What do I need to know about representing Children?

A guide to representing children facing criminal charges for duty lawyers.

"What does 'charge dismissed' mean, Miss? Am I still on curfew?'

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I. Introduction: why do I need to know what I'm doing?

There is sometimes a view amongst practitioners that Children's Court practice is 'Local Court lite', because of the perceived low stakes created by the lesser likelihood of being sentenced to custody than in the Local Court. However, the conduct of a Children's Court matter can have an impact on a child that persists over their lifetime. A large body of research has shown that children who have contact with the criminal justice system early are at risk of maintaining that contact long-term. Because there is a tendency within our criminal justice system to scale up penalties as a person's offending continues, children who start building their criminal histories early are positioned for adult gaol later on.

Children, perhaps more than any other group of defendants, are vulnerable to being 'defeated by the bail system'; that is to say, if they plead not guilty, they are vulnerable to being remanded in custody for offences for which a control order is not a realistic possibility. The rate of juveniles on remand has been a consistent concern amongst practitioners and policy makers for more than a decade. Some causes and suggested strategies for practitioners to address this issue are included at the end of this paper.

The extent of the difference between law and procedure applying to children, and that applying to adults, surprises some practitioners who are new to the jurisdiction. Whilst most practitioners are aware that broadly similar penalties have different names for children, many do not fully appreciate that criminal procedure and evidence law also have important differences.

This paper is intended to cover the fundamental ways in which appearing for defendants in the Children's Court differs from appearing in the Local Court, and offer a guide for practitioners in how to approach matters in the Children's Court. It is not designed to cover each topic practitioners need to know, but rather as a roadmap, to give practitioners a sense of what issues are useful to keep in mind, and some practical advice.

For more detail on specific areas mentioned in this paper, we recommend reviewing the 'Children's Court' page of the website criminalcpd.net.au, as it houses specific papers on various topics. We are also happy to be contacted about any of the issues in this paper at caitlin.akthar@forbeschambers.com.au & ruth.carty@legalaid.nsw.gov.au.

II. What does the Children's Court look like?

There are two types of Children's Courts: specialist children's courts, which operate in selected areas in the state; and Local Courts that sit as Children's Courts on an ad-hoc basis when there is a child defendant in the list.

Specialist children's courts feature specialist Children's Court magistrates who sit full-time in Children's Courts (with limited exceptions). These courts do not come within the remit of the Chief Magistrate of the Local Court, but rather the president of the Children's Court, who is a District Court judge (currently Judge Ellen Skinner). Most of metropolitan Sydney is covered by a specialist Children's Court, with two court complexes in Parramatta and Surry Hills drawing from a large catchment area.

In regional centres, some specialist Children's Courts operate via a circuit arrangement, where the magistrate divides their time between a number of courts covering a particular area of the state.

The Local Court sits as a children's court in areas without a specialist children's court, or where the specialist court does not sit on the particular day a child's matter is listed. In these courts the matters are sometimes done at a particular time convenient to the court (for example, following the morning tea adjournment).

III. Is etiquette different in the Children's Court?

There are two very important differences in your appearance in the children's court. One is that all practitioners appearing at the bar table remain seated when speaking. The other is that only one defendant at a time is allowed in court, unless they are co-accused.[1] This is because proceedings are held *in camera*, that is, the general public are excluded from the court. So, do not bring your client into court until you have confirmed that the court is ready to deal with their matter.

Many practitioners adopt a practice of referring to their clients by their first names when discussing them, rather than saying 'Master...' or 'Miss…'. we choose to use the first name of the young person, as we view this as in keeping with the object of the court to minimise the intimidating nature of court proceedings for children. Other practitioners refer to the client as the 'Young Person'. Any of these are fine. The terms defendant, accused or offender are not generally used.

If you have a Children's Court matter in a regular Local Court list, and are not sure what the procedure at that particular court is, you might mention the matter in the absence of your client, using their initials only, and let the court know you are ready to deal with the matter at a convenient time when the court can be closed.

[1] *Children (Criminal Proceedings) Act* 1987 (NSW), section 10.

