

## I am in the Children's Court – What the Hell Do I Do?

### Aboriginal Legal Service Training Manual

#### Overview

The Children's Court is a specialist jurisdiction and is governed predominately by the *Children's Criminal Proceedings Act 1987* (The Act). The primary consideration in the criminal jurisdiction when dealing with children is to facilitate their rehabilitation and integration into the community. It has been said that:

*In the case of a young offender there can rarely be any conflict between his interest and the public's. The public have no greater interest than that he should become a good citizen. The difficult task of the court is to determine what treatment gives the best chance of realising that object. That realisation is the first and by far the most important consideration.*<sup>1</sup>

This ideal of rehabilitation is often quoted as the 'section six principles' referring to section 6 of the Act.

There are various acts that are specifically relevant and important for you to know and to have read when working in this jurisdiction:

- *Children (Criminal Proceedings) Act 1987* and Regulations;
- *Children (Detention Centres) Act* and Regulations;
- *Children (Community Service Orders) Act* and Regulations;
- *Young Offenders Act* and Regulations;
- *Children's Court Act* and Regulation; and
- *Graffiti Control Act*.

It is also important to have read and have an understanding of *Crimes (Sentencing Procedure) Act 1999* and Regulations and *Criminal Proceedings Act* and Regulation.

The purpose of this paper is to introduce the subject area and then to focus on some areas that regularly come up in the jurisdiction; this paper is not a comprehensive and in depth paper that will cover all and reference to other papers will be made at the end.

#### Why have a specialist jurisdiction?

Imagine this scenario; an eight year old has a fight in the school yard with another eight year old. The fight is quite physical and one of the children's noses is broken. The fight started over the newest lolly at the local shop. Should the criminal law be involved, should the criminal law intervene and impose the various purposes of sentencing for an offence that has likely resulted in grievous bodily harm? The answer does vary from jurisdiction to jurisdiction – in New South Wales the Criminal Law has no role to play in this scenario because the law states that an eight year old lacks the ability to form criminal intent – *doli incapax*. This doctrine grew out of the harsh punishments

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<sup>1</sup> *Smith* [1964] Crim LR 70, quoted in *R v GDP* (1991) 53 A Crim R 112 at 116 per Matthews J.

the criminal law imposed on children who often were committing such offences as a result of their lack of maturity and understanding. For this hypothetical eight year old legislation provides them with an absolute protection,<sup>2</sup> the common law position remains for children from 10 through to 14, this will be discussed more later in the paper.

Today it is uncontroversial that in fact people's brain development continues until their mid 20's. However, things such as trauma, drug use, mental health issues and intellectual disabilities impact on the development of the brain and an understanding of this is necessary.

These issues make plain a need to treat children separately and differently. The common law and Parliament have taken consideration of this:

*The separate treatment of children has long had a dual purpose. First, it recognises the inappropriateness, except in the gravest of cases, of invoking the full range of adult criminal trial procedures and punishments where the offender is young, and typically inexperienced and immature. Secondly, it operates so as to prevent youthful offenders becoming associated with adults having extensive criminal histories, acknowledging that affording such offenders a second chance may divert them away from future criminal behaviour. The removal of accused children to a court such as the Children's Court is, therefore, both the mark of a civilised community and a reflection of that community's perception of its own self-interest in the treatment of young offenders.*

*These are not trivial purposes. They reflect extremely important social policies. In interpreting the CCP Act, it is the duty of courts, including this Court, not to brush such objectives aside but to attempt to fulfil them so far as this is possible, given the legislative provisions.<sup>3</sup>*

As advocates who appear for clients in this jurisdiction it is imperative that the principles and purposes of the Children's Court are not forgotten. It will be your responsibility to remind the Court of the above ideals and work fearlessly in protecting and promoting them on behalf of your client.

### **Jurisdiction**

Section 7 and 28 of the Act govern which Courts have jurisdiction over matters. Essentially the Children's Court is the only court that can hear matters it has jurisdiction over. The Court has jurisdiction for all non Serious Children's Indictable Offences<sup>4</sup> that are committed when the person is between 10 and 18 and charged before they are 21 and is not just a traffic offence of a person of licensable age. Always ensure that you look at the age of the client and when they committed the offence to ensure that the Children's Court has jurisdiction to hear the matter – you have an ethical obligation to ensure that the Court does not make a mistake of law. Charges that are 'strictly indictable' *prima facie* are matters that will be dealt with in the Children's Court, for example robberies, Aggravated Intercourse without Consent (if the aggravation is person under 16) and Aggravated Break and Enter offences.

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<sup>2</sup> Section 5 *Children (Criminal Proceedings) Act 1987*.

