendation), the requirement for DPP approval does not extend to prosecutions under the new s 66DF (see above).

- Section 91HAA provides that a child is *exempted* from an offence of possession of child abuse material (s91H) if a reasonable person would consider the possession is acceptable, taking into account a number of factors.

  Section 91HAA provides:
  A person does not commit an offence under section 91H of possessing child abuse material if:
  (a) the possession of the material occurred when the accused person was under the age of 18 years, and
  (b) a reasonable person would consider the possession of the material by the accused person as acceptable having regard to each of the following (to the extent relevant):
  i. the nature and content of the material,
  ii. the circumstances in which the material was produced and came into the possession of the accused person,
  iii. the age, intellectual capacity, vulnerability or other relevant circumstances of the child depicted in the material,
  iv. the age, intellectual capacity, vulnerability or other relevant circumstances of the accused person at the time the accused person first came into possession of the material and at the time that the accused person's possession of the material first came to the attention of a police officer,
  v. the relationship between the accused person and the child depicted in the material

  The exception does not apply to production of dissemination of the child abuse material under s 91H and also does not apply to offences under s 66DF or s 91G. The exception does not apply to possession once the accused has turned 18.

- Section 91HA(9) and (10) provide that there is a defence for a person possessing, producing, disseminating child abuse material under s 91H if it depicts the person alone.

  (9) <u>Person producing, disseminating or possessing depictions of himself or herself</u>
  It is a defence in proceedings for an offence against section 91H of possessing child abuse material if the only person depicted in the material is the accused person.

  (10) It is a defence in proceedings for an offence against section 91H of producing or disseminating child abuse material if:
  (a) the production or dissemination of the material occurred when the accused person was under the age of 18 years, and
  (b) the only person depicted in the material is the accused person.

[37] That is, police cannot lay a charge until they have received DPP approval. This is particularly important because once a charge, asides from the stress of placing a child within the criminal justice system, it will trigger a Working with Children Check risk assessment.

(11) Material that depicts a person other than the accused person is taken, for the purposes of this section, to depict only the accused person if the material would no longer be child abuse material were the depiction of the accused person to be removed.

(12) The onus of proving under subsection (9) or (10) that material depicts the accused person and no other person lies with the accused person on the balance of probabilities

The defence under s 91HA(9) is available to any person (whether child or adult) who is in possession of child abuse material which only depicts themselves. The defence under s 91HA(10) is only available to child defendants.

Section 91HA(11) deals with the circumstances where a person may take a naked selfie at a party and the photo depicts other people in the background or someone has photobombed. The material is deemed to depict only the accused alone.

There may be instances where it is clear that the child abuse material depicts the accused alone. However there may also be instances where it is not so clear cut. These could include:

- where there are other people depicted and it is arguable whether they are part of the child abuse material or not, especially if they are depicted to have some interaction with the depicted child;
- where it is unclear whether the child depicted is the accused (eg because the face is obscured)
- where the image depicted is a representation and not real (eg a cartoon). Is it a cartoon of depicting the accused alone?

The defences under s 91HA only apply to s 91H and do not apply to s 91G and s 66DF.

Hence, there appears to be some inconsistency in the application of the defences and exception.

Also, as noted above, the sexting defences and exception only apply to State offences and cannot apply to Commonwealth child pornography offences. I note that the Commonwealth offences apply not only to children under 16 but any child under 18 (ie it captures children above the age of consent). Hence, even where the defence/exception applies, police retain a discretion to prosecute for Commonwealth offences; they do not need DPP approval for this.

<u>How will this work in practice?</u>

How the defences and exception will work in practice is unknown but I anticipate that, police who receive a complaint about a sexting offence will:

1) make an initial determination about whether it relates only to possession under s 91H
2) if so, does an exception apply. This will be a subjective determination considering the factors in s 91HAA. If the police determine that an exception applies the matter may go no further.
3) if the police do not think an exception applies they will refer the matter to the DPP for DPP approval
4) the DPP will determine if an exception applies.

5) The DPP will determine if a defence applies. If so, the DPP will decide whether it will nevertheless prosecute. It may be likely that the DPP will not approve prosecution where a defence clearly applies (eg a naked selfie) However, in those cases where it is arguable whether a defence applies (see above) the DPP will be more likely to approve prosecution.
6) I note that the fact that the DPP approve prosecution may not necessarily mean that the DPP take carriage of the prosecution.
7) If the matter relates to dissemination or production and does not attract the exception in s 91HAA, the police (and ultimately the DPP) will still need to consider whether a defence applies under s 91HA. It is possible that the police may determine that a defence clearly applies and take the matter no further; no referral even to the DPP.

As mentioned above, there have been instances where police have sought to deal with consensual sexual offences via YOA caution. This has included sexting offences. Where a police indicate that they will deal with the matter via caution, a lawyer will need to provide advice to the child about whether to accept the caution (with the above mentioned adverse consequences) or force the police to refer the matter to the DPP for consideration.

Legal Aid and other stakeholders (eg Law Society) have advocated for changes in this area for a long time. As noted, the amendments have adopted some, but not all, of the suggestions submitted by Legal Aid. Nevertheless, the amendments are still very welcome.

1.5) Inquiry into the adequacy and scope of special care offences

There is currently an ongoing Parliamentary Inquiry into the adequacy of special care offences. Section 73 of the Crimes Act provides that it is an offence for a person to have sexual intercourse with a child 16 or 17 years old if the child is under the special care of the offender. Special care is defined by reference to an exhaustive list of categories of relationships in s 73(3), including where:

(a) the offender is the step-parent, guardian or foster parent of the victim or the de facto partner of a parent, guardian or foster parent of the victim, or
(b) the offender is a member of the teaching staff of the school at which the victim is a student, or
(c) the offender has an established personal relationship with the victim in connection with the provision of religious, sporting, musical or other instruction to the victim, or
(d) the offender is a custodial officer of an institution of which the victim is an inmate, or
(e) the offender is a health professional and the victim is a patient of the health professional.

In March 2018, s 73 was amended to broaden the scope of the category concerning teachers. The provision was amended to include reference to teaching staff and s 73(6) was inserted to define member of the teaching staff.

> “member of the teaching staff" of a school means:
>
> (a) a teacher at the school, or
>
> (b) the principal or a deputy principal at the school, or

(c) any other person employed at the school who has students at the school under his or her care or authority

Legal Aid has submitted[38] that s 73(6)(c) is too broad and does not require the child to be under the authority of the person employed at the school. It can encompass situations such as a 19 year old out of school hours carer for kindergarten having a sexual relationship with a 17 year old Year 12 student.

Similarly, Legal Aid has submitted that s 73(3)(c) is too broad and can also encompass peer on peer relationships.

Legal Aid has submitted, inter alia, that:

- There should be a modification of the offence to require proof of the existence of a relation of authority with a power imbalance
- There should be DPP approval for prosecutions
- Children should be exempt from prosecutions
- the similar age defence in s 80AG should be modified for ss 73 and 73A to allow for a greater age difference, given that the offence relates to older children (16 and 17) who would (but for this offence) be engaged in consensual sex.

1.6) Sentencing Reforms

The Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017 was assent on 24 October 2017 but has not yet commenced. Legal Aid are rolling out training about the significant sentencing reforms. The reforms have some limited impact upon children:

- The Act amends the Crimes (Sentencing Procedure) Act 1999 (CSPA) and does not apply for children sentenced being sentenced in the Children's Court under the CCPA.
- It may apply for children sentenced under CSPA for traffic matters in the Local Court. However, note s 210 of the Criminal Procedure Act (see further discussion below)
- The amendments will apply to Children being sentenced in the District and the Supreme Courts for both serious children's indictable offences and any other indictable offence sentenced according to law under the CSPA.
- Intensive Corrections Orders (ICOs) are not available for an offender who is under 18: s 7(3). However, I note that it appears that an offender who was under 18 at the time of the offence may turn 18 by sentence and hence be eligible for an ICO.
- A community service work condition cannot be imposed upon an offender to whom the Children (Community Service Work) Act 1987 applies, namely an offender who was a child at the time of the offence and under 21 when charged[39]: s 8(2). However, community service could be a condition on an ICO for which a child who has turned 18 (after the imposition of the ICO) could be eligible: ie the ICO is imposed before the child turns 18 but the community service condition only starts when the child turns 18.

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38 https://www.parliament.nsw.gov.au/lcdocs/submissions/60882/0014%20Legal%20Aid%20NSW%20ORIGINAL_Redacted.pdf

39 s 5, Children (Community Service Orders) Act 1987

- Assessment reports can be written by Juvenile Justice: s 17B
- Juvenile Justice may make an application for
    - additional conditions on a CCO (s 89) or a CRO (s 99); or
    - further conditions or variation/revocation of further conditions on a CCO (s 90) or a CRO (s 99A)
- A supervision condition may be supervised by Juvenile Justice for an offender who is under 18 when the condition is imposed: s 89(2)(g)(ii) for CCO and s 99(2)(e)(ii) for CRO.
- The functions of a Community Corrections officer may be exercised by a a Juvenile Justice Officer (and vice versa) in accordance with any arrangements between Corrective Services and Juvenile Justice: ss 89(2A) for CCO and 99(2A) for CRO.

1.7) Justice Legislation Amendment Act (No 2) 2018[40]

The *Justice Legislation Amendment Act (No 2) 2018* made the following amendments, which started on 21 March 2018. Those amendments marked * will commence on proclamation. I have extracted those amendments which are most relevant to children.

Children (Criminal Proceedings) Act 1987

- the supervision of a child or young person who is on a good behaviour bond or probation may be carried out by a juvenile justice officer or a community corrections officer without an application being made to the Children's Court to vary the bond or probation[41].

Children (Detention Centres) Act) 1987

- the parole provisions of the Act apply to a juvenile offender who is detained in a detention centre, whether or not the offender has reached the age of 18[42].

Court Suppression and Non-publication Orders Act 2010

- a court may suppress the name of a defendant charged with a sexual offence only in exceptional circumstances[43]. I note that this does not affect the non publication provisions in s 15A CCPA.

Crimes Act 1900

- in relation to offences relating to child abuse material, voyeurism and recording or distributing intimate images, the private parts of a female person, or a transgender or intersex person identifying as female, include the breasts, whether or not the breasts are sexually developed[44].
- Amends the definition of private parts in relation to child abuse material to provide that a person's genital and anal areas are private parts whether bare or covered by underwear[45].

Crimes (Domestic and Personal Violence) Act 2007

- proceedings relating to an apprehended violence order against a child are to be held in closed court[46]. However, I note that the definition of a child in the Act relates to a child under 16. Hence, this provision does not AVO against children 16 and 17 years. I note that s

[40] With thanks to Harriet Ketley and Bridget O'Keefe for the preparation of this summary.
[41] s 33(7)
[42] s 40(3)(a1)
[43] s 8 (3)
[44] ss 91FB, 91I, 91N
[45] s 91FB
[46] s 41

10 CCPA does not cover AVO applications because AVO applications are not criminal proceedings that fall within the ambit of the CCPA[47].

Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017 (which has not yet commenced)

- the supervision of an offender in the community may be carried out by a community corrections officer or a juvenile justice officer without an application being made to the sentencing court to vary the order[48].

Criminal Procedure Act 1986

- Establishes a scheme restricting an accused person's access to evidence that a prosecuting authority reasonably considers to be terrorism evidence.* The scheme establishes offences for possessing, copying and circulating terrorism evidence[49].
- Provides that the production of a certified exhibit detail sheet from the NSW Police Force exhibits management system is prima facie evidence of the dealings with that exhibit[50].
- parents and children of an accused in proceedings for a domestic violence or child assault offence are compellable to give evidence, except in domestic violence proceedings where the accused is under 18 years of age (see further discussion below concerning s 279 Criminal Procedure Act).
- Prevents a complainant in proceedings for a sexual assault offence being subpoenaed or otherwise compelled to disclose the identity of the complainant's counsellor[51].

Criminal Records Act 1991

- if an aggregate sentence is imposed on a person for a series of offences, it is the individual prison sentences that would have been imposed for each offence that are to be used for the purpose of determining whether each of the person's convictions is capable of becoming spent. Only prison sentences of 6 months or less are capable of becoming spent[52].

Drug Misuse and Trafficking Act 1985

- the identity of a substance that is in NSW Police custody can be determined using testing and analysis of a representative sample[53].
- Clarifies that certain hemp seed food products with a low concentration of THC are not a prohibited drug[54].

[47] Similarly s 15A CCPA which relates to non publication of a child's identity also has not application in AVO proceedings against a child in the Children's Court. Forensic procedure applications are also not criminal proceedings and therefore are similarly not covered by s 10 and 15A CCPA: *L v Lyons & anor; B and S v Lyons & anor* [2002] NSWSC 1199. See below mentioned discussion about the Department of Justice Consultation Paper on the *Protection of certain witnesses giving evidence*.
[48] See above mentioned discussion of this Act.
[49] Pt 2B
[50] s 275A
[51] s 298A
[52] s 7(5)
[53] s 39CA
[54] Sch 1

LEPRA

- Allows a police officer who reasonably suspects that a person in a public place or school has a knife or other dangerous implement unlawfully in the person's possession to stop, search and detain the person, and search their locker, rather than requiring the person to submit to a search[55]*. Removes the redundant offence of failing to comply with an officer's requirements relating to a search.*
- Allows a police officer to seize any knife or other dangerous implement found during such a search, rather than requiring the person to produce the knife or implement[56].*
- a police officer is not required to repeat a warning relating to a move on direction to each person in a group in a public place if the warning and direction are given to the whole group.*
- any time taken for a person arrested for one punch assaults have a breath test or analysis or to provide a blood or urine sample is not included in the 6-hour investigation period.

Mental Health (Forensic Provisions) Act 1990

- Provides that correctional officers and juvenile justice officers may exercise the same functions as they have in respect of inmates and detainees when transporting a defendant to a mental health facility for a mental health assessment, including powers to restrain, search and use reasonable force[57].*
- Enables a defendant who has been detained for a mental health assessment to be taken to a police station after the assessment for a police officer to decide whether or not to grant the defendant bail, instead of being taken before a Magistrate[58].*
- Removes the requirement for the District or Supreme Court to notify the Minister for Health of the making of an order detaining or releasing an accused person following a special verdict of not guilty by reason of mental illness[59].*

1.8) Section 279 Criminal Procedure Act

The above mentioned Justice Legislation Amendment Act (No 2) 2018 amended s 279 Criminal Procedure Act to make parents and children of defendant's of domestic violence offence or child assault offences to be compellable to give evidence.

Legal Aid secured an change to the legislation to exclude the operation of the provision domestic violence offences involving child defendants. Hence, a parent of a child charged with domestic violence offences (whether against the parent or otherwise) is not compellable to give evidence against their child. The parent will still be entitled to object to giving evidence under s 18 Evidence Act. This is an important recognition of the distinction between the power imbalance in domestic violence offence involving child defendants and domestic violence offences involving adult defendants.

[55] s 23
[56] s 23(5)
[57] s 33(5AA)
[58] s 33(5C), (5D)
[59] s 39(5)

Even though parents can object under s 18 Evidence Act, defence lawyers should be aware that if the objection is upheld the prosecution may apply to admit the parent's evidence pursuant to s 65 Evidence Act (maker unavailable). *R v A2; R v KM; R v Vaziri (No 4)* [2015] NSWSC 1306 suggests that this is permissible. Hence, defence lawyers and those who may provide independent legal advice to witnesses should take this into account. For further discussion about the interaction between s 18 and s 65 Evidence Act see my paper on in *Childrens Legal Service Bulletin 2016* (attached).

1.9) Child Protection (Working with Children) Amendment (Statutory Review) Act 2018

Last year, the Office of the Children's Guardian conducted a statutory review of the Child Protection (Working with Children Check) Act The OCG's report was tabled in Parliament on 13/3/18 and is available on the OCG webpage[60]. Since tabling the report, some of the recommendations have been implemented via legislative changes via the Child Protection (Working with Children) Amendment (Statutory Review) Act 2018 (the Statutory Review Act) – it was assented to on 18 April 2018 and came into operation on 1 June 2018 (with some exceptions yet to be proclaimed).