IV. Are my duties different when acting for a child?

You take your instructions from your client, and no-one else, and privilege applies. There is no requirement to have an adult or support person present. It is your client's choice whether to allow their parents or carers in, and no-one else's. One suggested way to approach this is to advise caregivers that you must speak with the child alone first, and then you may be able to speak with the caregiver afterwards. Once speaking with the child in private, you can advise them about privilege in an age-appropriate way, and seek their informed instructions about whether to have supporters join them in the conference.

With the best of intentions, caregivers are often advocates of 'owning up' and pleading guilty, and of telling you all of the child's behavioural difficulties. The presence of caregivers can easily overawe children, making it difficult to build rapport and ensure you are receiving the best quality instructions. Finally, it can make the process of ensuring the child understands your advice to them more difficult, as a caregiver's natural inclination is often to answer questions for the child.

Once you have provided the necessary advice to the child, if they are confident in their instructions to you that they wish their caregiver to be present or informed about their matter, then of course a caregiver can be a very valuable source of information, and an ally in getting the child to attend appointments, and other practical challenges.

V. Is the law different for children?

The law applying to child defendants differs significantly to laws that apply to adults. While offences are largely the same (with some important exceptions as to some sexual offences, that have a similar age defence),[2] other legislation governing criminal proceedings have important differences and exceptions when a matter involves a child defendant. Still more legislation relates to child defendants only.

Child-specific legislation:

Legislation to refer to and understand in its entirety is:

1. *Children (Criminal Proceedings) Act* 1987 (NSW)
2. *Young Offenders Act* 1997 (NSW)

Legislation that contains important differences in its application to child defendants:

1. *Bail Act*:
   - *a)* Section 16A(3) exempts children from the show cause provisions
   - *b)* Section 28(3)(a) allows the court to grant bail on condition that the Department of Family and Community Services, or the Department of Juvenile Justice, find accommodation for the young person
   - c) Section 74(3)(d) gives a child one additional bail application before section 74 would apply to prohibit further applications

2. *Crimes (Sentencing Procedure) Act* 1999 (NSW):
   - a) Section 54B: standard non-parole periods do not apply to children
   - b) Division 2A: Provisional sentencing for child offenders

3. *Criminal Procedure Act* 1986 (NSW):
   - a) 210: this section allows a Local Court, when dealing with a child for a traffic offence, to exercise the functions of the Children's Court, including using Children's Court penalties. It also prevents the Local Court from

[2] More detail on this defence can be found in our paper 'Sexual Offences Against Adults and Children: A New Regime', available from criminalcpd.net.au.

sentencing a child to a sentence of imprisonment for a traffic offence.

b) 279(2A): 279 does not apply to child defendants to compel their family to give evidence against them, except their spouses in DV matters

c) 335: penalty notices (criminal infringement notices) are not to be issued by police to children. If they are, they are not payable and if they are paid, the payer is eligible for a refund. The relevant offences are found in Schedule 4 of the *Criminal Procedure Regulation 2017* (NSW).

4. *Child Protection (Offenders Registration) Act 2000*

a) Section 3A(2) states unless a child is a corresponding registrable person, they are not to be placed on the register merely because they committed:

i. a single offence involving sexual touching or a sexual act, 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

b) Section 3C creates a discretion to treat child offenders as non-registrable persons, meaning they will not be placed on the register. Sentencing courts have a discretion when a sexual offence was committed by an offender who was a child at the time of the offence to make an order declaring that the offender is not to be treated as a registrable person under the Act for that offence. Various conditions must be met before an order is made. These conditions are set out in section 3C(3) and are as

follows:

a) the victim of the offence was under the age of 18 years at the time that the offence was committed, and
b) the person has not previously been convicted of any other Class 1 offence or Class 2 offence, and
c) the court does not impose in respect of the offence:
    i. a sentence of full-time detention, or
    ii. a control order (unless the court also, by order, suspends the execution of the control order), and
d) the court is satisfied that the person does not pose a risk to the lives or sexual safety of one or more children, or of children generally.

5. *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW): children are 'vulnerable persons' for the purpose of Part 9 and therefore additional safeguards apply.

VI. ‘Strictly Indictable Matters’ v Serious Children’s Indictable Offences

When practicing in adult jurisdictions, a useful clue about whether a matter is strictly indictable or not is that it is marked ‘Si’ on the police facts sheet by their computer system. However, this computer system does not account for child defendants, and does not recognise the effect of the *Children (Criminal Proceedings) Act* 1987.