<sup>3</sup> *PM v The Queen* [2007] HCA 49 at [70].

<sup>4</sup> For discussion of Serious Children Indictable Offences see page 5.

## **Obtain instructions from your Client and Explain things Simply and Thoroughly**

Working with Children can be one of the hardest areas to ensure your ethical obligations to the client are adhered to. It can be easy to forget with all the additional stakeholders involved with children's matters that we remain direct representatives of our clients. We, have a duty to our client to explain proceedings in a way that the client understands and to act on a fully informed client's instructions. There are many barriers to explaining complex legal concepts to clients: their age or their support people are examples of some obstacles.

Remember that your obligation to a child client is no different to that of an adult. Do not assume that it is okay for a support person to be present in a conference, or in Court; ask your client if they are happy with it. Tell your client and their support person that the child has the final say in what happens; often this is a strange concept and is best dealt with early. You must explain all the elements, penalties, discount and possible defences to your client in a way they understand. Their understanding being the key issue, parents and support people can be a tool in ensuring you have met your ethical obligations.

It may be useful to ask a client to explain a concept back to you in their own words, not to use leading questions when speaking with and obtaining instructions and to adopt words that your clients have used when discussing matters. Think laterally when it comes to explaining a concept – ask what is it that this client would have experienced that is analogous to the concept.

If a support person is becoming too dominant don't be afraid to ask them to leave. It is important in this situation to be cognisant about how you approach this, be tactful and respectful – the support person is usually there and dominating because they care, not to be malicious.

Finally, be sure that you are taking your clients instructions and acting on them. Often children will have a propensity to do what their lawyer suggests or what their support people want them to do. Be mindful of this and try and assist your client coming to a decision with minimal influence from yourself or their support people. This does not mean neither party should discuss this with the client, but it does mean that neither party should impose their wishes onto the child.

## **Bail**

The Bail Act applies to children in the same way as it does for adults, except for in three key ways.

1. If a young person requires a residential condition before release and they have no accommodation available, they can be granted bail pending an address being found. The matter will return to Court every two days until Juvenile Justice have secured accommodation.<sup>5</sup> Note that once the young person turns 18 this provision no longer applies;
2. A young person can make a second application for bail without a change in circumstances, if the first application was made on the first appearance;<sup>6</sup>
3. Show cause does not apply to offences committed by Children.<sup>7</sup>

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<sup>5</sup> Section 28 *Bail Act 2013*

<sup>6</sup> Section 74(3)(d) *Bail Act 2013*.

<sup>7</sup> Section 16A(3) *Bail Act 2013*.

Be conscious of section 18(k) which states youth as a special vulnerability in addition to being of Aboriginal or Torres Strait Islander heritage – point this out to the Court. Additionally, the Children’s Court can order a report from Juvenile Justice called a ‘bail plan’. This is useful in more complex applications, or if they have turned 18 and section 28 no longer applies. It should only take one week to prepare one of these reports, but can vary from area to area.

### **Doli Incapax – the test for criminal intent**

*Doli Incapax* at common law was the presumption that a child under 14 lacked the capacity to be criminally responsible for their actions. It was a rebuttable presumption from the age of seven to the age of 14 in which evidence could be adduced to rebut the presumption. Section 5 of the Act provides that the age of criminal responsibility starts at 10 – practically this means that a person under the age lacks the capacity to form criminal intent, and a person between 10 and 14 is presumed to lack this capacity unless evidence produced proves otherwise. For a comprehensive discussion of what is *Doli Incapax* and the history of it there is no substitute to reading the cases; the High Court in *RP*<sup>8</sup> helpfully defined what the doctrine is and settled the divergent jurisprudence that was developing between New South Wales and Victoria. The author believes that the following definition with the use of morality is most useful in grappling with and arguing whether or not the presumption has been rebutted:

*From the age of 10 years until attaining the age of 14 years, the presumption may be rebutted by evidence that the child knew that it was morally wrong to engage in the conduct that constitutes the physical element or elements of the offence. Knowledge of the moral wrongness of an act or omission is to be distinguished from the child's awareness that his or her conduct is merely naughty or mischievous.*<sup>9</sup>

### **Practical Tips and *doli incapax***

1. *Doli Incapax* is, and should be, hard to rebut;
2. The relevant age is the age of the person at the time of the offence;
3. Always double check a young person’s age before providing advice;
4. It is an element of the prosecution case, it is as important to prove as the break is in a break and enter;
5. Don’t let the prosecution tender evidence in a hearing that is not admissible to rebut the presumption.