Some of the key changes most relevant for child defendants include:

Meaning of criminal history

Previously, the Working with Children Check Act (WWCC Act) had no explicit definition of 'criminal history' that could be considered when conducting a working with children check. There was ambiguity about whether certain juvenile records were taken into account, in particular Young Offenders Act records. For a discussion about this issue see the (attached) paper *Children's Convictions and Criminal Records* by myself and Jane Sanders[61]

The Statutory Review report highlighted these concerns in the following extract:

> 3.2.2 Diversion under the Young Offenders Act
>
> Further, the review also heard that the legislation gives rise to uncertainty about whether records of young people who are dealt with by way of diversion under the Young Offenders Act 2000 (the YOA) are included in the criminal history information looked at by the Children's Guardian. Under several clauses in Schedule 1, risk assessments are triggered by "proceedings commenced against a person" for relevant offences if the person has been "convicted" of those offences. However, where the child or young person is dealt with by way of diversion under the YOA by police, there is technically no charge, criminal

60 https://www.kidsguardian.nsw.gov.au/ArticleDocuments/316/Statutory_Review_report_WWC_Act.pdf.aspx?Embed=Y

61 Delivered to Legal Aid, ALS and the Law Society pre-dating the completion of the statutory review.

proceedings, or conviction. While the WWC Act specifies that the Children's Guardian must risk assess a person if any of the matters specified in Schedule 1 to the Act apply, she is not limited to these matters. Section 15(3) and 15(4)(k) allow the Children's Guardian to consider any other relevant information, which means that even if interventions under the YOA fall outside the Schedule 1 on a literal interpretation of the "proceedings commenced against a person" they are still able to be considered.

The position with court imposed cautions and referrals to youth justice conferences imposed under the YOA also leads to some further disparity regarding whether the records are captured under Schedule 1 to the Act. However, as noted above, the Children's Guardian is not limited in the circumstances which give rise to risk assessment and this should therefore not affect whether a person is risk assessed or not in practice.

To remove any ambiguity and address the differing uses of the terms 'criminal history' and 'records' referred to above, the review considers that a definition of criminal history should be included in the WWC Act which is consistent with the Royal Commission's recommendation and includes all matters disposed of under the YOA. For absolute clarity the review also recommends that existing references to criminal record should be removed or replaced as appropriate.

The related issue of how juvenile offences should be treated (which would include whether juveniles diverted under the YOA should be treated differently) was raised in submissions to the review and this is discussed further below

….

….

3.3 Information about juvenile offences

.. a number of submissions to the review noted concern in relation to the same breadth of criminal history information being collected for both adults and juveniles. It was argued that there is a different power dynamic between children and young people who offend against each other, in contrast to adults who offend against a child. It was also argued that the link between peer on peer offending cannot easily be translated to risk to children when the offending child or young person grows into adulthood.

The review notes, however, that no records relating to offences committed as a juvenile give rise to automatic disqualification. All applicants who have a relevant record in relation to an offence committed as a child or young person are comprehensively risk assessed by the OCG. Risk assessment is undertaken by officers with expertise in child protection, being drawn from backgrounds of psychology, social work and criminology. The process requires these officers to consider the factors listed in s15 of the WWC Act and determine if there is a risk to children.

The review was satisfied that requiring risk assessment is not of itself an adverse outcome. Through risk assessment the OCG can consider peer on peer offending, which does not translate to a risk to children in adulthood, and is therefore distinguished from circumstances which legitimately do give rise to risk, such as an adult preying on a child. This is consistent with the Royal Commission's discussions in relation to aligning approaches across jurisdictions. In particular, the Royal Commission's report notes at page 86: "we believe applicants' complete unabridged history including offences from when they were

under 18 years of age should be available for review by screening agencies so they can identify offences, if any, relevant to WWCC decisions". For this reason, the review is of the opinion that all offences, regardless of how they have been disposed, should be considered in the WWCC process.

The Statutory Review Act[62] inserted s 5C which provides a definition of criminal history.

Section 5C provides:

(1) A person's ***criminal history*** includes:
   (a) convictions (including convictions that have been spent, quashed or set aside or for which a pardon has been granted), despite anything to the contrary in the *Criminal Records Act 1991*, and
   (b) criminal charges, whether or not heard, proven, dismissed, withdrawn or discharged, and
   (c) convictions or findings to which section 579 of the *Crimes Act 1900* applies (despite the provisions of that section).
(2) In this section ***conviction*** has the same meaning as it has in the *Criminal Records Act 1991*.

Section 33 of the WWCC Act authorises the Commissioner of Police to disclose information about a person's criminal history. The Statutory Review Act amended s 33(4) to read:

(4) Information about a person's criminal history may be disclosed under this Act:

   (a) whether or not the information relates to events that occurred when the person was under the age of 18 years, and
   (b) whether or not the information relates to offences that cause or may cause the person to be a disqualified person or result in an assessment requirement affecting the person.

I note that s 68(2)(d) of the Young Offenders Act allows cautions and conferences to be disclosed as records for the purposes of a working with children check.

However, despite that above mentioned concerns highlighted in the Statutory Review report about juvenile records (in particular Young Offenders Act records), the statutory changes to ss 5C and 33 do not, in fact, address those concerns directly. A court referred YOA will fall within the s 5C definition of criminal history but a police referred YOA will not (it is not a *criminal charge*[63] and it is not a *conviction*[64]*)*. Hence, a police referred YOA will also not fall within the ambit of s 33 because s 33(4) relates to disclosures of 'criminal history' only.

I note that there has also been no amendment to Schedule 1 of the WWCC Act so police referred YOA will not trigger an automatic risk assessment[65]. Similarly, some court referred YOA for which

[62] https://www.legislation.nsw.gov.au/acts/2018-14.pdf
[63] s 5C(1)(b)
[64] s 5C(1)(a) or (c)
[65] Pursuant to s 14 of the WWCC Act

there are no convictions will also not trigger an automatic risk assessment. However, as before, the Office of the Children's Guardian has a broad discretion to conduct a risk assessment of its own accord[66].

Continuing residence approval

Previously, a child living in an out of home care residence (either with a foster carer or in a group home) might turn 18 and then require a working with children clearance in order to continue to live in the home where other children resided, possibly including their own siblings. Legal Aid acted for a child who was being removed from a residence because of this issue.

Section 11D now allows the OCG to issue a continuing residence approval. A continuing residence approval is sufficient authority for a person who is or was in the out-of-home care of an authorised carer before turning 18 years of age to continue to reside at the residence of the authorised carer, even though the person does not hold a working with children check clearance.

1.10) Juvenile paroles[67]

The amendments to children's parole commenced on Monday 26 February 2018. The most important of those changes are outlined below.

Creation of separate juvenile parole system

The juvenile parole system was previously governed by the same Crimes (Administration of Sentences) Act 1999 provisions as applied to the adult parole system. The Children (Detention Centres) Amendment (Parole) Act 2017 amended the Children (Detention Centres) Act 1987 to introduce provisions which govern the juvenile parole system. Thus, adult and juvenile parole are now governed by separate provisions.

Public interest test replaced with community safety test

Previously, the Children's Court was only permitted to grant parole in respect of a juvenile offender if it was satisfied that release on parole was "in the public interest". Now, the Children's Court will only be permitted to release a juvenile offender on parole if satisfied that granting parole is "in the interests of community safety". This is in line with the change to the test for granting parole in the adult system. However, in the case of juvenile parole this test is subject to the fundamental principles which govern children's criminal proceedings, in particular the focus on rehabilitation and reintegration of children into the community.

Provisions relating to juvenile offenders who turn 18 while on parole

Previously, a juvenile offender who was sentenced to a control order or a term of imprisonment remained under the parole jurisdiction of the Children's Court until the completion of their sentence (even if they turn 18 before the end of their sentence). With the amendments, a juvenile offender will be transferred to the adult parole jurisdiction of the State Parole Authority (SPA) upon reaching the age of 18[68] unless:

[66] See s 15(3) and 15(4)(k)

[67] See also the Children's Court of NSW webpage about paroles: http://www.childrenscourt.justice.nsw.gov.au/Pages/typesofcase/criminal_cases/parole.aspx

[68] They will then be dealt with under the Crimes (Administration of Sentences) Act 1999.

(a) the offender turns 18 while on parole and the birthday occurs during the last 12 weeks of the parole period; or
(b) Juvenile Justice considers it appropriate for the offender to continue to be dealt with in the children's parole jurisdiction.

Juvenile Justice might consider it appropriate for the offender to be dealt with in the Children's parole jurisdiction because of the vulnerability of the young person and/or because Juvenile Justice has retained supervision of the young person, despite them turning 18.

At the time of the amendments, it was predicted that this change would have a significant impact on the size of the CLS parole lists and, as a corollary, on the workload of the Prisoners Legal Service (who deal with adult parole) in the State Parole Authority. It was also noted that whilst ALS appear for children in the parole list at the Children's Court they no longer appear in the State Parole Authority.

Of concern, there is no legislated provision for judicial review of Juvenile Justice's discretion concerning whether a young person stay within the Children's Court's jurisdiction. Lawyers with clients who turn 18 and are facing parole proceedings or likely to face parole proceedings (whether the granting of parole or breaches of parole) should make representations to Juvenile Justice for the proceedings to be dealt with in the Children's Court.

Supervision as a mandatory parole condition
All juvenile parolees will be supervised in the community as a condition of their parole. In certain circumstances Juvenile Justice can suspend supervision.

Actions in the event of a breach of parole
Juvenile Justice are able to impose sanctions for lower level parole breaches, such as reporting late or missing a program session. Penalties can include recording the breach and taking no further action, giving a warning or giving a direction about the breach behaviour. Issues of repeated non-compliance or more serious breaches can be referred to the Children's Court, which can impose more severe conditions or can revoke parole. The Children's Court can also be able to revoke parole if it decides that a juvenile parolee poses a serious and immediate risk to community safety or if there is a serious risk that the parolee will leave NSW, even if the parolee has not yet breached parole.

2) PENDING LAW REFORM

Other areas of law reform relevant to children's criminal law include, but are not limited to, the following:

2.1) Inquiry into the adequacy of youth diversionary programs in NSW

The Parliamentary Inquiries Terms of Reference[69] are to inquire into and report on the adequacy of diversionary programs to deter juvenile offenders from long-term involvement with the criminal justice system.

In examining this matter, the Committee should pay particular regard to:

a) the way in which youth diversionary efforts work with:
   - - the Police
   - - Juvenile Justice
   - - Community Corrections
   - - the Courts
   - - Health, Housing and children's services
   - - schools and educational authorities
   - - non-government organisations and the local community
b) Aboriginal over-representation in the Juvenile Justice system
c) evaluating outcomes and identifying areas for improveme
d) staff capacity and training requirement
e) case management options
f) bail issues
g) the experience of other jurisdictions
h) any other related matter.

The terms of reference are broad and the Legal Aid submission[70] covers many areas including:

- Calling for the widening of the scope of the Young Offenders Act
  - to include:
    - Traffic matters
    - Certain types of sexual offences
    - Offences under the Crimes (Domestic and Personal Violence) Act 2007
    - More drug offences
    - Graffiti offences
  - To remove the restriction on the number of cautions available
  - To expressly provide that an admission via a police interview is not necessary
- Noting the inconsistent use of the YOA across the State

[69] https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2464#tab-termsofreference

[70] https://www.parliament.nsw.gov.au/ladocs/submissions/59784/Submission%2014.pdf

- Debunking police misconceptions that the Hotline is a barrier to diversion in that it always advising children to exercise their right to silence and thereby excluding them from YOA eligibility[71]
- Calling for increased diversion of ATSI children
- Noting concerns about STMPs
- Noting concerns about the imposition of bail conditions on children
- Noting concerns about children on remand due to homelessness and issues concerning s 28 Bail Act
- Supporting the funding and expansion of the Youth Koori Court[72]
- Discussions about Youth on Track
- Support for the establishment of a funded and legislated Youth Drug and Alcohol Court.

2.2) United Nations Committee on the Rights of the Child review of Australia's implementation of the Convention on the Rights of the Child

This year, the UN Committee on the rights of the child is considering submissions concerning Australia's implementation of the Convention on the Rights of the Child (CRC)[73]. The last time that the Committee considered Australia's compliance with the Convention was in its Concluding Observations in 2012. The Concluding Observations, which operate like Australia's report card, made a number of recommendations for improvement. This year, Australia is over due for another assessment.

In 20 November 2017 the Law Council provided a comprehensive submission to the Commonwealth Attorney-General's department in relation to Australia's draft Report to the Committee on the CRC[74]. Subsequently, the Australian Government submitted its Final Report to the Committee on 15 January 2018[75].

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[71] A statistical analysis of Hotline calls found that in over 90% of calls where children were being considered for YOA, children were advised to admit to an offence to receive a YOA option. In the less than 10% of calls where children were advised to exercise their right to silence, this was largely due to the child denying the offence and/or because doli incapax applied.

[72] See further discussion of the Youth Koori Court below.

[73] The Committee is also examining compliance with the *Optional Protocol on the sale of children, child prostitution and child pornography* and the *Optional Protocol on the involvement of children in armed conflict*.

[74] https://www.lawcouncil.asn.au/resources/submissions/australias-draft-report-to-the-committee-on-the-convention-on-the-rights-of-the-child

[75] *Australia's joint fifth and sixth report under the Convention on the Rights of the Child, second report on the Optional Protocol on the sale of children, child prostitution and child pornography and second report on the Optional Protocol on the involvement of children in armed conflict.* Available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/AUS/5-6&Lang=en

There are three ways in which to make a submission to the Committee:

1) making a civil society submission directly to the Committee
2) contributing to a submission by the National Children's Commissioner
3) contributing to a submission by the Australian Child Rights Taskforce

The National Children's Commissioner whilst independent is nevertheless providing a governmental response.

The Australian Child Rights Taskforce is the peak body for child rights in Australia. Chaired by UNICEF, its membership is "made up of advocates, service providers, individuals and experts, speaking with a united voice to promote and realise the rights of Australian children".

The Taskforce webpage provides[76]:

> The Child Rights Taskforce is guided by the United Nations Convention on the Rights of the Child and core to its role is ensuing the Australian government is held to account on its commitment to the CRC.
>
> The CRC is the only international human rights treaty that expressly gives non-governmental organisations a role in monitoring its implementation. This means that, when the Australian Government reports to the UN Committee on how it believes it is faring in its commitment to children, it is the role of the Australian Child Rights Taskforce to produce the alternative report.
>
> This process of Reporting on the CRC ensures that, as well as the voice of Government, the experiences of children and young people in Australia are considered….

The Law Council provided a submission to the National Children's Commissioner on 15 June 2018. The NSW Law Society provided input into the Law Council's submission. In turn, Legal Aid, via its membership on the Law Society's Children's Legal Issues Committee and Human Rights Committees, provided input into the Law Society's submission.

The Law Council submission addresses a number of concerns relevant to children's criminal law, including:

- Raising the minimum age of criminal responsibility: a concern that Australia's position in maintaining the minimum age of criminal responsibility at 10 years old is incompatible with its obligations under the CRC and should be increased[77].
- STMPs
- The rates and conditions of detention for juveniles, noting the serious and widespread discrimination faced by ATSI children in the criminal justice system

[76] http://www.childrights.org.au/about-us/what-we-do/

[77] I note that the *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (the NT Royal Commission) also recommended raising the minimum age of criminal responsibility.
https://childdetentionnt.royalcommission.gov.au/Documents/Royal-Commission-NT-Findings-and-Recomendations.pdf

- The impact of mandatory sentencing laws on children
- The impacts of bail laws and practices on children, together with the lack of support programs for young people in the criminal justice system
- The criminalisation of children in care
- Children in adult prisons

2.3) NSW Custodial Inspectors Report

Within the context of the NT Royal Commission report and taking into account the closure of the Chisholm Behaviour Program[78], the NSW Custodial Inspector is currently undergoing an investigation into how the use of force against detainees in juvenile justice centres is managed[79].

The Terms of Reference (updated in November 2016) require an examination of

- how the use of force against detainees in NSW juvenile justice centres is managed; and
- how the use of segregation, separation and confinement in NSW juvenile justice centres is managed

There have been delays in the release of the Custodial Inspectors report and, to date, it is still unknown if or when the report will be released.

The isolation of children from other detainees within a juvenile justice centre (a detention centre) has been justified on three distinct grounds:

1) separation – s 16 of the Children (Detention Centres) Act 1986 provides for different classes of detainees to be separated (eg boys separated from girls, younger children from older).
2) segregation –s 19 of the Act provides for the segregation of detainees for their own protection or the protection of others. There are legislative safeguards concerning the length and circumstances of segregation and reporting requirements.
3) confinement -s 21 of the Act provides for the confinement of detainees as punishment for misbehaviour. Again there are different and distinct legislative safeguards.

Whilst Chisholm has closed, detainees who are subject to isolation now may also likely be subject to a Detainee Risk Management Plan (DRMP). Juvenile Justice notes that DRMPs can be made for children who are not subject to isolation. Juvenile Justice have been in the process of reforming DRMPs.

If your client is subject to a DRMP you should request a written copy of the DRMP from Juvenile Justice.

Children's Legal Service's Visiting Legal Service may be utilised upon request to visit detainees in custody. The VLS conducts weekly visits of all of the NSW juvenile justice centres.

[78] A program within Cobham Juvenile Justice Centre which involved juvenile detainees spending lengthy periods of time in isolation.
[79] http://www.custodialinspector.justice.nsw.gov.au/Pages/current-inspections/how-use-force-against-detainees-juvenile-justice-centres-managed.aspx

2.4) Ombudsman review of JIRT

Last year, the NSW Ombudsman conducted an independent review of JIRT and its report made 67 recommendations and a number of related practice suggestions[80]. According to the Ombudsman's Annual Report 2016/17, the JIRT agencies have committed to release the Ombudsman's report publicly after the release of the Royal Commission's final Criminal Justice Report in August 2017.