The adult system of Strictly Indictable, Table 1, Table 2 and strictly summary offences does not apply to children. The Children’s Court has a system of exclusive jurisdiction to deal with all matters other than Serious Children’s Indictable Offences (SCIOs) summarily.[3] SCIOs are a much smaller group of offences than offences that are Strictly Indictable for adults. They are found in section 3 of the *Children (Criminal Proceedings)* Act, and r4 of the *Children (Criminal Proceedings) Regulation* 2016. Annexure 1 is a list of current SCIOs at time of publication.

Where a matter is not a Serious Children’s Indictable Offence, but the prosecutor seeks to have it dealt with at law by the District Court, they cannot simply ‘elect’ to do so as they may with Table matters in the Local Court. Sections 31(3) and 31(5) allow a Children’s Court to treat a matter as a committal matter only if, after all the prosecution evidence is taken, the court is of the view that the matter may not be appropriately disposed of in a summary manner. The wording of the provisions leave this decision clearly for the court.

This means the procedure for a matter that is not a Serious Children’s Indictable Offence to be committed to the District Court to be dealt with at law is generally:

1. The matter is run as a summary hearing in the Children’s Court (or, at least, ‘the evidence for the prosecution’);
2. The prosecutor invites the court to make the determination outlined in section 31(3); and
3. If the court is satisfied that the charge ‘may not be properly disposed of in a summary manner’, the court then treats the matter as a committal matter;

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[3] *Children (Criminal Proceedings) Act* 1987, section 31(1).

4. If the matter is committed for trial, a trial is then held in the District Court.

This is an onerous process, which means that the number of such matters is small compared with elections by the DPP in the Local Court. It is a process which we have found is not well understood amongst prosecutors, particularly police prosecutors. It is important, if advised by a prosecutor that they are 'electing', to seek clarity about what they mean. Sometimes, a friendly early discussion of the matter with reference to the legislation will avoid this long process altogether.

It is important to note that the court has the power to make a determination under section 31(3) (if a child pleads not guilty) or 31(5) (if a child pleads guilty) of its own motion. It does not require the application of a prosecutor. Such orders are rare, but not unheard of.

A final word on 'Strictly Indictable' offences: many Children's Court magistrates will agree to order a brief of evidence without a plea, for a matter that would be strictly indictable if it were in the adult jurisdiction. This can sometimes be an appropriate course to take where a matter, despite not being a Children's Court committal, is serious.

VII. *Doli Incapax*

Section 5 of the *Children (Criminal Proceedings) Act* 1987 provides that a child under the age of ten years cannot commit an offence. The common law presumes that a child between the age of 10 and 14 years does not possess the necessary knowledge to have criminal intention, that is, it is presumed the child is incapable of committing a crime due to a lack of understanding of the difference between right and wrong. This is the common law presumption of *doli incapax.*

The topic of *doli incapax* has been thoroughly covered in other papers available on criminalcpd.net.au. We commend those to you. The essential cases are *RP v The Queen* [2016] HCA 53, and the Court of Criminal Appeal decision of *BC v R* [2019] NSWCCA 111.

Defence lawyers should consider *doli incapax* in all cases involving children under the age of 14. When reviewing a charge sheet in the Children's Court, the starting point is to check the child's age at the date of offence. You should verify the child's date of birth with the child or a carer, as a child's date of birth on a police facts sheet is not infrequently wrong.

If they were under 14 at the time of the alleged offence, consider whether to defend the matter. Remember the following key points:

1. The prosecution must rebut the presumption of *doli incapax* as an element of the prosecution case;
2. Proof requires that the child appreciated the moral wrongness of the alleged offence, as opposed to being aware that the conduct was merely naughty;
3. The evidence to prove guilt must be clear and beyond all doubt and contradiction; and
4. The evidence is not mere proof that the child did the act charged, however horrifying or obviously wrong the act may be. The mere act of offending itself cannot be relied upon to rebut *doli incapax*; however, evidence may be adduced by the prosecution regarding the surrounding circumstances attending the act,

> the manner in which it was done, and evidence as to the nature and disposition of the child[4].