### **Some Useful Information running a *Doli* Hearing**

It cannot be stressed enough; one must read the cases and papers on this topic. This is just some suggestions and tips on running a hearing that the author has experienced.

- A conviction or bail report is not admissible in a hearing – [R v GW \[2015\] NSWDC 52](#);
- However a certified copy of conviction is easily obtainable and could be admissible – [section 178 Evidence Act](#);

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<sup>8</sup> *Rp v The Queen* [2016] HCA 53.

<sup>9</sup> *Rp v The Queen* [2016] HCA 53 at [9].

- [Section 91 Evidence Act](#) states that evidence of a decision or judgment of a fact in issue in previous proceedings is not admissible – consider how this interacts with section 178;
- Consider 137 *Evidence Act* objection on admissible certified document;
- A Court alternative record is not admissible, ie a record of Young Offenders cautions and Conferences, providing this document improperly can carry a 12 month sentence of imprisonment – [Section 66 Young Offenders Act](#);
- Statements made by a young person in a conference or caution is not admissible – [Section 67 Young Offenders Act](#);
- Question and Argue what 66 and 67 cover;
- Any statement made by a child to an investigating officer in the absence of a support person is *prima facie* inadmissible – [Section 13 of the Act](#).

### **AVO Proceedings**

As a movement towards the rehabilitative focus of the Children’s Court practice note 8 was devised. All practice notes can be accessed from the Children’s Court website. The practice note essentially provides for AVO’s on conviction to be made on an interim basis for a period of some months. If there are no further incidents then they will be withdrawn. It is important to draw the Court and prosecutions attention to the practice note when appearing in AVO matters to seek that adherence is made to the practice.

It is also important to know section 35(3) *Crimes (Personal and Domestic Violence) Act 2007*. This prevents a provisional order containing conditions other than the ‘mandatory conditions’ on a person under the age of 16.

### **EAGP**

This paper will not discuss the new law surrounding EAGP other than to comment that the reforms as to discounts do not apply to offences committed by a child who has been charged before they are 21.<sup>10</sup>

### **Serious Children’s Indictable Offence**

The Act defines a Serious Children’s Indictable offence (SCIO) in section 3 definitions. These offences are defined as:

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

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<sup>10</sup> Section 25A(1)(b) *Crimes (Sentencing Procedure) Act 1999*.

(e) an indictable offence prescribed by the regulations as a serious children's indictable offence for the purposes of this Act.

These offences are treated differently to other offences in the Children's Court as there is no jurisdiction to finalise these matters there. An SCIO charge is dealt with in the higher Court and is subject to the EAGP provisions and should follow that course of action.

### **Committal**

Section 31 of the Act governs the test when a matter would be committed to the Higher Courts. This section refers to indictable offences that are not serious children's indictable offences. This section provides for three scenarios:

1. With the Consent or by application of the accused;
2. By application of the prosecution or the Court's own motion for trial; and
3. By application of the prosecution or the Court's own motion for sentence.

For 2, this is the case when a matter is defended and the Prosecution (or the Court) wish for the matter to be committed for trial. In this situation the case proceeds in the ordinary summary fashion, and at the close of the prosecution case, the prosecution, or the Court on its own motion, can ask that the matter be considered for committal. It is important to note that the case runs as an ordinary hearing and after evidence is given and cross examination has occurred does this application occur. Once the defence case has started, it is too late for this application and the matter is to be finalised summarily for hearing. If the application is made in time, the Court ought to adjourn the matter for a background report and submissions to determine the relevant test.

Number 3 is similar except relate to matters for sentence. This becomes a test on whether or not the Court can deal with the matter appropriately. The prosecution ought to flag if they wish to make this application with notice, and the Court can seek assistance on this point off its own motion. The procedure ought to proceed with a background report and time for the parties to make submissions on this issue.

### **Sentencing**

Sentencing in the Children's Court could incorporate a whole paper in and of itself. Annexed is the quotes from various important cases in this field – no substitute can be made from reading the cases.

The general principles of sentencing are:

- The younger the offender the greater weight to rehabilitation and less weight to punishment and retribution;<sup>11</sup>
- The greater the nexus between the young person's immaturity and the offence the greater the mitigation in culpability;<sup>12</sup>
- Chronological age is not the determinative factor, it is the level of maturity that is important;<sup>13</sup>
- Against the general rule, drug addiction from a young age can be a mitigating factor in sentencing;<sup>14</sup>

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<sup>11</sup> *KT v R* [2008] NSWCCA 51.

<sup>12</sup> *BP v R* [2010] NSWCCA 159.

<sup>13</sup> *BP v R* [2010] NSWCCA 159.