The Ombudsman recommended that the JIRT agencies publish their response to the recommendations within 12 months of its release.

The publication of the report is still pending.

2.5) Independent National Security Legislation Monitor (ISLM) Review of the Prosecution and Sentencing of Children for Commonwealth Terrorism Offences

The review is considering:

1. Prosecution of children: Section 20C of the *Crimes Act (Cth)* means that a child charged with a Commonwealth terrorism offence may be tried, punished or otherwise dealt with as if the offence was an offence against a law of a State or Territory. The requirements for the trial of children differ among the States and Territories. The review will consider whether Commonwealth legislation should ensure a consistent approach to such matters.

2. Sentencing: Section 19AG of the *Crimes Act 1914* (Cth) establishes minimum non-parole periods for persons convicted of certain offences. For most terrorism offences, upon conviction, s 19AG (2) compels the court to fix a single non-parole period of at least three-quarters of the sentence for that offence. The review will consider whether s 19AG should be amended for children convicted of Commonwealth terrorism offences

3.Bail: The review's background paper[81] also considers s 15AA of the Crimes Act 1914 (Cth) which provides that bail is not to be granted in Commonwealth terrorism cases, unless there are exceptional circumstances. Two NSW Supreme Court bail case concern children charged with terrorism offences:

R v NK [2016] NSWSC 498

NK was a 16 year old girl charged with an offence pursuant s 102.6(1) of the *Criminal Code* 1995 (Cth), being an offence of collecting funds for, or on behalf of, a terrorist organisation. In considering whether there was exceptional circumstances to justify the granting of bail the Supreme Court took into account her youth. The Court noted special provisions (in State law) that apply to children in relation to bail (eg children are exempt from show cause provisions) and the court stated (at 40) that the issue of a juvenile's youth, is a relevant factor in determining the issue of exceptional

[80] See Annual Report 2016/17: https://www.parliament.nsw.gov.au/lc/papers/DBAssets/tabledpaper/WebAttachments/72081/New%20South%20Wales%20Ombudsman%20Annual%20Report%202016%2017.pdf

[81] https://www.inslm.gov.au/sites/default/files/files/INSLM%20-%20background%20paper%20-%20ss%2015AA%2C%2019AG%20and%2020C%20of%20the%20Crimes%20Act.pdf

circumstances. Moreover, the court found there might be evidence that adult co-accused were using the child and noted (at 41) that 'in some cases, the possible vulnerability of youth to adult persuasion or influence may be a relevant consideration in a determination as to whether exceptional circumstances under s 15AA exists.

The court found that strict bail conditions were appropriate.

AB v R (Cth) [2016] NSWCCA 191

AB was a 17 year old children charged with intentionally doing an act in preparation for or planning a terrorist act. He was alleged to have posted threats on Facebook threatening to carry out a stabbing in the Sydney CBD at a particular time. The police arrested him at his house after the appointed time. He was suffering from psychiatric issues and had a history of self harm.

He had allegedly made admissions whilst sitting in the back of an ambulance that the police had called for him to assess his mental health. He denied any religious or hate motivation but alleged that he made the threats to make a statement to raise awareness about mental health, bullying, depression. The Crown nevertheless alleged that it was a terrorist act because the ideological or political purpose for the attacks was to raise awareness of mental health and suicide awareness. The Supreme Court expressed doubts about whether the child's conduct would amount to advancing a political, religious or ideological cause and thus noted relative weakness in the Crown case. This, along with the mental health of the child and the offer to place him on GPS tracking was enough for the court to find exceptional circumstances. However, because of the history of self harm and the ready access that the child might have to knives, the court found there was an unacceptable risk that could not be mitigated by bail conditions, including the GPS tracking. He was bail refused.

2.6) Countering Violent Extremism Unit within Juvenile Justice

On 7 February 2018, the Premier and Minister for Counter Terrorism and Minister for Corrections issued a media release about a specialist Countering Violent Extremism Unit within Juvenile Justice whose role is to identify and closely manage radicalised youths, or those at risk of radicalisation. The media release provided:

> Under the new regime, detainees deemed by law enforcement agencies to pose a possible risk will receive a 'National Security Interest' designation. They face increased screening and restrictions on mail, telephone calls and visitors.
>
> Juvenile Justice will also develop an intervention program for detainees at risk of radicalisation, similar to the model used for adult inmates.
>
> This will include individual case management addressing disengagement and isolation. This model of de-radicalisation will be the first program of its type in Australia.
>
> Frontline staff will receive training on signs of radicalisation, intelligence gathering and assessment of extremist detainees.

In Parliamentary Question Time, the Premier also indicated that a role of the Unit would be to ensure that those detainees who are designated are prevented from imparting their views upon

other detainees and that Juvenile Justice would be funded to ensure they had the infrastructure to enable this. It is anticipated that there will be separation of detainees (see above discussion about isolation).

Currently there are only five juveniles charged with terrorism offences, although the government has noted that this is a concern already and that there is a concern that the number will rise. In any event, the focus is not only on those detainees who are charged with terrorism offences but also covers those who are at risk of radicalisation.

The legislation in relation to the national security interest designation is currently being considered in a draft Children (Detention Centres) Amendment Regulation 2018.

Practitioners should be wary about whether their clients will be impacted by this upcoming legislation.

2.7) Protection of certain witnesses giving evidence

The Department of Justice released a consultation paper *Protection of certain witnesses giving evidence* which noted various bits of legislation which provided protections for various witnesses giving evidence. They included protections for child witnesses, cognitively impaired witnesses and sexual assault complainants, inter alia. It was noted that there were inconsistencies and gaps within the various legislation.

The Legal Aid submission, June 2018[82] has recommended a consolidation of protection for witnesses, rather than a continuation of the piecemeal approach. Relevantly, the submission makes the following general recommendation in relation to child witnesses:

1) protections should apply to all children under 18, including children over 16 and including child defendants[83]
2) protections should apply to all criminal proceedings, relating to child and adult defendants[84].
3) protections should also apply to AVO proceedings and forensic procedure applications

See the above linked Legal Aid submission for further discussion about the various proposals, including CCTV link, use of support people, replaying videos of evidence, extension of provisions to tendency witnesses, inter alia.

[82] https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0009/28935/LAN-Protections-for-certain-witnesses-submission.pdf

[83] Currently, some protections only apply to children under 16 and some proposed provisions do not apply to the child defendant.

[84] For example, currently s 10 and 15A CCPA do not provide for a closed court and non publication of the identity of child witnesses in criminal proceedings against an adult.

3) CASE LAW

The following is a reproduction, with permission, of a paper by Elizabeth Nicholson (Barrister at Sir Owen Dixon Chambers) *Recent Developments in Children's Criminal Law*:

RECENT DEVELOPMENTS IN CHILDREN'S CRIMINAL LAW*

***Paper presented on 11 June 2018 at the Getaway CPD Criminal Lawyers Conference 9 – 11 June 2018 in Honolulu, Hawaii.**

Elizabeth Nicholson

This paper endeavours to cover some of the recent developments in criminal law regarding children, with a focus on developments in the last 12-18 months.

Some terms in this paper are abbreviated as follows:

- New South Wales Court of Criminal Appeal – "CCA"
- New South Wales Court of Appeal – "CA"
- Serious children's indictable offence – "SCIO"
- *Children (Criminal Proceedings) Act 1987* – "CCPA"
- *Evidence Act 1995 (NSW)* – "EA"
- Early Appropriate Guilty Pleas – "EAGP"

This paper assumes some general familiarity with the provisions of the *Children (Criminal Proceedings) Act 1987*.

DOLI INCAPAX

There have recently been several decisions of the superior courts considering this common law presumption. The High Court recently considered the principles regarding the presumption of doli incapax in *RP v The Queen* [2016] HCA 53. Following that decision, the New South Wales Court of Criminal Appeal has considered the effect of *RP v The Queen* in *AL v R* [2017] NSWCCA 34. Separately, the Victorian Court of Appeal also considered the relevance of doli incapax in relation to context evidence concerning sexual misconduct.

RP v The Queen [2016] HCA 53

RP had been convicted, after trial by judge alone, of of two counts of sexual intercourse with a child under 10 years. The complainant was the appellant's half-brother. At the time of the offending, the appellant was aged approximately 11 years and six months and the complainant was aged six years and nine months. There had been evidence in the trial (by way of psychological reports) suggesting that RP was of borderline intellectual functioning. He was described as requiring supervision in daily activities, and he had been placed on a disability support pension.

The only issue at trial was whether or not the presumption of doli incapax had been rebutted. That is, whether the evidence established beyond reasonable doubt that RP knew that his actions were seriously wrong in a moral sense.

The trial judge was satisfied that the circumstances surrounding the commission of the first offence established beyond reasonable doubt that the appellant knew that what he was doing was seriously wrong, specifically: the use of force; the placement of the hand over the complainant's mouth; the complainant's evident distress; the breaking off of the act of intercourse when an adult returned to the home; and the instruction to the complainant to say "nothin'". The trial judge found that it logically followed that the presumption was rebutted in relation to the second offence.

The CCA dismissed RP's appeal against his two convictions. It unanimously held that the presumption was rebutted in relation to the first offence, and further a majority of the Court held that it was also rebutted in relation to the second offence on the basis that RP's understanding of the wrongness of his actions in the second offence was informed by the finding that he knew his actions in the first offence were seriously wrong.

RP appealed to the High Court. The plurality found that in the absence of evidence of the environment in which the appellant had been raised or from which any conclusion could be drawn as to his moral development, it was not open to conclude that the appellant, with his intellectual limitations, was proved beyond reasonable doubt to have understood that his conduct was seriously wrong in a moral sense.[85] The Court ordered that his convictions be quashed and entered verdicts of acquittal.

Importantly, the High Court confirmed that no matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or those acts; and that to the extent that the decision of the Court of Appeal of the Supreme Court of Victoria in *R v ALH* suggests a contrary approach, it is wrong.[86] Instead, attention is directed to the child's education and the environment in which the child had been raised.

In response to the conclusion at trial that RP must have known what he was doing was seriously wrong, because of the inferences that he knew his brother was not consenting and must have observed his distress, their Honours stated that it cannot be assumed that a child

[85] *RP v The Queen* [2016] HCA 53 at [36].
[86] *RP v The Queen* at [9].

of 11 years and 6 months understands that the infliction of hurt and distress on a younger sibling involves serious wrongdoing.[87] Their Honours reinforced that the starting point was that RP was presumed in law to be incapable of bearing criminal responsibility for those acts and the onus was on the prosecution to adduce evidence to rebut that presumption.[88]

The High Court also considered that what sufficies to rebut the presumption will vary according to the nature of the allegation and the child. The focus is on the particular child's experience and values rather than the child's chronological age – a child will more readily understand the seriousness of an act if it concerns values of which he or she has direct personal experience.[89] Evidence of the requisite knowledge may come from answers in a police interview; in other cases evidence of the child's progress at school or of the child's home life will be required.

The High Court was critical of any suggestion that the close the child is to the age of 14 the less strong the evidence need be to rebut the presumption, stating that the difficulty with such statements is that they are apt to suggest that children mature at a uniform rate.[90] Their Honours emphasised that rebutting the presumption of doli incapax requires attention be directed to the intellectual and moral development of the *particular* child.[91]

In relation to sexual offences in particular, the judgment of the plurality made reference to the fact that *"[i]t is common enough for children to engage in forms of sexual play and to endeavour to keep it secret, since even very young children may appreciate that it is naughty to engage in such play. The appellant's conduct went well beyond ordinary childish sexual experimentation, but this does not carry with it a conclusion that he understood his conduct was seriously wrong in a moral sense, as distinct from it being rude or naughty."*[92]

Their Honours noted that while the evidence of RP's intellectual limitations did not preclude a finding that the presumption had been rebutted, it pointed to the need for clear evidence that he possessed the requisite understanding despite the limitations.[93]

<u>*AL v R* [2017] NSWCCA 34</u>

This was a conviction appeal to the CCA. It is an interesting case to consider for the reason that it is the first time the CCA has considered the presumption of doli incapax since *RP v R*, and thus it gives practitioners some insight into how the CCA seems to be interpreting the High Court decision.

In *AL v R* one of the issues on appeal was whether the evidence that had been presented to the jury on the issue of doli incapax was insufficient to rebut the presumption. There was

[87] *RP v The Queen* at [35].
[88] *RP v The Queen* at [32].
[89] *RP v The Queen* at [12].
[90] *RP v The Queen* at [12].
[91] *RP v The Queen* at [12].
[92] *RP v The Queen* at [33].
[93] *RP v The Queen* at [35].

also an issue about whether the directions given to the jury on the doli incapax aspect were adequate.

In *AL,* the prosecution had relied at trial upon evidence including:

- Two positive school reports from when AL was in Year 7, which indicated his attendance and that he had done PDHPE studies;
- Photographs of AL and his home at the time (tendered by AL in his case, but relied upon by the prosecution as evidence of his home environment);
- Evidence suggesting he had taken steps to avoid detection by making threats to the complainant to secure his silence, locking the door and ensuring the complainant composed himself before returning to his brothers;
- An admission given by AL in cross examination that he supposed he would have known at the time that it would have been seriously wrong to put his penis into a young boy's mouth (NB – doli incapax was not the sole issue in the trial, there was a factual issue about whether the events had occurred).

The CCA held that the evidence led by the prosecution, coupled with AL's own concession in evidence of his level of understanding, was sufficient for the jury to be satisfied beyond reasonable doubt that the presumption had been rebutted. Further, they were not persuaded that the directions to the jury on the issue of doli incapax were inadequate.

In considering the submissions that had been made on behalf of AL in the appeal, the CCA stated "*Although the applicant places heavy reliance on the outcome in RP v The Queen, that was a case that very much turned on its own facts. We do not understand it to have changed or developed relevant principle."*[94]

That statement is perhaps open to question. It does, however, reveal what may be the current attitude of the CCA to interpreting *RP v The Queen* and requiring a fairly low threshold of evidence outside the circumstances of the offence. Putting to one side the somewhat equivocal admission made in cross examination, the other evidence relied upon was photographs of AL's home environment and Year 7 school reports that did not specifically address AL's understanding of sexual misconduct and the circumstances of the offence (which might be considered analogous to those considered in *RP*).

DPP v Martin [2016] VSCA 219

Although a Victorian case, the decision in *DPP v Martin* is still relevant to consider given the identical provisions of s.137 EA in New South Wales

The applicant was facing two charges of incest involving his biological sister. The indictment had originally contained five counts, three of which occurred when the applicant was under 14 years of age however prior to the trial being heard the prosecution had withdrawn those three charges (to which the presumption of doli incapax applied).

[94] *AL v R* [2017] NSWCCA 34 at [137].

Then, in the pre-trial argument immediately before the trial, the prosecution indicated for the first time that it intended to lead the three incidents as "context evidence".

On application by the accused, the trial judge excluded the context evidence pursuant to s.137 EA (Vic) on the basis the risk of unfair prejudice outweighed the "reasonably high" probative value of the evidence. The trial judge found it was a matter of fundamental unfairness that the prosecution could use the actions of a child who was doli incapax in aid of proof of subsequent serious criminal acts that occurred at a time when he did have capacity; and such unfairness was increased by the forensic decision of the prosecution not to proceed with those offences as charged matters (which would have required proof beyond reasonable doubt that the presumption was rebutted).

The trial judge also found (expressly rejecting an argument made by the prosecution that the issue of the accused's capacity at the time of the context evidence would not be one upon which the jury would need to be directed) that the capacity issue was a matter of law, and thus required the jury be directed on it.

The Crown appealed to the Victorian Court of Appeal on the basis that the exclusion of the context evidence would eliminate or substantially weaken the prosecution case. The Court of Appeal held that the question of doli incapax was irrelevant to the admissibility of the evidence as context evidence and the jury would not have had any reason to consider that issue when assessing what weight to accord to the evidence of other sexual misconduct. In holding that the presumption did not apply to evidence of other sexual misconduct led as context only, the Court of Appeal explained "*…[t]he relevance of the respondent's acts was to be viewed from the perspective of the victim, and not through the prism of the respondent's criminal responsibility."*[95]

The Court were also of the view that no fundamental unfairness arose from proof of those acts in the absence of proof that the applicant did not appreciate the seriousness of those acts.[96]

PROCEDURE AND JURISDICTION

JW v District Court of NSW [2016] NSWCA 22

JW was charged with an offence contrary to s.52A *Crimes Act 1900* (NSW) in the Children's Court. The solicitor acting on his behalf had mistakenly believed that s.52A was a SCIO and on that basis the solicitor (erroneously) assumed the relevant provisions of the *Criminal Procedure Act 1986* applied in

[95] *DPP v Martin* [2016] VSCA 219 at [110].