The fact a child has previously been dealt with, either in court or via court alternatives such as police cautions or youth justice conferences, is not determinative in rebutting *doli incapax*. This is made clear in *RP v The Queen*. Although it is a factor the prosecution can point to in arguing that *doli incapax* is rebutted, the child's development and understanding at the time of each offence must be considered. Consider, for example, whether the offences are alike. The fact a child has pleaded guilty to or been found guilty of an offence of common assault for punching someone, for example, does not necessarily mean they understand that swearing at their parent (Intimidation) is criminally wrong.

The decision you assist the child to make about this matter is one which has the potential to affect the child long-term. If the child pleads guilty to an offence today, it will be important evidence for the prosecution in future allegations. That is not evidence that should be given up lightly.

Experienced practitioners in the Children's Court are familiar with children who become entrenched in the criminal justice system at an early age, and can end up detained by control orders at a very young age, because of their repeated breaches of good behaviour bonds, probation and suspended control orders. In many cases, the children would likely have been able to rely on *doli incapax* for many of their early offences, but a decision was made at that time to plead guilty, because the penalty was unlikely to be grave and so finalising the matter seemed an expedient solution. Early entry into conditional liberty is a risk factor for children being detained in juvenile justice facilities at any young age, because of the increased likelihood of being bail refused, and because of a perception of children 'using up their chances' at an early age. These are all reasons I argue in favour of relying on *doli incapax* whenever you can get those instructions.

[4] It is important to be aware of the CCA's articulation of the relevance of the 'circumstances of the offending' to *doli incapax* in *BC v R* [2019] NSWCCA 111 at [53]-[54].

VIII. Section 14 Applications and Fitness

If a young person has a mental health condition, every possible consideration should be given to applying for a section 14 order as an alternative to a criminal penalty. The principles of the Children's Court criminal jurisdiction (see section 6, and especially 6(b), of the *Children (Criminal Proceedings) Act*; and see appendix 2) are more conducive to a favourable assessment of whether a section 14 order is 'more appropriate' than to be dealt with by the criminal law than the law applying to adults.

It is often appropriate to quote section 6 when making submissions about the appropriateness of a section 14 order. Magistrates who preside over Local Courts each day may need refreshing on the differing principles applicable to their work in the Children's Court; and may be assisted by clearly presented information about the different legislative regimes and focus of the Children's Court jurisdiction.

Another important consideration, particularly for very young children and/or who have a cognitive impairment or mental health condition, is whether the child is fit. This issue is often overlooked in the Children's Court. *Presser* standards apply to children in the same way they do adults and, where children are under 14 and impaired, they sometimes will not meet *Presser* standards. Whilst these young people will often be legally eligible for a section 14 order, ethically you must be careful about obtaining instructions for such an order. You must ensure your client is at least able to comprehend that a conditional section 14 is a discharge conditionally upon them following a treatment plan, and that if they apply for such an order through you, they are agreeing to follow the treatment plan and have an obligation to do so.

If the child does not have sufficient capacity to understand what asking for a section 14 order means, it is possible they are not fit. If the court agrees they are not fit, the only legally available options are an unconditional section 14, or permanent stay. This is because the legislative framework outlined in the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 for persons unfit to be tried has application in the District and Supreme Courts only. There is no legislation providing guidance to courts hearing summary matters on how to approach cases where defendants are unfit.

The common law does provide some guidance on fitness in summary jurisdictions.[5] For more detailed consideration of this issue, we recommend the 'Fitness in the Local Court' papers by Riyad El- Choufani and Chris Yee, available at criminalcpd.net.au.

[5] See Police v AR (2009) Children's Court (NSW), R v HW [2017] NSWLC 25, Mantell v Molyneux [2006] NSWSC 955, *DPP v Shirvanian* (1998) 44 NSWLR 129, *Jago v The District Court (NSW)*.

IX. Compellability of family members: sections 18 and 65 of the *Evidence Act*

Section 279 of the *Criminal Procedure Act*, which limits the ability for family members to object to giving evidence under section 18 of the *Evidence Act* in domestic violence matters, does not apply in cases where the accused is a child, except for the young person's spouse. So, some family members (usually parents) can continue to object to giving evidence under section 18 of the *Evidence Act*. This is a section that is frequently relevant in the Children's Court, because of the commonality of domestic violence charges with parents as the only witnesses.