- A person's upbringing from childhood is relevant to their moral culpability.<sup>15</sup>

The Children's Court cannot impose a conviction for a person who is under 16 at the time of sentencing and has a discretion to impose one after they are 16.<sup>16</sup> The convention is however that this section refers to the age of the Young person at the time of the offence and the general practice is that young people who commit offences prior to 16 cannot be convicted. Importantly, section 33(6) of the Act provides that in traffic matters any penalty other than under 33(1) of the Act has the effect of being a 'conviction' for the purposes of disqualification.

Children of licensable age that have committed *Road Transport* offences only will be dealt with in the Local Court.<sup>17</sup> This does not mean that the principles of sentencing disappear and also does not mean that the Local Court cannot impose a children's penalty. Section 210 of the *Criminal Procedure Act* gives the Local Court power to impose Children's penalties and a restriction for imposing sentences of imprisonment for traffic offences (a control order is not a sentence of imprisonment). You should ask for the Local Court to impose a sentence under the Children's Provisions.

No sentence of custody can be imposed on a child unless a background report has been provided to the Court – this is regardless of which jurisdiction the sentence is in.<sup>18</sup> Juvenile Justice have confirmed on many occasions that a full background report will take six weeks to prepare when the young person is in the community and two when they are in custody – this can vary in the regional centres and is worth checking with the local Juvenile Justice to see how long it will take to prepare.

### **The Young Offenders Act**

It is important to know that the *Young Offenders Act* (YOA) exists and provides for some more favourable sentencing options to young people. There is no substitute for reading the act itself.

The traditional view is that this form of punishment is lower on the sentencing scale and should only be used in early interactions with the Criminal Justice System. It is the author's opinion that this is not an accurate reflection of the act and it can be used effectively in more serious matters.

What assists in the more complex matters when a solicitor is asking for a YOA disposition are the sections dealing with the principles of the YOA and the purposes of conferencing.<sup>19</sup> It is very wide and incorporates a great deal of ideals and should be noted that one of the objectives of the YOA is to address "the over representation of Aboriginal and Torres Strait Islander children in the criminal justice system ... by the use of youth justice conferences, cautions and warnings."<sup>20</sup>

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<sup>14</sup> *R v Henry* [1999] NSWCCA 111; (1999) NSWLR 346.

<sup>15</sup> *R v Millwood* [2012] NSWCCA 2.

<sup>16</sup> Section 14 of the Act.

<sup>17</sup> Section 28(2) of the Act.

<sup>18</sup> Section 25 of the Act.

<sup>19</sup> Sections 7 and 34 *Young Offenders Act* 1997.

<sup>20</sup> Section 7 *Young Offenders Act* 1997.

## **Graffiti Offences**

It is children that are most affected by offences of this nature. As a peculiarity, police are unable to initiate YOA cautions for graffiti offences;<sup>21</sup> Courts however can.<sup>22</sup> The offences that will most often come before the Court are:

- Mark Premises or Property – both aggravated and non aggravated forms of offence;<sup>23</sup>
- Possess Graffiti Implement with intention to commit an offence under section 4(2);<sup>24</sup> and
- Person under 18 possess spray can in a public place.<sup>25</sup>

The aggravated mark premises and the other two offences referred carry as a maximum penalty a six or 12 month sentence of imprisonment. This however is only enlivened when there have been previous convictions for particular other offences, “on so many occasions that the court is satisfied that the person is a serious and persistent offender and is likely to commit such an offence again”.<sup>26</sup>

It is important to note this when appearing in these matters for sentence and bail and ensure that the Court is not mistaken as to the sentences available. It is beyond the scope of this paper, other than to note, that it is the author’s belief that conviction for these purposes means a conviction when the Court has exercised its discretion pursuant to section 14 of the Act.

## **Fingerprints and Photographs**

Police do not have the power to take the fingerprints or photographs of a person in lawful custody under the age of 14,<sup>27</sup> in the absence of a forensic procedure application before the Court. Consequently, often young people will be charged with an offence after turning 14 and many historical offences will become apparent as ‘fingerprint hits’ have occurred. It is extremely important to consider this when assessing a person’s record to note that the date of charge does not necessarily equate in any way with the date of the offence.

If the Police have obtained the fingerprint or photograph of a young person it is important to know that section 38 of the Act allows the Court to make a destruction order. Upon a dismissal or a s33(1)(a)(i) penalty the Court must make the destruction order and has a discretion otherwise, this section should be considered and request for such an order be made in appropriate circumstances. It should also be considered when there have been fingerprint hits if the police have failed to destroy the fingerprint when directed to do so and the admissibility of this ‘hit’.