[96] *DPP v Martin* at [111].

respect of committal. In fact, s.52A was not a SCIO and therefore s.31 CCPA applied to that offence.

JW signed a waiver of committal acting on the advice of his solicitor, who had not realised that s.31 CCPA applied to the offence (because it was not a SCIO). Acting on that document, the Children's Court Magistrate committed the child for trial to the District Court.

Relevantly, the matter had been mentioned in the District Court and an indictment presented in April 2015. A trial date (22 February 2016) was set. In October 2015 the solicitor discovered his error and organised for a new legal representative to assume carriage of the matter (advising of the issue). In December 2015 a Notice of Motion was filed seeking a stay of the proceedings in the District Court and to vacate the trial date. It was heard on 4 February 2016 and the list Judge refused to make the orders.

A Summons was urgently filed in the Court of Appeal pursuant to s.69 of *Supreme Court Act 1970* (NSW) seeking an order setting aside the Children's Court Magistrate's order committing him for trial and an order setting aside the District Court order refusing to stay the proceedings. A Summons was also filed in the Common Law Division of the Supreme Court seeking leave to appeal against the order made by the Children's Court Magistrate committing the young person for trial on the s.52A charge. An application pursuant to 5F of the *Criminal Appeal Act 1912* was also filed, seeking leave to appeal against the interlocutory order of the District Court refusing to stay the proceedings.

The proceedings all eventually came before Justice Simpson (constituting both the Court of Appeal and Court of Criminal Appeal) as a matter of urgency on 18 February 2016.

A large part of the judgment is concerned with issues of jurisdiction, but the Court also considered the issue of the validity of proceedings where there are deficiencies in the committal process – specifically in circumstances where s.31 CCPA applied and was mandatory (because the offence was not, in fact, a SCIO).

The position of the Respondent was that, the indictment having been presented in the District Court, the decision of the Director to find a bill overtook the deficiencies in the procedure in the Children's Court (relying on *PM v The Queen* [2007] HCA 49; 232 CLR 370).

The case of *PM* had parallels with the facts in *JW v The Queen*, in that an indictment had been presented (and a trial had partially taken place) in respect of three charges, none of which was a SCIO. The trial judge in the District Court had determined he did not have jurisdiction and remitted the matter pursuant to s.44 CCPA. The CCA set aside that order, the majority holding that the District Court had jurisdiction to deal with the indictment presented notwithstanding the absence of compliance with s.31 and, accordingly, s.44 provided no basis for remitter. That decision was upheld in the High Court. The focus of the High Court was the remitter, specifically that s.44 allows for

remitter only when the remitting court lacks jurisdiction and in the circumstances of the case s.46(2) of the CPA conferred jurisdiction on the District Court in respect of all indictable offences (other than those that may be prescribed by regulation). The HC held that the failure to comply with s.31 did not deprive the DC of jurisdiction and therefore there was no power under s.44 CCPA to remit the matter.

There was, however, a difference in *PM* – the offence that the young person had originally been committed on was a SCIO. Ultimately that offence was not contained in the indictment presented. But PM had gone through the process of a valid committal (albeit a CPA committal rather than a s.31 committal). The young person JW had not. Section 31 CCPA was mandatory and was not complied with.

The CA noted that in *PM* the High Court had left open the question of what might occur in circumstances such as these with the majority (Gleeson CJ, Hayne, Heydon and Crennan JJ) saying:

> *"30 … [I]f, unlike this case, criminal proceedings against a child were instituted by filing an indictment in the District Court alleging indictable offences unrelated to any charges that had been laid in a court attendance notice and had been the subject of examination in prior committal proceedings in the Children's Court, there may be some question whether the prosecution of that indictment should be stayed …"*[97]

In JW, the Court of Appeal came to the view that the door left open in *PM v The Queen* was sufficient to preserve the position of the young person on an interlocutory basis and that the young person was entitled to have his claim fully heard by the Court of Appeal given the procedural deficiencies attending the committal (which the Court said were of considerable magnitude).

However, the Court did note that *PM* stood strongly against the ultimate final orders sought by the young person, as the offence with which he was charged was one within the jurisdiction of the District Court (and therefore, as in *PM*, s.44 confers no power of remitter).

The Court made an order staying the District Court trial until the matter could be finally determined.

JW v The District Court of New South Wales & Anor [2016] NSWCA 141

In May 2016 the substantive matter was heard in JW's appeal. The young person ultimately proceeded in the CA with the Summons filed to have the orders of the Children's Court set aside, but

[97] *PM v The Queen* [2007] HCA 49; 232 CLR 370 at [30].

abandoned any challenge to the orders of the District Court and the appeal pursuant to s 5F *Criminal Appeal Act 1912*.

Ultimately, the appeal was resolved in a somewhat different way than had been anticipated in *JW v District Court of NSW* [2016] NSWCA 22. There was no further substantive consideration of the legal issues that had been raised in that application for a stay (i.e. as to *PM v The Queen* and the jurisdiction of the District Court where there were deficiencies with committal).

The argument of the young person on the appeal was that the proceedings in the Children's Court had miscarried by reason of the Magistrate's failure to apply the provisions of the CCPA, with such error amounting to jurisdictional error and/or denial of procedural fairness. Specifically, there had been no consideration of s.31 CCPA and the young person had not informed the court he wished to take his trial according to law pursuant to s.31(2) and neither had the Magistrate formed the opinion referred to in s.31(3)(b). Thus the Magistrate fell into jurisdictional error by failing to apply the Act and denied the young person procedural fairness in denying him an opportunity to have his matter heard summarily.

The respondent's position was that there had been no error and the Magistrate properly proceeded on the basis that the applicant wished to take his trial according to law, reasonably concluding that because of the manner in which the matter was conducted before her; and that the Magistrate was entitled to conclude that the matter was a committal because the parties treated the proceedings as such.[98] The respondent also submitted that while the young person may have been advantaged by the opportunity of summary jurisdiction, the loss of an opportunity is not unfairness leading to a miscarriage of justice.[99]

The Court of Appeal determined that the only error that attended the proceedings was that of the young person's then solicitor and it could not have had the effect of invalidating what followed thereafter and it did not itself lead to a miscarriage of justice (despite being unfortunate).[100]

Their Honours held that the Children's Court did not mistakenly assert or deny jurisdiction, or misapprehend the nature or limits of its powers and functions – it had the jurisdiction to commit the young person to stand trial in the District Court exercising the power conferred by s.31(2) CCPA[101] as the Magistrate was satisfied of the relevant jurisdictional fact (being that the young person wished to take his trial according to law), and had regard to the considerations of the CCPA in doing so.[102]

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[98] *JW v The District Court of New South Wales & Anor* [2016] NSWCA 141 at [64].

[99] *JW v The District Court of New South Wales & Anor* at [66].
[100] *JW v The District Court of New South Wales & Anor* at [74].
[101] *JW v The District Court of New South Wales & Anor* at [76].
[102] *JW v The District Court of New South Wales & Anor* at [88].

Their Honours further held that the young person had not been denied procedural fairness, because the Children's Court Magistrate was entitled to conclude that the young person wished to take his trial according to law.[103] Despite the fact that neither party referred to s.31 CCPA or the young person electing to be dealt with at law, everything that was said and done before the court by the young person through his representative indicated that it was, in fact, his wish.[104]

Further, there was no requirement of the Magistrate to make specific enquiry of the young person or his solicitor to confirm that which was apparent, and no requirement for the Magistrate to go behind the apparent instructions of the young person to his lawyer. Their Honours rejected an argument that s.12 CCPA would require such (particularly in these circumstances where the accused was at that time an adult of 18 years and 7 months).[105]

The CA acknowledged that the young person lost the opportunity for summary jurisdiction and the more benign regime available in the Children's Court, but held that it did not amount to a miscarriage of justice.[106]

Interestingly, the CA remarked that the proper context of the case is that it is not unusual for s.52A matters to be the subject of submissions by the DPP as to the appropriate jurisdiction, but further that *"it is also common for an accused child to inform the court of his or her wish to take a trial according to law, rather than accepting summary jurisdiction. The perceived advantage in such a course is the more onerous task that faces the Crown in the District Court of persuading twelve jurors of the accused's guilt beyond a reasonable doubt at trial, as opposed to a single judicial officer who might be regarded as less susceptible to considerations of sympathy."*[107]

Although it is the case that s.31(2) elections by young people do occasionally take place, it might be thought that the description by their Honours of such elections as "common" in the Children's Court jurisdiction is somewhat misguided.

DJ v R [2017] NSWCCA 319

The young person was to be sentenced in the District Court for an offence of discharging a firearm with intent to do grievous bodily harm contrary to s.33A(1)(a) of *Crimes Act 1900*, which is a SCIO offence. There was no doubt that in respect of that offence he would be dealt with at law. At the time of sentence the Crown and counsel for the young person asked the sentencing judge to take

[103] *JW v The District Court of New South Wales & Anor* at [90].
[104] *JW v The District Court of New South Wales & Anor* at [84].
[105] *JW v The District Court of New South Wales & Anor* at [84] – [86].
[106] *JW v The District Court of New South Wales & Anor* at [91].
[107] *JW v The District Court of New South Wales & Anor* at [81].

into account two related matters on a s.166 Certificate – an offence of possessing an unregistered prohibited firearm contrary to s.93I(2) *Crimes Act 1900* and an offence of failing to keep a prohibited firearm safely contrary to s.39(1)(a) *Firearms Act 1996*. The sentencing judge did so, and sentenced the young person to a penalty at law.

On appeal the issue was whether the District Court had jurisdiction to deal with the s.166 certificate offences at all, and if it did whether its sentencing powers were confined to that of the Children's Court.

The CCA confirmed that the statutory scheme surrounding the CCPA and *Criminal Procedure Act* enabled the District Court to deal with s.166 certificate related offences coming from the Children's Court at the same time as sentencing for the primary offence. Further, it was open to the District Court to deal with the s.166 matters according to law, and the District Court was not confined to exercising the sentencing powers of the Children's Court. [108]

On the appeal, the argument had also been made by the young person that the sentencing judge was required to consider and apply the provisions of s.18 CCPA prior to dealing with him at law for the s.166 offences. Although the CCA did not expressly state that it agreed, it resolved this ground by determining that the various consideration in s.18 had been touched upon, "*one way or another*"[109] and in this way the sentencing judge took into all relevant considerations in his remarks on sentence.

EVIDENCE

P v JC [2018] NSWChC 2

The young person (17 years old) was charged with two offences – intentionally recording an intimate image without consent, and intentionally distribute image without consent – relating to a 16 year old complainant with whom he had been in an on/off relationship since they were both in Year 8.

The prosecution case entirely relied upon admissions made by the young person to a teacher, and to a police officer investigating the matter. Those admissions were challenged on a voir dire, pursuant to s.13 CCPA and s.90 EA.

[108] *DJ v R* [2017] NSWCCA 319 at [76].

[109] *DJ v R* at [87].

The factual scenario was as follows:

- The evidence did not establish when the complainant had spoken to the school or the deputy principal about the allegations, but the Deputy Principal had become aware in October 2017 that images or photos had been disseminated by the young person of himself engaged in sexual intercourse with the complainant.
- On 12 October 2017 the Deputy Principal interviewed the young person in circumstances where she called for him to attend her office and speak to her, and asked him about whether there was inappropriate material on his phone and whether he had sent it to some of his mates. The young person made admissions at that time. He was told the matter would be referred to police and asked to hand over the phone that he had with him.
- The Deputy Principal called police and spoke with a Detective.
- The following day she called the young person back to her office and advised him the police were attending. She asked if he wanted his parents contacted to attend for the interview, or whether the young person would like her or another teacher to be in the interview with him. The young person asked the Deputy Principal to be in the interview with him.
- During that conversation the Deputy Principal asked further questions about the alleged offending and the young person again made admissions in more detail as to how he had committed the offences.
- The police then attended and the Deputy Principal had a conversation with them, after which time the young person again returned to the office area and took part in an interview.
- The Deputy Principal was the support person during the interview.
- The young person was cautioned and then interviewed by investigating police in the Deputy Principal's office. The interview was recorded on the mobile phone of one of the investigating police. He was asked if he was happy to have her as his support person and he agreed.
- The parents of the young person had been contacted at some time after the first interview and prior to the second interview but it was not clear when or what had been said during that phone call.
- The young person was not advised about the existence of, nor given an opportunity to telephone, the Legal Aid hotline.
- During the interview with police the young person made admissions to the conduct the subject of the alleged offences.

In excluding the admissions pursuant to s.90 EA, his Honour (Judge Johnstone, President of the Children's Court) gave weight to the fact that:

- the deputy principal interviewed the young person without calling the parents in advance or without him having the opportunity to have another person present who could protect him from making fatal admissions in breach of his right to silence;
- the whole investigation by the police was precipitated by the teacher who obtained the admission then notifying the police, who in turn conducted an investigation which would otherwise never have occurred;
- the police had not facilitated or given the young person opportunity to contact the Hotline or be given any legal advice; and
- the teacher did not discharge her duties appropriately as a support person in the police interview and in fact could not ever have been an appropriate support person (having obtained the original admission and being potentially a witness for the prosecution in any subsequent proceedings).

In his judgment, the President also reflected on the wider difficulties encountered with the intersection of the education environment and the criminal justice process, stating "*What occurred in this case was wrong on so many levels … What is clear, it seems to me, is that the procedure of schools in interviewing students in relation to whom complaints have been made that may or may not amount to criminal offences is occurring, as it occurred in this case, in a completely unfair way."*[110]

The President suggested that there was a place for a protocol to be entered into between the Department of Education, the Police, Legal Aid and the Law Society of New South Wales that appropriately protects the rights of young persons in these types of situations. His Honour requested that the circumstances of the matter be brought to the attention of two Superintendents of police, one being a member of the Children's Court Advisory Committee, so that a protocol could be created and put in place *"that properly protects young persons but also protects teachers and police conducting these investigations to ensure that future prosecutions of this type do not fail due to technicalities of this type."*[111]

P v JC was handed down in March 2018. As yet, no protocol has been announced. In the interim, having regard to the frequency with which similar factual scenarios arise in hearing matters – i.e. a young person having made admissions in an interview with, or answering questions put by, a teacher or principal in a schooling environment; where those admissions are later relied on as evidence in a criminal prosecution – this is an important decision. Applications pursuant to s.90 EA and/or s.138 EA and/or s.13 CCPA, of course, will often turn on their particular facts and are discretionary – however it might be thought that the strongly worded judgment of the President of the Children's Court would provide Children's Court Magistrates with some guidance on the issue.

Director of Public Prosecutions (NSW) v GW [2018] NSWSC 50

The young person, a 14 year old Aboriginal girl, had been walking in the street in Dubbo. She was seen by a police officer who had recognised that she was in breach of her curfew bail condition. The officer also knew that the young person was on parole and (according to the evidence given by the officer on the voir dire) had "numerous breaches of bail" and "outstanding warrants". The officer called out the young person's name from the car. Within a split second of either hearing her name or seeing the police car, the young person began to run away and the officer chased her. During the chase the young person threw a rock that hit the officer in the face (giving rise to the offences the subject of the hearing). Eventually she was apprehended by the officer chasing her and another police officer.

[110] *P v JC* [2018] NSWChC 2 at [22].

[111] *P v JC* at [32].

At hearing, an application was made on behalf of the young person to exclude the evidence of the throwing of the rock pursuant to s.138 EA on the basis it had been improperly obtained. On the voir dire the police officer gave evidence that at the point he gave chase after the young person he had already decided to arrest her, that he did not consider taking no action in respect of the breach, nor did he consider applying to an authorized justice for a warrant to arrest her; and that due to the short amount of time between seeing the young person and her flight he did not consider any other alternative conduct in relation to the breach of bail.

The argument on behalf of the young person was that despite the power to arrest for breach of bail existing pursuant to s.77 *Bail Act 2013*, in the absence of a consideration of the alternatives to arrest that are contained within s.77, the immediate decision to arrest the defendant was improper or involved an impropriety (relying on the decision of Tupman J in *NT v R* [2010] NSWDC 348).

The Magistrate gave a very brief ex tempore judgment concluding that the evidence was "improperly obtained and that the evidence therefore should be excluded with regard to the events that occurred in pursuing the young person that morning".[112]

The DPP appealed to the Supreme Court on the basis that the Magistrate had erred in law. There were eight grounds including (amongst others) that the Magistrate had erred in failing to undertake the balancing exercise in s.138(1), had failed to assess the matters in s.138(3), and had failed to give adequate reasons. The respondent young person conceded most grounds of appeal. The only ground not conceded was that the Magistrate had erred in impermissibly holding that the police officer's alleged failure "to take into consideration various options" was capable of amounting to impropriety within the meaning of s.138. Despite the young person's concession on all other grounds (and therefore the guaranteed success of the appeal) the DPP pressed the hearing of this issue.