However, it is important to understand that if the family member has made a statement or a DVEC, this is potentially admissible under section 65 of the *Evidence Act*. I consider the law in NSW not quite settled on this point, although reasonable minds differ about this.

In *R v BO* (No. 2) (2012) 15 DCLR (NSW) 317, Haesler DCJ adopted a purposive approach to sections 18 and 65 of the *Evidence Act*. His Honour did not admit recorded evidence from a previous trial of a child who had objected to giving evidence under section 18 at retrial, as he did not consider that the child was 'unavailable' within the meaning of section 65. His Honour also revised his judgment to clarify that he retained that view after considering the contrary judgment in the Victorian case of *DPP v Nicholls* [2010] VSC 397, since that case 'did not specifically consider the continued operation of section 18'.

In *Fletcher v R* [2015] VSCA 146, the Victorian Court of Appeal held that a witness who had been excused from giving evidence after their objection under section 18 of the *Evidence Act* was upheld, was unavailable for the purpose of section 65 of the *Evidence Act*. In considering *BO*, the Victorian Court of Appeal considered that the case may be distinguishable on the basis that recorded evidence in a trial was different in nature to a statement given to police during an investigation. Whilst the former might be considered to fall squarely within the character of 'evidence', a statement only becomes evidence if admitted during later proceedings.

Unhelpfully for those wishing to pursue the argument that DVECs and statements of

people who have had their section 18 objections upheld should not be admissible under section 65, his Honour Johnson J considered the conflicting decisions in *R v A2*; *R v KM*; *R v Vaziri (No 4)* [2015] NSWSC 1306 and expressed a firm view that persons who had been excused from giving evidence under section 18 were unavailable under section 65. These remarks were obiter dictum, but they were carefully considered and given after the issue was fully argued. Neilson DCJ observed in *R v Lewis* (No 2) [2018] NSWDC 273 at [7]:

> *'Strictly speaking what his Honour said on this issue is obiter dictum but his Honour is a highly respected and learned judge of the Supreme Court who sits regularly in the criminal jurisdiction of that Court, and sits regularly in the Court of Criminal Appeal. To whatever falls from his Honour, I give the utmost respect.'*

In *Lewis,* Neilson DCJ ruled that a person excused from giving evidence after objecting under section 18 was 'unavailable' for the purposes of section 65 of the *Evidence* Act.

It remains the case that there is no NSW authority higher than *BO* offering comfort to the argument that persons excused from giving evidence under section 18 of the *Evidence Act,* are not 'unavailable' within the meaning of section 65 of the Act. Both the Victorian Court of Appeal decisions and the NSW Supreme Court decision, whilst persuasive, are not strictly binding. However, the decision in *Lewis* means that recent NSW case law is all one way.

Nonetheless, we are of the view this issue is ripe for further consideration by a higher NSW court in an appropriate case. In particular, discussion in *Fletcher* about the potentially different nature of recorded evidence at trial as compared to a written statement given to a police officer raises a question about the character of a DVEC. Although a DVEC, like a statement given to police, does not become evidence until such time as it is admitted in court, it is expressly created for that purpose and intended to be played as evidence in the same way as recorded evidence at a trial. This may be a fertile ground for argument.

X. Exclusion of Admissions

There are additional safeguards that apply to children as compared with adults that have particular application to the exclusion of admissions. There are entire papers on this topic available from criminalcpd.net.au.

When first considering a police fact sheet it is essential to consider whether there was an appropriate adult present when the young person spoke to police. Section 13 operates to exclude anything said by an accused child to police without such a person being present. Note that the information excluded by section 13 is broader than the definition of 'admission' in the *Evidence Act*. Additionally, this does not only apply to a formal interview, but anything said by the child to police, whether in response to official questioning or not. This is not always understood amongst the police force and prosecutors.