## **Parole**

The Children’s Court has power to hear juvenile parole matters. If a person commits an offence whilst on parole they will be in breach of their parole. The power to deal with parole matters by the Children’s Court is contained in the *Children (Detention Centres) Act and Regulations* (it previously

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<sup>21</sup> Section 18 *Young Offenders Act* 1997.

<sup>22</sup> Section 31 *Young Offenders Act* 1997.

<sup>23</sup> Section 4 *Graffiti Control Act* 2008.

<sup>24</sup> Section 5 *Graffiti Control Act* 2008.

<sup>25</sup> Section 8B *Graffiti Control Act* 2008.

<sup>26</sup> Section 4(4), section 5(2) and section 8B(5) *Graffiti Control Act* 2008.

<sup>27</sup> Section 136(1) *Law Enforcement (Powers and Responsibilities) Act* 2002.

was governed by the same legislation as adult parolees – the *Crimes (Administration of Sentences)* Act however there have been recent legislative amendments). The Children’s Court jurisdiction acts differently than the State Parole Authority. In the Children’s Court jurisdiction the parole will be called up after a plea of guilty. Depending on where the young person is will depend on how the young person is brought to Court ie in custody or not. The Children’s Court sitting in its parole jurisdiction has the power to make the following orders when a person is in breach of parole: find no breach, take no action, revoke the parole and grant a fresh parole order with a new release date or revoke parole and order the young person to serve the remainder of their sentence in custody. It should also be noted that if the young person turns 18 whilst on parole, upon revocation the young person will serve this time in adult custody and may be dealt with under the adult system. When dealt with in the Children’s Court the Young Person will often have a further parole order made. All parole hearings are at Parramatta Children’s Court, if you have any questions you should contact the relevant solicitor at Parramatta.

### **Family and Community Services/Out of Home Care Offences**

Many of the children that come before the Children’s Court will be in the care of family and community services. Many of the offences that bring these young people to the Court will be committed at residential facilities run by FaCS or an out of home care provider, and these are often very minor matters.

As a response to the over representation of children in out of home care facilities coming before the Court the Joint Protocol to reduce the contact of young people in residential out-of-home-care with the criminal justice system was drafted. This document is an agreement between NSW Police, FaCS, out of home care providers and Legal Aid. The effect of this is that only in serious matters will the police be called out to the homes and the police if called out will only lay charges in appropriate matters. It is important that one reads this document and try to utilise in representations to police for appropriate matters.

In addition, when children are under the care of the Minister, this can be utilised as a tool to obtain material that you might not have been able to obtain otherwise. Consider getting FaCS to fund psychological reports, programs for rehabilitation or other such things. As the legal guardian of the young person they must do and facilitate what is in the best interests of the young person.

Finally, when you have clients in this position and there perhaps are short comings on behalf of FaCS or one has questions in regards to the carer’s obligations, consider contacting Legal Aid’s Children’s Civil Legal Service: 9219 5007 or [childrenscivil@legalaid.nsw.gov.au](mailto:childrenscivil@legalaid.nsw.gov.au).

### **Youth Koori Court**

It is worth knowing that the Youth Koori Court sits currently in Parramatta. It is designed to be a program that is culturally appropriate and focuses on therapeutic jurisprudence as its fundamental guiding principle. The Court sits in a circle with elders, magistrate, prosecutor, support people, young person and their lawyer at the same table. Children’s Court Practice note 11 governs the proceedings of the Youth Koori Court.

## **Appeals**

It is always worth considering appealing a sentence imposed if it is a control order or for some other reason inappropriate. There are inherent difficulties with appeals to the District Court because of the different sentencing regimes between adults and children, this should not deter an appeal – it is the advocate’s job to inform the Court of these differences. It is worthy of noting that the Aboriginal Legal Service has not merit test and is particularly concerned about the excessively disproportionate representation of Aboriginal and Torres Strait Islander children in juvenile detention.

## **Further Reading**

**Childhood Adversity and Sentencing** - Alissa Mohen, Sir Owen Dixon Chambers

**SECTION 13 CHILDREN (CRIMINAL PROCEEDINGS) ACT 1987 A PRACTICAL APPROACH** – Angela Cook, Forbes Chambers

**PROVING THE CRIMINAL RESPONSIBILITY OF CHILDREN: RP v The Queen** - Hament Dhanji SC, Julia Roy and Sally McLaughlin

**The Boy Who Was Raised As A Dog And Other Stories From A Child Psychiatrist’s Notebook – What Traumatized Children Can Teach Us About Loss, Love, And Healing** – Bruce Perry and Maria Szalavitz

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Jacob Tate – 13 July 2018