The CCA upheld the appeal, noting that the Magistrate did not refer in any part of the reasons for judgment to any test for impropriety or any reason for the finding that embarking on a foot pursuit amounted to an impropriety. Further, no attempt was made to undertake the balancing exercise required under s.138 of Evidence Act. The CCA also held that on the uncontroverted facts it did not seem that the evidence was obtained improperly – the evidence being a description of that which the constable saw and observed (being the throwing of the rock and other matters).

On the issue about whether the failure to take into account other options than arrest for a breach of bail is capable of being improper within the meaning of s.138, the CCA noted that it is not every case of a failure to consider all options available for breach of bail that will render an arrest or chase improper – the circumstances of that particular situation must be considered and if the circumstances were such that there was insufficient time in an urgent situation, it could not be said

[112] *Director of Public Prosecutions (NSW) v GW* [2018] NSWSC 50 at [15].

to be improper for a police officer not to consider the other options available under s.77.[113] Further, in the circumstances of GW's case the police officer also had a belief about the outstanding warrants which would have made it necessary to arrest the young person. The CCA indicated that the judgment in *NT v R* is not a prescription that should be applied to every situation of arrest without regard to the circumstances that led to a failure to consider other options.

However, ultimately the CCA found it was not in a position to determine whether it was open to the Magistrate to find that the conduct of the officer in giving chase to arrest was "improper" – because that finding was dependent on conclusions of fact that had not been determined at first instance. For the same reason, the CCA was not in a position to determine whether the evidence of the officer had been obtained as a consequence of that impropriety.[114]

The matter was remitted to the Children's Court for determination according to law.

However, the obiter comments of Button J at [44] – [46] are worth keeping in mind and may still be useful in any s.138 application on such an issue:

> *"44 Nothing in the foregoing should be taken to condone or to encourage the arrest or continued detention of young persons and, in particular, young persons of Aboriginal descent. It is a blight on society that, despite the findings of the Royal Commission into Aboriginal Deaths in Custody and since those findings have been published, there has been an increasing rate of incarceration of persons of Aboriginal descent.*
>
> *45 The experience of those involved in this area is that positive, therapeutic steps, such as those undertaken in Redfern under the guidance of Inspector Freudenstein, have a far greater effect on the incidence of criminal conduct and the incarceration of Aboriginal persons than continued arrest of such persons and their continued involvement in the cycle of criminality associated with custody. Further, culturally appropriate steps are more effective in achieving a positive outcome.*
>
> *46 Lastly, it is necessary, given the foregoing comments, for the Court to reinforce the comments (usually made in the context of a bail application) that it is inappropriate for the powers of arrest to be used for minor offences, where the defendant's name and address are known and there is no risk of the defendant fleeing. Further, in particular, the provisions of s 8 of the Children (Criminal Proceedings) Act 1987 (NSW) emphasise the inappropriateness of treating the arrest of a young person as the first and primary option, even though arrest may "technically" be permitted."*

[113] *Director of Public Prosecutions (NSW) v GW* at [40] – [41].
[114] *Director of Public Prosecutions (NSW) v GW* at [49], [50].

CHILDREN (CRIMINAL PROCEEDINGS) ACT 1987 – S.18

LD v R [2016] NSWCCA 217

LD was committed for trial from the Griffith Children's Court on two charges, being one charge contrary to s112(3) – being a SCIO – and one charge contrary to s.112(2). When LD was arraigned the Crown accepted the plea of guilty to s.112(2) offence in full satisfaction.

At sentence, the parties did advise the sentencing judge that LD was a child, but both parties failed to draw her Honour's attention to the mandatory requirements in sentencing for an offence which was not a SCIO – i.e. determining whether the young person should be dealt with at law or pursuant to CCPA and the factors in s.18 CCPA, as well as considering s.6 CCPA principles and other principles relevant to the sentencing of children.

The appeal was conceded by the Crown and the matter remitted to the District Court for sentence. The case underscores the importance of ensuring that ss.18 – 20 CCPA are brought to the attention of the sentencing judge where any court other than the Children's Court is sentencing a young person for a non-SCIO offence.

DS v R [2017] NSWCCA 37

In *DS v R* the Court of Criminal Appeal dealt with the issue of s.18 CCPA again, albeit in a slightly different circumstance where a young person was being sentenced for a SCIO and additional (non-SCIO) indictable offences.

The provision of s.18 CCPA were not addressed on sentence and no submission was advanced by either party that any of DS' offences should be dealt with under CCPA. The sentencing judge also did not refer to s.18.

The young person appealed his sentence on the basis that the sentencing judge had erred in failing to consider s.18 CCPA. The CCA dismissed the appeal, being of the view that no miscarriage of justice had occurred because, in reality, none of the other counts could have been dealt with exercising the discretion in s.18 when regard was had to the factors to be considered under s.18(1A). The Court was of the view that well explained why neither the parties nor the sentencing judge referred to the section, as it simply could not have been given effect in DS' case.

It seems on one hand difficult to reconcile the judgment of the Court in *DS v R,* with the decision in *LD v R*. In each case, the Court was sentencing the young person for indictable offences other than SCIO matters. In each case, the sentencing judge did not have any regard to s.18. In each case, the parties also did not make any submissions about s.18 or draw it to the sentencing judge's attention.

One crucial difference perhaps is that LD was being dealt with solely for non-SCIO offences, whereas in DS he was also to be sentenced for an extremely serious SCIO matter (which may well have meant that the exercise of the discretion under s.18 in respect of other related matters had little practical effect in any event, and thus it could not be said that there was any miscarriage of justice).

A similar approach to the one taken by the court in *DS v R* was taken previously in *BT v R* [2012] NSWCCA 276. It also involved a young person being sentenced (for a SCIO as well as other indictable offences) according to law in respect of all matters without the sentencing judge mentioning s.18, or the parties referring to the provision. The Court of Appeal said in that case:

> *"The fact that the applicant was sentenced according to law demonstrates that a choice was made. It might be possible to infer in some circumstances that a judge had been unaware of, or had not adverted to, the need to make a choice, or had thought that such a choice was simply unavailable: such a conclusion might involve a true failure to exercise an available power in circumstances where there was an obligation to make the choice. However, where the operation of the Children (Criminal Proceedings) Act was very much in the Court's mind, and in circumstances where it was common ground that it applied to the particular offender, the more plausible explanation (which should be accepted) was that the sentencing judge failed to advert to s18 because he did not think there was, in any practical sense, an issue to be resolved…"*[115] (emphasis added)

The judgment suggests that in any challenge on appeal to the failure of a sentencing judge to have regard to s.18, the focus must be on whether it can be inferred that there was a true failure to exercise an available power in circumstances where there was an obligation to make the choice.

Neither *DS v R* or *LD v R* expressly mentions *BT v R*.

Other successful appeals regarding the failure of a sentencing judge to have any regard to s.18 include *CTM v R* [2007] NSWCCA 131; 171 A Crim R 371 at [153] – [156] and *DPN v R* [2006] NSWCCA 301. Notably in both cases there was acceptance by the Crown that the sentencing judge had failed to take the provisions of CCPA into account.

[115] *BT v R* [2012] NSWCCA 276 at [21].

In considering these cases, there still appears to be some inconsistency in how the appellate courts will treat the failure to consider the mandatory provisions of s.18 CCPA. There does appear to be some tension between, for example, the remarks of Howie J in *CTM* as to the determination under s.18 being a "fundamental issue" and the sentence being invalid; and the interpretation of that paragraph of the judgment in the later decision of *BT v R*.

Arguably *DS v R* and *LD v R* have done little to resolve the equivocality that exists in appeal judgments on this issue.

SENTENCING

Paul Campbell v R [2018] NSWCCA 87

The young person (pseudonym Paul Campbell) had entered a plea of guilty to two offences of sexual intercourse with a child under the age of 10, and one offence of indecent assault on a person under the age of 16. There were several offences to be taken into account on a Form 1. Paul had been 13 years old when the offences were committed but by entering a plea of guilty had accepted the presumption of doli incapax was rebutted. The sexual intercourse offences were serious children's indictable offences.

Paul was sentenced by his Honour Judge Berman SC in November 2017, when he was 14 years old. He presented evidence that he had engaged in counselling to address his offending behaviour and of his remorse. His psychologist gave evidence as to his progress and his expressions of remorse, and that he did not pose a risk to the community. Two Juvenile Justice reports were also tendered that were positive. The reports noted that the offences were suggestive of impulsive thinking and limited foresight, but that Paul had acknowledged the harm and wrongdoing inherent in the offences. The reports and evidence all emphasised the rehabilitation that had occurred since the offending, and Paul's regret and embarrassment. The Juvenile Justice psychologist also opined that Paul did not pose any risk.

During the sentence proceedings the Crown Prosecutor had conceded that a sentence other than full time custody was within range. His Honour Judge Berman had indicated that concession was contrary to sentencing principle and inconsistent with the comparative cases.

Judge Berman SC sentenced Paul to an aggregate term of 16 months with an aggregate non parole period of 8 months.

Paul appealed to the CCA. The respondent conceded the appeal on one ground only – that there had been an erroneous inclusion of an offence carrying life imprisonment on one of the Form 1

documents. However, the CCA proceeded to determine the other grounds of appeal raised by the appellant.

The CCA determined that the sentencing judge had erred in finding that the Crown concession was wrong in sentencing principle. The Court held that, although it was not apparent what his Honour Judge Berman had meant when he said that the Crown's concession was "*contrary to sentencing principle*", that if his Honour meant by the remark that there was a sentencing principle that children charged with offences of this kind and seriousness could never escape a full-time custodial sentence, his Honour fell into error.[116] The CCA accepted that the passage suggested that the sentencing Judge (incorrectly and impermissibly) felt himself "constrained" in the exercise of the sentencing discretion and bound to impose a full time custodial sentence – and he was not so bound.[117]

Although the Court of Appeal felt that comparative cases were not of significant assistance given each case turns on its own facts, they did note that his Honour's statement that the Crown concession was inconsistent with the cases was, in fact, wrong.[118]

The Court also upheld the appeal on the ground that the sentencing judge had failed to consider an alternative to full-time custody (which to some extent overlapped with the submissions in respect of the error of sentencing principle ground). There was nothing in the remarks on sentence which suggested that the sentencing judge had considered the options for a community based order but determined that such an order was inappropriate for some reason. Moreover, given the term of imprisonment was less than 2 years, his Honour was required to consider alternatives to full time custody, such as a suspended sentence.[119] The Court of Appeal found that while it was implicit in his Honour's remarks that he had rejected a suspended sentence as an appropriate sentencing outcome, the remarks did not explain why that conclusion had been reached notwithstanding that the law required rehabilitation to be the primary focus of the proceedings.[120]

In determining this ground the Court considered that it was analogous to the issue that had been raised in *Parente v R*[121], that is that even if the sentencing judge had determined that the threshold in s.5 had been crossed it remains incumbent on a sentencing judge to consider whether there are any alternatives to full time incarceration that are available and appropriate.[122] The Court noted that where a sentence of less than 2 years is imposed and there are clear alternatives available (as was the case in Paul's sentencing) the preferable course is to make it clear that such alternatives have been considered and explain why they are not appropriate.[123]

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[116] *Paul Campbell v R* [2018] NSWCCA 87 at [40]
[117] *Paul Campbell v R* at [40]
[118] *Paul Campbell v R* at [37]
[119] *Paul Campbell v R* at [47]
[120] *Paul Campbell v R* at [48]
[121] [2017] NSWCCA 284
[122] *Paul Campbell v R* at [47] – [49]
[123] *Paul Campbell v R* at [53]

Further, the Court held that the sentencing judge had erred in assessing the seriousness of the offence. The sentencing judge had mentioned a number of times during the remarks on sentence that Paul had acknowledged that he knew that the offending was "seriously wrong", in that he did not rely on the presumption of doli incapax. However, Paul's formal admission did not mean that he had the same appreciation of the wrongfulness of his act or understanding of its possible impact on the victims as an adult (or even an older teenager) would have.[124]

The Court noted that Paul was only 13 years old when the offences had been committed and the reports emphasised the impulsivity of the offences and the relevance of his youth and less developed decision making capacity.[125] Their Honours considered that in assessing the objective seriousness of the offences the sentencing judge had not paid adequate attention to the brevity, and impulsivity of the offences and that they had been opportunistic.[126]

Finally, the sentencing judge had erred in aggravating Paul's criminality by finding that he had used his position as a trusted family member to commit the offences. The CCA held that in circumstances where Paul had been one of a number of children at a family function at a time when adults were present in another room, and in those circumstances it was an error to consider he used any relevant position of trust in a calculated way – the evidence did not establish that he had determined to commit the offences because of the opportunity that arose by virtue of the trust that the older members of the extended family had placed in him.[127] In considering this ground, the CCA referred to *RP v R* [2015] NSWCCA 215 at [81] – [87] where the same issue had arisen.[128]

Ultimately the matter was remitted to the District Court. As it was unclear what the DPP would do with the outstanding count that had erroneously been included on the Form 1, the Court was persuaded that remittal was the most desirable course so that all matters might be dealt with together. However Hamill J did indicate that had he been resentencing Paul, he would have imposed a suspended sentence.

The judgment is a useful summary of the principles of criminal liability and punishment of children, including s.6 CCPA and the rationale for a different sentencing regime.

R v AA [2017] NSWCCA 84

This was a Crown appeal that concerned a sentence imposed on AA for two aggravated indecent assault offences and three offences of sexual intercourse with a child under 10. Three of the

[124] *Paul Campbell v R* at [55]
[125] *Paul Campbell v R* at [55]
[126] *Paul Campbell v R* at [56]
[127] *Paul Campbell v R* at [58]
[128] This part of the decision was not considered by the High Court.

offences had occurred when AA was a juvenile, but they were discovered and prosecuted when he was an adult.

There were several grounds of appeal in this matter, but three grounds in particular were directly relevant to issues of sentencing children (or adults being sentenced for offences committed as children) and the ways in which an offender's youth can be taken into account. They were:

a. Whether it was an error to take into account in mitigation the sentencing regime apposite to juveniles if offences had been discovered earlier.
b. Whether the age of the offender could have any relevance to objective seriousness
c. Whether it was "double counting" to take into account the youth of an offender in determining the head sentence (in this case, in the assessment of objective seriousness and moral culpability, and the alternative sentencing regime that he might have been dealt under) and also in finding special circumstances.

a) When sentencing an adult who was a juvenile at the time of the offences, should the provisions of the CCPA be considered in mitigation?

At first instance, the sentencing judge had taken into account the sentencing regime that would have been applicable if AA had been prosecuted as a juvenile shortly after he committed the first three offences.

His Honour considered that in respect of the first two offences (the aggravated indecent assault offences) that AA would have been dealt with summarily in the Children's Court. In respect of the third offence committed as a juvenile (sexual intercourse with a child under 10), it was a SCIO and so AA would have been dealt with according to law. However, the sentencing judge had observed that if AA had been under 18 at the time of sentence the Court "would have imposed a control order" (NB - on appeal it was contended and confirmed that this was incorrect at law) and further that the Court could have directed AA serve part of his sentence until the age of 21 in a juvenile facility pursuant to s.19 CCPA.[129]

The sentencing judge made it clear that he was taking those factors into account in the same way as he would take into account a different sentencing regime in other cases, such as historical abuse.[130]

On appeal, the CCA confirmed that his Honour was entitled to adopt the approach he did in having regard to the provisions of the CCPA as a matter in mitigation of sentence in relation to the two aggravated indecent assault offences.[131] The CCA referred to their recent decisions on the same issue in *TC v R* [2016] NSWCCA 3 and *SHR v R* [2014] NSWCCA 94.

[129] *R v AA* [2017] NSWCCA 84 at [27].
[130] *R v AA* at [27].
[131] *R v AA* at [64].

- In *TC v R* the CCA had found error in circumstances where the judge at first instance failed to specifically address the statutory regime for the sentencing of children prevailing at the time the offence was committed.
- In *SHR v R* Fullerton J accepted that an offender who was thirty nine years old but had committed serious sexual assaults when he was 16 years of age had the capacity to "ask what might have happened had he been arrested and dealt with expeditiously after the offending"[132]. However, in that particular circumstances of that matter there was no assistance to the appellant because the offences were all SCIO offences and therefore had to be dealt with according to law.

However, the CCA found error in relation to the third offence (sexual intercourse with a child under 10) because it was a SCIO and had to be dealt with according to law (and therefore could not have included the imposition of a control order as his Honour had considered).[133]

b) Is age/youth relevant to objective seriousness?

The sentencing judge had taken AA's age into account in an assessment of both his moral culpability and the objective seriousness of the offence.

The CCA confirmed, referring to *KT v R* [2008] NSWCCA 51[134] and to *JH v R* [2017] NSWCCA 22[135], that an assessment of moral culpability can also extend to an offender's relative youth.[136] This proposition was relatively uncontroversial.

The sentencing judge had, however, also expressly referred to AA's age in the context of a determination of objective seriousness of the offending. The issue on appeal was whether this was an error, as the "objective seriousness of an offence is to be assessed without reference to matters personal to a particular offender or class of offenders[137]".

The CCA held that there was no error in the sentencing judge referring to the age of AA and his victims in assessing the objective seriousness of the offence, and specifically noted that in the context a sexual offence some aspects of an offender's personal circumstances may bear upon the "nature of the offending"[138] – for example the age difference between a sexual offender and their perpetrator may affect an assessment of the objective seriousness of the offending; or the age of the perpetrator might be relevant to an explanation of the context in which the offending occurred.[139] In respect of AA, the CCA noted that AA's age (in

[132] *SHR v R* [2014] NSWCCA 94 at [50]; per Fullerton J, Basten JA and Davies J agreeing.
[133] *R v AA* at [67].
[134] per McClellan CJ at CL at [22] - [25].
[135] Regarding the limits of its mitigating effect at [128].
[136] *R v AA* at [54].
[137] *Muldrock v R* [2011] HCA 39; 244 CLR 120 at [27].
[138] Referring to the phrase used in *Muldrock* at [27].
[139] *R v AA* at [55].

his teens) was such that he had not assumed responsibility for the care of the victims and it was likely, or at least possible, that they could distinguish between AA and an adult. These were factors that made AA's age relevant to an assessment of the objective seriousness.[140]

c) *Double counting to take into account age/youth as special circumstance if already considered it in determining head sentence?*

As discussed, the sentencing judge had taken AA's youth/age into account in mitigation with regard to the fact he could have been dealt with for some offences under the CCPA and in determining the objective seriousness of the offence. His Honour then also took AA's youth into account in finding special circumstances. The issue that arose on the appeal was whether this was an impermissible form of double counting. The Crown contended that it was, in that matters taken into account in reducing the head sentence should not be used to reduce the non−parole period.

The CCA did not accept that there had been any relevant form of double counting because the analysis of the relevance of AA's youth to the head sentence was different to the analysis of its relevance to the non−parole period.[141] That is, when the sentencing judge had taken AA's youth into account in determining the head sentence he had done so on the basis that it affected an assessment of objective seriousness and moral culpability, as well as taking into account the sentencing regime for juveniles in determining the appropriate sentence for the first two offences. It had not been considered by the sentencing judge to be "some generally mitigating circumstance". It was considered in that general way as part of the determination of special circumstances only because, when considered with other factors, it bore upon the sentencing judge's assessment that a longer period of supervision was required as part of AA's rehabilitation.

LCM v The State of Western Australia [2016] WASCA 164

This appeal was an appeal against sentence that was originally brought on the grounds of manifest excess. However, shortly before the hearing of the appeal the young person was diagnosed with foetal alcohol spectrum disorder (FASD) as a result of screening that had taken place in the detention centre after his sentence. The appeal grounds were amended to include a further ground that a miscarriage of justice had occurred as a result of this material mitigating factor being unknown to the sentencing judge at first instance.

[140] *R v AA* at [55].
[141] *R v AA* at [75].

Although this decision is obviously from another jurisdiction, it is a useful decision regarding FASD, specifically the ways in which it can impair functioning and the relevance of FASD in sentencing offenders (particularly young offenders). The judgment of Martin CJ summarises the Australian and Canadian cases about FASD, and considers the diagnosis and management of FASD in the child protection and criminal justice systems (of which his Honour is somewhat critical).

There is very little case law in New South Wales, or Australia more generally, which goes into detail about the impact of FASD and the significance of it in the sentencing process. The judgment of the Western Australia Court of Appeal in this matter is a useful one to rely upon in sentencing for young people (or indeed adults) with FASD.

BH v R [2016] NSWCCA 290

This matter involved a "one punch" manslaughter that occurred in Church Street mall at Parramatta. The offender BH was sentenced at first instance to a head sentence of 5 years and 3 months, with a non-parole period of 3 years and 11 months.

The incident had been captured on CCTV so there was little dispute about the sequences of events. There was also no dispute that the deceased had a blood alcohol level of at least 0.20 and that early in the interaction between the pair he had called BH "*black peasant*". BH had then begun to walk away and the deceased had followed for a few steps, about 1-2 metres behind. The deceased then stopped and turned away from BH, but then turned again towards him. BH stepped forward as did the deceased and BH then punched the deceased to the left hand side of the face once. The deceased fell to the ground and BH fled. Moments later a group of doctors who happened to be passing through the mall attempted to save the life of the victim but the extensive efforts of those doctors, the paramedics who attended and the doctors at the hospital all failed. The autopsy indicated a fractured left jaw and minor abrasions to face and elbows.

During the sentencing proceedings there was a significant factual dispute about whether BH punched the deceased in anger at the racist remark, or whether he struck out in fear at being followed by the deceased.

The sentencing judge ultimately determined that BH had punched the deceased in anger about the racist remark. Her Honour found that it was a serious example of a manslaughter, based on the fact that BH was on conditional liberty, he did not render assistance to the victim, he struck the deceased appreciating the risk of serious injury, the deceased posed no physical threat, the blow was struck out of anger. A finding was also made that the young person was genuinely remorseful.

The sentencing judge failed to make a finding of special circumstances with regard to the statutory ratio. The sentencing judge also declined to make a finding of special circumstances pursuant to s.19(3) of the *Children (Criminal Proceedings) Act 1987*.

Section 19(3)(a) of CCPA permits a court sentencing a juvenile for a serious children's indictable offence to make an order that all or part of the sentence be served as a juvenile offender if the court is satisfied that there are special circumstances justifying the detention of the person as a juvenile offender after that age. That finding can be made on the grounds set out in s.19(4), including that the person is vulnerable on account of illness or disability, that the only available educational, vocational training or therapeutic programs suitable to the person's needs are those available in detention centres, or that if the person were in an adult gaol there would be an unacceptable risk of the person suffering physical or psychological harm.

The refusal to make an order pursuant to s.19(3) CCPA had the effect that BH (who had turned 18 some months before the sentence) was immediately transferred to an adult correctional facility that day upon conclusion of the sentence proceedings.

BH appealed. On appeal, the argument in relation to manifest excess focused on the combined effect on BH of the refusal to make a finding pursuant to s.19(3) and the failure to vary the statutory ratio – i.e. that BH would spend a significant period of time in an adult correctional facility.

The CCA was somewhat critical of the decisions of the sentencing judge on these aspects, Button J stating:

> *"The sentence featured no shortening of the non-parole period. It also led to the incarceration of a young man in an adult gaol for over two years, for an offence committed when he was barely 17 years old. I respectfully think that that sentence was not without its punitive aspects."*[142]

However the Court was not persuaded that the sentence was manifestly unreasonable or plainly unjust, nor that the findings of the sentencing judge as to special circumstances were not open.[143]

In order to fully appreciate the impact of that finding by the Court, it is worth examining the subject circumstances of the applicant BH, briefly summarised as follows:

- He was 17 years and 3 months old at the date of offence.
- He had a borderline intellectual disability.
- He was of Maori descent and had moved to Australia in 2005 with his family to escape his father's OMCG ties in New Zealand.

[142] *BH v R* [2016] NSWCCA 290 at [73].

[143] *BH v R* at [73].

- He also had ADHD which responded to medication and counselling, but his family could not always afford to provide him with counselling.
- It was accepted by the sentencing judge that BH had acts of violence perpetrated against him in his upbringing and resultant demonstrated anger from a young age.
- He had left school in Year 10, having exhibited behavioural problems in primary and secondary school.
- He had a Children's Court history, being dealt with by a good behavior bond for assault with intent to rob, and by a probation order for a robbery in company. After the date of the offence he was dealt with for driving offences, an offence of failing to disclose his identity and goods in custody.
- A juvenile justice officer who had extensive contact with BH during his time in custody spoke highly of his potential for rehabilitation, as did the father of his girlfriend who had offered him employment upon his release.

Thus, despite those subjective matters (particularly the intellectual disability and that BH was a juvenile), it was found to be open to the sentencing judge to find that there were no special circumstances justifying the variation of the statutory ratio, and there was no error in declining to make an order under s.19 CCPA.

Curiously, the CCA judgment (and, it might be inferred, the remarks of the sentencing judge) make no reference to *Muldrock* or *Bugmy* and any consequential reduction of moral culpability in this case as a result of BH's intellectual disability or his upbringing of social deprivation and dysfunction (including being the victim of significant violence, being surrounded by violence and "criminal milieu" as a young child and the disruption to his life when the family were forced to flee to Australia to escape that violence).

LEGISLATIVE AMENDMENTS – EAGP

There have been recent legislative amendments to the CCPA and the Regulations to reflect changes made as part of the EAGP reform.

In respect of SCIO matters, the EAGP committal process as contained in the *Criminal Procedure Act 1986* applies: s27(2) CCPA. It is thought that there may be some differences in the implementation of the process (such as the DPP becoming involved earlier, and the possibility of using conference rooms at the specialist Children's Courts for face-to-face case conferences.

Importantly, the statutory discounts do not apply to juveniles (where the offence was committed by a young person <18 who is <21 at time of charging): s 25A(1)(b) *Crimes (Sentencing Procedure) Act 1999*.

An important distinction in the Children's Court jurisdiction, is that the EAGP amendments to the committal process only apply to SCIO matters: s 27(2B) CCPA. The provisions do not apply to indictable offences other than SCIO matters, even where those matters are subject to a committal process. The newly inserted Division 3A of Part 3 CCPA governs the procedures for committal for (non-SCIO) indictable offences in the Children's Court.

There have also been some amendments to s.31, including:

- the insertion of s.31(2A) to make it clear that if an accused young person makes a request to take their trial according to law before the close of the prosecution case, that the proceedings are to continue as summary proceedings for the purpose of completing all of the evidence for the prosecution.
- the insertion of s.31(2B), that (notwithstanding any such request for election made by a young person) if at the close of the prosecution case the Court is of the view that the evidence is not capable of satisfying a reasonably jury beyond reasonable doubt that the person has committed an indictable offence, the Court must discharge the young person.
- the insertion of ss. 31(6) and (7) in respect of the transfer of back up and related offences on a s.166 Certificate – which seems to resolve by statute the matters determined in *DJ v R* [2017] NSWCCA 319 as discussed above.

Any committal in respect of such offences will be governed by s.31 CCPA and Div 3A of Part 3 (ss 31A – 31H) CCPA. The committal procedures contained in those provisions are similar to the committal procedures that were in place prior to the EAGP amendments.

The provisions emphasise that a matter is not dealt with under Div 3A of Part 3 until after all prosecution evidence has been taken and that an accused young person may cross examine witnesses, as well as calling evidence: s.31B CCPA. That emphasis seems to do away with the previous argument of prosecutors that it was permissible under s.31(3) to tender statements only and ask the Court to make a determination that the matter should be committed.

There is some provision for the tender of statements in certain circumstances: ss.31C and 31D. Section 31E provides fairly broad powers for the Children's Court to dispense with requirements in relation to statements and exhibits where the accused young person consents.

Section 31F provides the power for the Court to commit or discharge the young person. Section 31F(3) includes a power for the Children's Court to, on application by the accused young person and with consent of the prosecutor, commit the accused young person for trial at any time despite any provision of s.31B. However, this power must be considered in the context of s.31(2B), wherein an offence can only be referred to be dealt with under Div 3A of Part 3 once all of the evidence for the prosecution has been taken in the summary proceedings. It is suggested that s.31F(3) must therefore refer to at any time during the committal process (ie after all the prosecution evidence has been taken, and thereafter the provisions of Div 3A of Part 3 have been enlivened).

The President of the Children's Court has issued a new Practice Note 12 to coincide with the legislative amendments.

In a notable addition, the Practice Note provides that a prosecutor is to provide notice to a young person if it is proposed to make an application in respect of s.31(3) or s.31(5) and imposes minimum notice requirements (in respect of a s.31(3) application it is the time that the Court adjourns the matter for summary hearing; in respect of a s.31(5) application is the time that a guilty plea is entered and the matter adjourned for a background report).[144] Likewise if a young person intends to make an application pursuant to s.31(2) then notice is to be provided at the earliest opportunity.

Some other children's criminal law cases

Regina v RP [2018] NSWDC 125 – taking into account onerous bail conditions

This case involved the District Court sentence for RP – the same RP who was the child defendant in the High Court case about doli incapax. Paragraph 42-48 is noteworthy because the court took into account onerous bail conditions in backdating the sentence. The conditions included a house arrest condition and reporting daily to the police station. Whilst there was little evidence of the negative impact of the bail conditions upon him and of the quasi custodial nature of the house arrest, nevertheless, the court was prepared to backdate the sentence by 8 months which was approximately 20% of the time spent on bail[145].

Whilst there is nothing new about courts taking into account time spent in quasi custodial rehabilitation centres, time spent on onerous house arrest type bail conditions is often forgotten. Given that children are more likely than adults to have onerous bail conditions imposed (often for welfare purposes) and given the impact of such conditions upon a child may be more adverse than that on an adult (eg missing out on education), this case serves as a reminder for defence lawyers to submit that bail conditions should be taken into account to mitigate sentences.

[144] Clause 8 of Practice Note 12.

[145] See also *Kelly v R* [2018] NSWCCA 44 at [43]-[54].

***Barry Lloyd (a pseudonym) v R* [2017] NSWCCA 303 – s 21A(2)(ea) aggravating factor of the offences being committed in the presence of a child when the offender himself is a child**

It was argued that the aggravating factor of the offences being committed in the presence of a child[146] had little or no application in the applicant's case as he was also a child of the same age. However, the court noted (at 69)

> This provision has been said by Howie AJ in *Gore v R; Hunter v R* [2010] NSWCCA 330; 208 A Crim R 353 at [104] to be "principally aimed at the deleterious effect that the commission of a crime, particularly one of violence, might have on the emotional wellbeing of a child" or their moral values. Howie AJ added:
>
> > [W]hether such a factor is aggravating in a particular case and how aggravating it is, will depend upon the nature of the offence charged and the likelihood that the child will be affected by it, having regard to all the circumstances including the child's age.
> >
> > …
>
> [71] Why, as a matter of principle, the exposure of a child to serious violence against close family members could be aggravating factor in the case of the adult offenders but not in the case of the child offender was not explained in the applicant's written submissions. Counsel retreated a little from this submission at the hearing but maintained that "in the circumstances less weight may be given to that factor" (T5.20). This was said to be on the basis that it would attract more weight where the offender is in a position of influence over the child (e.g. a parent) or where the child witness is appreciably younger than a youthful offender.
>
> [72] As counsel conceded that there was no error in assigning *some* weight to this aspect as an aggravating factor the point falls away. Given one does not know (and I do not suggest it should be known) precisely how much weight the judge gave this factor it does not assist the applicant on this ground of appeal to submit, in effect, that if the circumstances were different an aggravating factor could have attracted more weight.

***KE (By His Next Friend and Tutor Ne) v CMR of Police* [2018] NSWSC 941 – exemption of child offender from Child Protection Register for offences of possession and dissemination of child abuse material**

The child was placed on the Child Protection Register by the police, over his lawyers objections, when he was sentenced for possession of child abuse material and dissemination of the same child abuse material. He sought a judicial review from the Supreme Court claiming he was not a registrable person by virtue of s 3A of the Child Protection (Offender Registration) Act 2000 (the Act).

Facts

KE was a student at a high school when he gained access to a file on a friend's mobile phone in the course of transferring music from that phone to his own. The file name referred to the friend's girlfriend by name and contained images of breasts, vagina and buttocks. The girl was then 12 years of age. KE copied copied the entire file to his personal folder, which was password protected, on the

[146] s 21A(2)(ea) of the CSPA

school's server (the possession offence). The plaintiff then uploaded the file to a share folder on the school server, to which staff and students at the school had access (the dissemination offence). The plaintiff created a folder titled "porn" within the share folder and transferred all the images to that folder.

The staff were alerted to the existence of the folder by other students and the police were called.

The legislation

The objects of the Act are set out in s 2A. They include ensuring the early detection of offences by recidivist child sex offenders, protecting children from serious harm, monitoring registrable persons and ensuring that registrable persons comply with the requirements imposed upon them by the Act.

Section 3A defines someone as a registable person as someone who has been sentenced for a registrable offence (ie a Class 1 or Class 2 offence).

Section 3A(2) of the Act provides for certain exceptions:--

(2) Unless a person is a corresponding registrable person, a person is not a registrable person merely because the person:
(a) is a person in respect of whom a courts has made an order under section 10 of the Crimes (Sentencing Procedure) Act 1999 or section 33(1)(a) of the Children (Criminal Proceedings) Act 1987 (or an equivalent order under the laws of a foreign jurisdiction) in respect of a Class 1 or Class 2 offence, or
(b) (Repealed)
(c) as a child committed:
(i) a single offence involving an act of indecency, or
(ii) a single offence under section 91H of the Crimes Act 1900 or an offence of producing, disseminating or possessing child abuse material (in whatever terms expressed) under the laws of a foreign jurisdiction, or
(iii) a single offence under section 91J (1), 91K (1) or 91L (1) of the Crimes Act 1900, or
(iv) a single offence (including an offence committed under the laws of a foreign jurisdiction) that falls within a class of offence the regulations prescribe for the purposes of this subparagraph, or
(v) a single offence an element of which is an intention to commit an offence of a kind listed in this paragraph, or
(vi) a single offence of attempting, or of conspiracy or incitement, to commit an offence of a kind listed in this paragraph, or
(d) is a person whom a court has found guilty of a registrable offence before 15 October 2001, unless the person is an existing controlled person or the offence results in the making of a child protection registration order against the person.

Section 3A(5) provides that "[a] reference to a single offence in this section includes a reference to more than one offence of the same kind arising from the same incident."

Subsection (3) of s 3 of the Act provides that "offences arise from the same incident only if they are committed within a single period of 24 hours and are committed against the same person."

The question for the Supreme Court was whether KE fell within the exception provided by s 3A(2)(c)(ii).

The court noted:

[22] In general terms, the legislature has carved out exemptions in the case of adults and juveniles who have received the benefit of a conditional discharge or the dismissal of the charges against them. In the case of juveniles, further exemptions apply which focus upon the commission of a "single offence" involving an act of indecency, dealing in child abuse material, voyeurism, or ancillary offences. The definition of a "single offence" allows for the application of these exemptions to juveniles who have committed more than one offence in defined circumstances.

[23] There are several features of the Act which support the conclusion that the policy behind the registration of offenders is aimed at recidivists, that is, those who habitually relapse into the commission of offences against children, post-sentencing. The objects of the Act specifically refer to recidivist offenders and the provisions relating to a "single offence" reflect that focus.

[24] That this was the legislative intention is confirmed by the Second Reading speech of the then Minister for Police on 20 June 2001 (Hansard, Legislative Assembly 14854):--

> The Act treats offences arising from the same incident as a single offence, as it is possible that an offender may be charged with multiple offences for the same action. The Act seeks to impose longer registration periods on recidivists, not people who receive multiple charges for a one-off offence against a single victim.
>
> It was never the intention of the Government that lawyers would spend valuable court time arguing the meaning of "arising from the same incident". Accordingly, new section 3(3) makes the meaning of that term precise and transparent. New section 3(3) adopts the 24 hour threshold used in distinguishing the separate incidents in the offence of persistent sexual abuse of a child. Offenders who commit offences outside a single period of 24 hours demonstrate clear recidivist behaviour and will not be able to satisfy the same incident test. The test also excludes persons who commit offences against more than one victim, even where those offences were committed at the same time.

[25] The exemptions aimed at juvenile offenders, in particular, recognise that the consequences of registration impact severely and disproportionately upon them, in circumstances where immaturity and poor judgment contribute to a potentially isolated instance of offending. Those consequences would inhibit, if not terminate, access to educational opportunities, sporting activities and interactions with a peer group, all of which are important to the personal development and socialisation of young people. Moreover, the consequences of registration would adversely affect career choices and occupational development far into the future.

The court went on to note (at 26) that research found only 9% of adolescents convicted of sexual offences against children commit further sexual offences and ‘Against this background, the targeting of recidivism, as one important measure in the assessment of risk, attempts to strike an appropriate balance between safeguarding children from serious harm and the far-reaching consequences to juvenile offenders of registration under the Act’.

<u>Application of s 3(3) – “against the same person”</u>

The child abuse material which was disseminated by KE was of the same child as the child depicted in the material the subject of the possession offence. However, the police argued that KE’s offences

did not fit within the exception because the offences were not 'against the same person'. The dissemination offence was not committed against the same person because the material was made available to children within the plaintiff's school, thereby widening the scope of those adversely affected by the material to include 'indirect victims'.

However, the court found that the offences of possession and dissemination do not require proof of a 'victim'. They are complete upon proof that the offender controlled or used the material, which qualifies as "child abuse material", in the requisite sense. Indeed, it was noted that child abuse material may consists of a representation of a child (eg a cartoon) and hence have no 'victim'. The potential for the material to be viewed by other children does not justify the characterisation of those children as persons against whom the offence is committed. That observation is not inconsistent with the nature and extent of the dissemination being a relevant factor in the assessment of objective gravity[147].

The court was not persuaded by the police arguments about indirect victims. The language of s 3(3) of the Act requires a direct nexus between the offending conduct and the victim.

Offences of the same kind

The police also argued that possession and dissemination under s 91H of the Crimes Act were not offences of the same kind.

The court noted that the natural and ordinary meaning of the phrase 'of the same kind' is not controversial. Things bearing the same characteristics, or belonging to the same genus, class or type are said to be of the same kind. 'Of the same kind' is obviously not 'identical'. Hence 'an offence of the same kind' must signify more than 'one instance of an identical offence', otherwise the legislature would have adopted that course and drafted s 3A(5) accordingly.

Section 91H of the Crimes Act creates three separate or distinct offences, yet that does not determine that they are not 'of the same kind'. Although possession and dissemination have different elements they both concern the same subject matter - child abuse material.

Furthermore, s 3A(2)(c) of the Act delineates three different categories or species of offending in (i), (ii), and (ii)

(an offence involving an act of indecency, an offence involving child abuse material, an offence involving voyeurism) and an ancillary offence "of a kind listed in this paragraph" ((v) and (vi)). Plainly, "of a kind listed in this paragraph" refers to the "kind" of offences set out in each of (i), (ii) and (iii).

'A consistent and sensible reading of s 3A supports the conclusion that offences involving an act of indecency are offences "of the same kind" or genus, offences involving child abuse material are offences "of the same kind" or genus and offences involving voyeurism are offences "of the same kind" or genus'[148].

[147] At 41. The court also noted in passing (at 42) that it is not an offence under the Crimes Act to expose a child to indecent material, unless the exposure is coupled with an intention to engage a child in unlawful sexual activity: s 66EB.
[148] At 58.

Accordingly, the court found that the police had wrongly determined that the child did not come within s 3A(2)(c) of the Act and declared that the child was not a registrable person.

Prior to the judgment in *KE,* I recently ran a forensic procedure hearing where the police were applying under s 75ZB of the Crimes (Forensic Procedures) Act 2000 for my client's DNA because he was an untested registrable person. Similarly, my client was sentenced for possession and dissemination of child abuse material. The court found that he was not a registrable person because the offences were of the same kind against the same person and within a 24 hour period. Nevertheless, the police refused to remove the client from the register. Along with the arguments expressed in *KE* (which have now been ruled upon by the Supreme Court) the police also argued that the possession and dissemination offences were not against the same person because the child abuse material which was the subject of both offences nevertheless depicted two children. As I understand the argument, the offences are not against the same *person* because the possession offence relates to one victim and the dissemination offence could relate to the other. However, I submit that the reasons provided by Latham J in *KE* equally deal with this argument.

Some other children's cases listed in the Childrens' Court's *Childrens Law News*

IS v Regina [2017] NSWCCA 116

CRIMINAL LAW – sentencing – aggravated robbery– intentionally destroy property– where robbery committed in company and under the influence of "ice" – where offender a juvenile – where offender's upbringing engages the principle in Bugmy v The Queen – where primary judge emphasised general deterrence and community protection – where primary judge accepted the offender's remorse and expressed confidence in his prospects of rehabilitation – balance between the principle in Bugmy v The Queen, remorse, rehabilitation and general deterrence – held that the primary judge erred in applying the principles applicable to the offender's deprived background – held that the primary judge erred in applying the principles applicable to the sentencing of juveniles

DPP v MHK (a pseudonym) [2017] VSCA 157

CRIMINAL LAW – Sentence – Crown appeal – Offence of doing acts in preparation for, or planning, terrorist act contrary to s 101.6 of *Criminal Code* (Cth) – Respondent sentenced to 7 years' imprisonment with non-parole period of 5 years and 3 months – Whether sentence manifestly inadequate – Respondent 17 years old at time of offence – Guilty plea – Culpability measured by nature and extent of planned terrorist act – Serious example of offending – High moral culpability – General deterrence, denunciation and protection of community paramount sentencing considerations – Personal mitigatory factors of limited weight – Sentence manifestly inadequate – Appeal allowed – Respondent resentenced to 11 years' imprisonment with non-parole period of 8 years and 3 months – *R v Lodhi* [2006] NSWSC 691; (2006) 199 FLR 364 – *Lodhi v The Queen* (2007) 179 A Crim R 470 – *Fattall v The Queen* [2013] VSCA 226 – *Elomar v The Queen* [2014] NSWCCA 303; (2014) 316 ALR 206.

LD v R [2016] NSWCCA 217

CRIMINAL LAW – appeal against sentence – aggravated break, enter and commit serious indictable offence – where applicant was a child at the time of the offence – conceded failure of sentencing judge to apply provisions of the Children (Criminal Proceedings) Act 1987 – matter remitted

BH v R [2016] NSWCCA 290

CRIMINAL LAW – sentence appeal – manslaughter – guilty plea – juvenile offender – whether sentencing judge sentenced applicant on basis of factual findings not open – question of motivation for offence – whether sentence was manifestly excessive – appeal dismissed

OK v R [2016] NSWCCA 318

Sentence – juvenile offender – multiple offences – armed robbery in company – approach to sentencing youthful offenders – cognitive impairment – emotional immaturity – prospects of rehabilitation – whether sentence manifestly excessive.

RC v Director of Public Prosecutions [2016] NSWSC 665

CRIMINAL LAW – sentence – appeal from Children's Court constituted by the President – multiple property offences – break enter and steal, break and enter with intent, aggravated break enter and steal – some offences committed whilst on parole and other conditional liberty – young person with intellectual and emotional deficits – Attention Deficit Hyperactivity Disorder – need for supervision – length of non-parole period

JP v Director of Public Prosecutions (NSW) [2015] NSWSC 1669

CRIMINAL LAW – appeal under Part 5 of the Crimes (Appeal and Review) Act 2001 – plaintiff convicted in Children's Court of aggravated breaking and entering – prosecution case dependent on finding that plaintiff's fingerprint found at scene of break and enter – challenge to admissibility of fingerprint expert's conclusion that plaintiff's fingerprint found at scene – necessity for expert to set out the reasons for their conclusion – level of detail required – whether ground contending that expert certificate should not have been admitted involved a question of law alone – whether ground involved mixed question of fact and law – whether leave should be granted – expert certificate should have but did not reveal outcome of inspection of the fingerprints but no question of law alone arose – leave granted to raise ground involving mixed question of fact and law – ground failed – deficiencies in certificate rectified by expert's oral evidence – whether Magistrate's reasons for admitting certificate inadequate – whether Magistrate's reasons for convicting plaintiff inadequate – complaint not made out – whether Magistrate wrongly purported to apply different standard to admission of expert evidence in Children's Court compared to other courts – Magistrate did not apply that approach – whether Magistrate devolved decision making task to expert – complaint not made out – whether leave should be granted to challenge conviction – leave refused

RC v Director of Public Prosecutions [2016] NSWSC 665

CRIMINAL LAW – sentence – appeal from Children's Court constituted by the President – multiple property offences – break enter and steal, break and enter with intent, aggravated break enter and steal – some offences committed whilst on parole and other conditional liberty – young person with intellectual and emotional deficits – Attention Deficit Hyperactivity Disorder – need for supervision – length of non-parole period

4) POLICY and PRACTICE

4.1) Legal Aid means test

Previously, the Legal Aid means and merit tests did not apply to children's criminal matters in the Children's Court. However, the means test did apply to matters before higher courts. Recently, the Legal Aid board amended the means test policy for children. Thus, from 2 July 2018, there was no longer a means test applicable for any children's criminal matter. This includes:

- Indictable matters in the District and Supreme Court
- Appeals to the District Court, Supreme Court or High Court
- Local Court traffic matters

4.2) Local Court traffic matters

Section 28 (2) of the Childrens (Criminal Proceedings) Act 1987 (CCPA) provides that 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 Act 2013* or any other applicable Act authorising the person to drive the motor vehicle to which the offence relates.

That is, the Children's Court will have jurisdiction over the traffic matter if the child is

- (for example) charged with stealing the car and also driving unlicensed; or
- below licenseable age – ie 16 years old for a car and 16 year and 9 months for a motor bike.

In all other matters, the traffic offences will be dealt with in the Local Court.

Legal Aid is not generally available in local court traffic matters unless there is a real possibility of a term of imprisonment or there are exceptional circumstances. I note that it is an exceptional circumstance if the applicant is a child[149]. Hence, Legal Aid lawyers or those practitioners doing duty work for Legal Aid should consider not only advising but also representing children in Local Court traffic matters.

When representing children in Local Court traffic matters, lawyers should be particularly mindful of:

- s 15, CCPA relating to the admissibility of children's criminal records[150]; and

[149] Criminal Law Matters – when legal aid is available – Local Court criminal matters – driving and traffic offences - Policy 4.3.4.
https://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/4.-criminal-law-matters-when-legal-aid-is-available/4.3.-local-court-criminal-law-matters#4.3.4 Driving and traffic offences
[150] See attached paper about children's criminal records.

- s 210 of the Criminal Procedure Act 1986 (CPA).

Section 210 (1) provides that the Local Court may deal with a child found guilty[151] of a traffic offence under the provisions of Pt 3, Div 4, CCPA – ie it may impose a Children's Court sentence under s 33 CCPA. Section 210 (3) specifically provides that a court cannot impose a term of imprisonment upon a child for a traffic offence. There are few benefits of utilising s 210 CPA to deal with a child under the CCPA:

  - the court is reminded that the offender is a child and the sentencing principles that apply to children;
  - there is a broader sentencing range under the CCPA;
  - any supervision on a community based order (eg bond or probation) can be supervised by Juvenile Justice;
  - the court has discretion to not impose a conviction pursuant to s 14 CCPA. Unlike in the adult system, this discretion applies to all sentences;
  - a sentence under the CCPA, especially considering any court order under s 14 CCPA, will make a better criminal/traffic record than a sentence under the Crimes (Sentencing Proceedings) Act 1999 (CSPA).

4.3) LECC

The Law Enforcement Conduct Commission (LECC) has taken over the functions of the NSW Ombudsman and Police Integrity Commission to investigate and monitor complaints against police. As well as dealing with individual complaints, the LECC is able also to deal with systemic issues.

LECC appears to have a particular focus on issues concerning the policing of young people. It's first public hearing concerned police use of force against a child in Byron Bay.

Also, last year the Youth Justice Coalition published its report on *Policing Young People in NSW: A report of the Suspect Targeted Management Plan (STMP)*[152]. The report raised concerns about the NSW Police use of STMP to target young people some of whom may not even be charged. As a result, the LECC is currently conducting an investigation of STMP and children.

The LECC also has powers to investigation serious misconduct and maladministration. This may include assaults or excessive use of force by police, illegal/improper searches of the person and illegal/improper searches/seizures of mobile phones. The LECC is also interested in any misconduct by supervising police (eg custody managers) and prosecutors.

Referrals to LECC can be made by magistrates and by lawyers. There are separate referrals forms for each. The lawyer referral form is attached. There is an obligation on police prosecutors to report to LECC about any police misconduct that comes to light within a hearing.

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[151] I suggest that s 210 CPA is not confined to children who are *found* guilty of traffic offence but applies equally to children who *plead* guilty to a traffic offence.

[152] Sentas, V and Pandolfini, C (2017) *Policing Young People in NSW: A Study of the Suspect Targeting Management Plan. A Report of the Youth Justice Coalition NSW.* http://www.yjc.org.au/resources/YJC-STMP-Report.pdf

Referrals can be made requesting that the details of the client remain confidential.

The LECC also receive notification of any statements of claim and civil settlements against police.

4.4) Childrens' Civil Legal Service

Legal Aid's Children's Civil Legal Service (CCLS) consists of solicitor and youth workers and provides civil law advice and representation to children with complex needs. CCLS works with clients referred from CLS, ALS and Shopfront Youth Legal Centre. CCLS is involved in the Joint Protocol Steering Committee (see below) and also the Youth Koori Court (see below). CLS works hand in hand with the CCLS to provide clients with a holistic service.

4.5) Holistic client service delivery

Increasingly, it is not enough to be a children's criminal lawyer who merely deals with a child client's criminal law issue. A children's criminal lawyer's practice should also involve an examination of the client's needs and the provision of a holistic service. This may include assistance with:

- civil law issues (eg via a referral to CCLS or other civil law service);
- family law/care and protection issues;
- welfare issues (eg utilising the Children's Court Assistance Scheme or other welfare groups);
- education and health

Education

There have been some exciting discussions which are currently ongoing with the Department of Education. These have included:

- advocacy by the Children's Court and Legal Aid for Department of Education liaison officers based at court to assist children to re-engage with education. This would follow the very successful model (Education Justice Initiative) in Victoria[153]. There is discussion about obtaining such officers as part of the Their Futures Matter pilot (see below).
- School lawyers – lawyers who are based at a school to provide more access to justice to children. Again, this would follow models in Victoria.
- the development of policies/protocols between the Department of Education and police on the handling of child suspects. See the case of *Police v JC* above. See also *R v MG* [2016] NSWDC 374 where the District Court was similarly critical of the Department of Education's treatment of a student suspect. In that case, the student was intellectually disable and was interviewed by the school without a support person and without legal advice.

[153] http://parkvillecollege.vic.edu.au/?page_id=44&_sm_au_=iVVWfNN4nr3tD732

5) DIVERSION

5.1) Young Offenders Act

More eligible offences

The following legislation made amendments so that offences which were previously strictly indictable were instead added to Table 1 or Table 2 of the Criminal Procedure Act.

Offence	*Table*	*Commencement date*
Criminal Procedure Amendment (Summary Proceedings for Indictable Offences) Act 2016		
Aggravated break and enter: s 109(2), 111(2), 112(2), 113(2), Crimes Act 1900 where the serious indictable offence is stealing/malicious damage and the value of the property was less than $60,000 and the aggravation is "in company"	1	11 November2016
Justice Legislation Miscellaneous Act 2018		
Pervert the court of justice: s 319 Crimes Act 1900	1	16 April 2018
Reckless deal with proceeds of crim: s 193B(3), Crimes Act 1900, (offences involving $5000 and under)	2	
Recklessly deal with proceeds of crime: s 193B(3), Crimes Act 1900, (offences involving more than $5,000)	1	
Robbery simpliciter: s 94, Crimes Act 1900	1	2 July 2018
Supply a prohibited drug but only where the quantity involved is less than the commercial quantity: s 25(1), Drug Misuse and Trafficking Act 1985	1	

There are still restrictions on the eligibility of certain drug matters for YOA[154]. However, because they are no longer strictly indictable offences, the other above mentioned offences will now be eligible for YOA[155]. The fact that aggravated break and enters in company and robbery simpliciter are now eligible offences is significant.

Protected Admissions Scheme

In order for a child to be eligible for a caution or conference under the YOA they must admit to the offence. The legislation does not place any requirements on the form of such an admission; ie there is no requirement that the admission be via a police interview (eg in an ERISP). Indeed, a child can simply admit the offence in court, via their lawyer, and be referred to a YOA option by the court.

The Protected Admission Scheme (PAS) was initially intended to allow for a child to simply make an 'admission' to the police so as to become entitled to a YOA option. However, the police continue to insist on conducting police interview. The PAS now provides that where a child makes an admission

[154] s 8, YOA.
[155] s 8(1), YOA.

under PAS (usually by signing and/or their lawyer signing the PAS form) then any admission made in respect of the offences listed are 'protected' and cannot be used in any criminal proceedings.

This means, the admissions cannot be used:

1) as evidence against the child if the police decided to charge the child with the offences
2) as evidence against the child if the police seek to use the admissions in future criminal proceedings against the child (eg as evidence to rebut doli incapax or as tendency evidence for another offence)
3) as evidence against a co-accused

However, the PAS does not prevent the admissions being used as police intelligence or in civil proceedings. These could include AVO applications or forensic procedure applications.

Before being eligible for PAS the child must have received legal advice about it (eg from the Hotline or the ALS Custody Notification System).

The police guidelines on PAS and the police information sheet to police and to young people refer to PAS mostly in relation to the giving of YOA cautions. However, PAS is also available to give a child a referral to Youth justice conference – indeed the PAS form has been updated to include reference to youth justice conferences.

Defence lawyers should always check with the police and/or Hotline or CNS whether an admission made in an interview was subject to a PAS.

5.2) Joint Protocol

The NSW Ombudsman *Joint Protocol to reduce the contact of young people in residential out of home care with the criminal justice system* (the Joint Protocol)[156] . The Protocol applies to children in residential out of home care (OOHC) in NSW and it aims to address the criminalisation of children in out of home care but requiring carers to consider appropriate behavioural management and diversionary options before merely calling the police (Annexure A : Procedures for OOHC service staff. It also requires police to consider alternative actions when dealing with such children: Annexure B: Policing response to incidents in residential OOHC services.

The Protocol states it aims to:

i. Reduce the frequency of police involvement in responding to behaviour by young people living in residential services, which would be better managed solely within the service.
ii. Promote the principle that criminal charges will not be pursued against a young person if there is an alternative and appropriate means of dealing with the matter.
iii. Promote the safety, welfare and wellbeing of young people living in residential services, by improving relationships, communication and information sharing both at a corporate level and between local police and residential services.
iv. Facilitate a shared commitment by police and residential services to a collaborative early intervention approach.

[156] https://www.facs.nsw.gov.au/__data/assets/pdf_file/0006/585726/Joint-Protocol-to-reduce-the-contact-of-young-people-in-residential-care-with-the-criminal-justice-system.PDF

v. Enhance police efforts to divert young people from the criminal justice system by improving the information residential services provide police about the circumstances of the young person to inform the exercise of their discretion.
vi. Ensure that appropriate responses are provided to young people living in residential services who are victims.

"The Protocol (and procedures) emphasise the importance of flexibility and determining the most appropriate response to a young person's behaviour on a case by case basis. The procedures for residential staff stress that contact with police should only be made when the circumstances warrant it

While the central purpose of the Protocol is to reduce unnecessary police contact with young people, it is equally important that residential service staff respond to the needs of any victim(s). In this regard, the Protocol also emphasises the importance of ensuring residential services promptly contact police when necessary – especially when there are immediate safety risks which require a police response. When police are called in these circumstances they will attend the service and take appropriate action to secure the safety of any alleged victim(s), the involved young person and service staff".

The procedures (outlined in Annexure B) for police include:

- Liaising with OOHC staff about the child behavioural management
- Consider taking no action
- Consider diversion under the YOA, including use of the Protected Admissions Scheme
- Police may obtaining further information form the OOHC providers within 14 days. This could include any progress in behavioural management within that time and could effect police decisions about what action they will take.
- Charges should be a last resort.

Lawyers should be familiar with the Joint Protocol when dealing with clients in out of home care. It may be useful in drafting representations for the withdrawal of charges and/or form the basis for questions about whether the police actions were improper/illegal.

Unfortunately, despite being in existence since 2016, many OOHC providers and police are still not aware of the Joint Protocol and training is still being rolled out.

5.3) Care/Crime Working Group

FACS co-ordinated the establishment of the Care/Crime Working Group which held its first meeting on 7 May 2018.

The purpose of this working group is to address issues for children in the care jurisdiction who are vulnerable to crossing over into the criminal justice system, by identifying systemic problems and solutions.

The working group includes representatives from the Children's Court, Magistracy, Legal Aid (CLS, CCLS and Care), ALS, Police, Juvenile Justice, Justice Health, Community Legal Centres (eg Shopfront Youth Legal Centre), Law Society, Office of the Advocate for Childrens and Young People.

The working group has been meeting approximately monthly and addressing a number of issues, including liaison about Their Futures Matter and the Joint Protocol.

5.4) Their Futures Matter

Their Futures Matter (TFM) is a cross-government reform delivering whole-of-system changes to better support vulnerable children and families. The guiding vision is to create a coordinated service system that delivers evidence-based, wraparound supports for children and families. The reforms respond to a number of whole-of-system issues identified through the Independent Review of Out of Home Care in New South Wales (the Tune Review). Their Futures Matter has performed its work around a number of different cohorts of children. The cohort named *A Place to Go* concerns children 10-17 with a focus on those who are entering/exiting remand. After extensive consultation, a multiagency holistic plan is being implemented as a pilot in July 2018. Agencies involve include the Children's Court, Police, Legal Aid , ALS, Juvenile Justice, FACS, Justice Health, Department of Education, NGOs, inter alia. The pilot will be located at Penrith LGA and Parramatta Children's Court. It's details are being finalised.

5.5) Youth Koori Court – expansion to Surry Hills

The Youth Koori Court (YKC) commenced at Parramatta Childrens' Court in 2015. Its practice is governed by Children's Court Practice Note 11.

The aim of the YKC is to:

a) Increase Aboriginal and Torres Strait Islander community, including Aboriginal and Torres Strait Islander young people's, confidence in the criminal justice system,
b) Reduce the risk factors related to the re-offending of Aboriginal and Torres Strait Islander young people,
c) Reduce the rate of non-appearances by young Aboriginal and Torres Strait Islander offenders in the court process,
d) Reduce the rate of breaches of bail by Aboriginal and Torres Strait Islander young people, and
e) Increase compliance with court orders by Aboriginal and Torres Strait Islander young people

To eligible for the YKC a child needs to be ATSI and 10-17 years old at the time of the offence and under 19 when the proceedings commenced. The child must have pleaded guilty or been found guilty of a crime that can be finalised in the Children's Court. A referral to YKC is on the application of the child and the magistrate will refer the matter if satisfied that the eligibility criteria is met. Upon referral the YKC will make a suitability assessment of the child.

Where the prosecution have made a s 31(5) CCPA application, arguably, this application must be heard first before a referral to the YKC in order to determine if the child's matter is eligible in that it can be dealt with summarily.

If assessed as suitable the child will appear before the court regularly with the court sitting informally around the bar table. Participants in the YKC include the Magistrate, Aboriginal elders, the child, represented by Aboriginal Legal Services, prosecutors, Juvenile Justice and Legal Aid's Civil Children's Legal Service[157]. Magistrate Duncombe, who has run the court, describes: "We sit down with the young person and discuss the offence and develop a plan to keep them out of

[157] The CCLS provides a holistic civil law service for children who are engaging with the YKC.

trouble, which might include finding stable accommodation, getting back into school or a job and addressing health, drug and alcohol issues".

The matter can be adjourned for up to 12 months and the child's participation is taken into account in sentencing.

On 7 May 2018, Western Sydney University's released its evaluation report of the YKC[158], noting that the model is an effective and culturally appropriate means of addressing the underlying issues that lead many Aboriginal and Torres Strait Islander young people to appear before the criminal justice system.

On 31 May 2018, the Attorney General announced an expansion of the YKC to Surry Hills Children's Court. $2.7 million was allocated over 3 years.

5.6) Justice Health – Teen Got It!

This pilot is run by Justice Health at Parramatta Children's Court and offers support for children with a disruptive behaviour disorder (DBD - eg conduct disorder). The aim of the project is to engage young people in early intervention via a group based course, working together with families and schools. Research shows that untreated DBD leads young people to become more entrenched in the justice system/substance misuse etc.

Inclusion criteria

The initial service provision will include:

- Young people aged 11–16 years of age appearing before selected NSW Children's Courts (initially Parramatta Children's Court) on domestic violence related matters, where the young person is involved in violence against their parents or peers. This may present in court in the following ways:
    - Young people with an Apprehended Violence Order (AVO) or application for AVO
    - First time domestic violence offences where there is no accompanying AVO
    - Domestic violence offences referred to Youth Justice Conference
    - Peer to peer violence in schools where referred to Youth Justice Conference.
- The aggressive behaviour that forms the basis of the court matters has occurred in the home environment and involve the young person's family and /or
- The aggressive behaviour that forms the basis of the court matters needs to have occurred in the school environment and involve the young person's peers
- The young person cannot be in OOHC
- The young person needs to be involved in or have a desire to be involved in some form of education
- An adequate command of the English language
- An ability to attend weekly at the specific location of the program.

Exclusion criteria

The initial service provision will exclude:

- Young people in out of home care placements

[158]https://www.westernsydney.edu.au/newscentre/news_centre/more_news_stories/report_koori_court_effective_for_young_offenders

- Young people who have severe mental illness requiring more intensive service provision e.g. symptomatic psychotic illness
- Young people with a moderate to severe intellectual disability
- Young people with an extensive criminal history, which will be assessed by the clinicians

What's involved for the child?

If, after assessment, the child is eligible, there is a commitment to attend group sessions weekly for 6 months (with the possibility of attending twice weekly for 3 months). Legal Aid expressed concerns with the length of the program, especially noting that it was longer than the period of a usual AVO (5 months). However, Justice Health have indicated that the program length cannot be altered because it needs to be so long to be effective. Nevertheless, they believe that children may not be deterred from attendance because it will assist them with a mental health issue (and can also assist with schooling and family relationships) and because they are promoting it as a fun program (eg at a youth drop in, during school hours, involving activities and a pizza party upon graduation etc)

What legal benefit is there for the child?

Teen Got It! does not report to the

court; it's concern is the health outcomes for the child. However, referrals to the program can be used to obtain better legal outcomes too. For example, a lawyer can:

- Ask the court to either not make an AVO or have an AVO of shorter duration (eg 3 months) due to referral to the program;
- Ask the court for a referral to a youth justice conference so that a child is eligible for the program;
- Participation in the program could be a mitigating circumstance for sentence

6) CONCLUSION

6.1) Specialist Children's Courts across the State

The President of the Children's Court, Judge Peter Johnstone, has been reappointed as the President for a new term (1 June 2017 – 7 July 2021). The President has recently noted[159]:

> The specialist nature of the Children's Court operates as a safeguard to the detrimental exposure of children to the adult court environment and to adult offenders.
>
> The practices and procedures of the Children's Court also reflect an enlightened judicial understanding of the issues and risk impacting on children and young people, as well as a comprehensive understanding of important legislative principles distinguishing children and young people from adult offenders.
>
> Currently Children's Magistrates hear roughly 90% of care cases in the State, up from 45% in 2011, but the coverage for criminal matters remains around 67%.
>
> The balance of cases is heard by Magistrates in the Local Court exercising the Children's Court jurisdiction.
>
> In a letter to the then Attorney General The Hon. Gabrielle Upton, I have previously requested that consideration be given to the legislative and administrative frameworks that currently operate in a way which limits the Children's Court ability to provide a consistent and focused approach to cases within the Children's Court jurisdiction across NSW.
>
> I am an advocate for the expansion of the specialist Children's Court across as much of the State as might realistically be achieved, to ensure that all children and young people receive the benefit of the specialised treatment from trained professionals and diversionary programs within the Children's Court jurisdiction, and consistency of opportunity and outcomes[160].

Much has already been done to expand the reach of specialist children's courts across the State (eg via circuits and otherwise) and this expansion continues. Children's Legal Service has similarly expanded and CLS now has in house lawyers at the following courts:

- Parramatta
- Surry Hills
- Campbelltown
- Woy Woy
- Wyong
- Broadmeadow
- Raymond Terrace
- Singleton

[159] Children's Court submission to the I*nquiry into the Adequacy of Youth Diversionary Programs in NSW*, 8 February 2018. https://www.parliament.nsw.gov.au/ladocs/submissions/59799/Submission%2019.pdf

[160] Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017) vol 2B, 305 and 312.

- Sutherland
- Port Kembla
- Nowra
- Goulburn

Other Children's Courts across the State are serviced by Legal Aid offices or private duty solicitors.

Last year, Bidura Children's Court closed and the new Surry Hills Children's Court opened on 15 January 2018. The President has noted [161]that 'the new Surry Hills Children's Court honours the solid foundations, history and heritage of the former Metropolitan Children's Court, and acknowledges the troubled history whilst incorporating new features to reflect the needs of modern court users and the specialist nature of the Children's Court jurisdiction.

It is inspiring and empowering to reflect upon and to witness the changes which have occurred since the original building opened in 1911, which are a stark reminder of the need to continually advocate for the best outcomes for the most vulnerable members of our community'.

6.2) Appointment of Debra Maher as Children's Court Magistrate

Ms Debra Maher was a senior solicitor with CLS since 2001 and spent many years as CLS' Solicitor in Charge. She was recently appointed to the bench as a Children's Court magistrate.

Whilst a sad loss to Legal Aid, and CLS in particular, she will bring a wealth of experience, skills and passion to the Children's Court bench. It is with great joy that we celebrate her very well deserved appointment. Amongst other recent Legal Aid appointments to the magistracy, Debra's appointment is testament of the quality of Legal Aid staff. It also serves as an endorsement of the important work of CLS and the importance of children's law.

This paper illustrates the many recent reforms and initiatives which affect the practice of children's criminal law. I expect the pace and quantity of reforms will continue unabated into the future. Thus, it is hoped that this paper provides a comprehensive snapshot of the current and emerging issues in children's criminal law and can operate as a toolkit for children's lawyers. There remain many significant challenges for children, especially the overrepresentation of ATSI children in the criminal justice system[162]. In addressing these issues, what is needed even more than conference papers in the children's lawyer's toolkit is the passion to be a voice for the most vulnerable members of our community and to fight for children's rights in court and beyond…

[161] Judge Peter Johnstone, *Updates in the Children's Court Jurisdiction*, Children's Legal Service Conference 2018.

[162] For example, approximately 47% of children in detention are ATSI.

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