It is also important to determine whether the Legal Aid Youth Hotline or ALS Custody Notification Service was called before an interview was conducted, and what the solicitor on that phone service advised police. Section 7(b) of the *Young Offenders Act 1997* (NSW) states that children who are alleged to have committed an offence are entitled to be informed about their right to obtain legal advice and have an opportunity to obtain that advice. Police should facilitate this by arranging for the young person to speak with either the Legal Aid Youth Hotline or ALS Custody Notification Service.[6] A custody management record will need to be obtained for most defended matters in the Children's Court to enquire as to whether the child was given the opportunity to obtain legal advice. Additionally, good records are kept by both Legal Aid NSW and the ALS of the calls made to their phone services and these are available upon furnishing an appropriate authority from your client to them. This is vital information, as it is fertile ground for an application to exclude admissions under sections 138 and/or 90 of the *Evidence Act*. Some common examples of important information found in those records include:

1. After speaking to the young person, the lawyer advises police that the young

[6] Legal Aid Youth Hotline Protocol between NSW Police and the Legal Aid Commission of NSW, September 2004.

person wishes to exercise their right to silence, but shortly after, the young person participates in an ERISP. This may well be inadmissible on the basis police ought to have respected the young person's wish to exercise their right as expressed through the solicitor. The essential case to read on this point is *R v FE* [2013] NSWSC 1692, where admissions relating to a murder were excluded after police ignored the advice of the Youth Hotline lawyer that the young person wished to exercise their right to silence.

2. The custody manager calls the phone service, but has insufficient information about the allegation to give the lawyer. When the lawyer asks for more information to properly advise the young person, the custody manager tells the lawyer that investigating police are not available to discuss the allegation further. The lawyer speaks to the young person to reassure them, but also clearly advises police that the information is insufficient, the lawyer has not been able to give them any advice, and police will need to call back with further information in order for the young person to advise the young person adequately (this will be recorded on the solicitor's call record). Police do not call back, and proceed to interview the young person.

3. Police advise the lawyer that they will deal with the young person under the Young Offenders Act if they admit the offence (again, this should be clear on the solicitor's call record), and the young person agrees to make admissions on that basis, but police then charge the young person.

Sometimes, police will indicate that they asked the child whether they would like to call a lawyer and the child declined. In some cases, you will still be able to make a successful application for exclusion under sections 138 or 90 of the *Evidence Act*, if you can demonstrate that the custody manager did not make sufficient effort to assist the young person to understand and assert their rights. In this regard again it is essential to refer to the Custody Management Record. You should also seek your client's instructions about why they declined the offer to speak to a lawyer, and importantly, their recollection about what they were advised about their right and practical ability to access one.

XI. The Young Offenders Act

The *Young Offenders Act* 1997 (NSW) is a diversionary scheme designed to keep children away from the criminal justice system as much as possible. From a criminologist's point of view, the *Young Offenders Act* is a good option because it's an evidence-based restorative justice effort. It is designed to particularly reduce the cohort of children who have their first contact with the criminal justice system when they are very young, and continue frequent contact over their lifespan, gradually leading to more serious penalties including adult imprisonment.

From the perspective of a criminal defence lawyer, the *Young Offenders Act* is a good option because it is not a conviction for the purposes of a criminal record, and it does not involve conditional liberty like good behaviour bonds or various other Children's Court penalties do. These diversionary options should be considered as often as possible, and advocated for whenever appropriate.

The diversionary options are:

- Warnings by police;[7]
- Cautions by police or court;[8] and
- Referrals for Youth Justice Conferences by police or court.[9]

Youth Justice Conferences should be carefully discussed with your client. The idea of a Youth Justice Conference is that the young person(s) and victim(s) of the offences sit down together with support people, the police Youth Liaison Officer, and a conference convenor contracted by Juvenile Justice. They discuss the offence, the young person acknowledges their wrongdoing, usually apologises, and the group formulate an outcome plan that the young person and victim agree to, in lieu of a criminal penalty.

Whilst attending a Youth Justice Conference requires only that the child 'admits the

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[7] *Young Offenders Act* 1997 (NSW) ss13- 17.
[8] *Young Offenders Act* 1997 (NSW) ss18-33.
[9] *Young Offenders Act* 1997 (NSW) ss34- 59.

offence' and consents to the process,[10] in reality the format of the conference requires a child to begin by outlining their wrongdoing in front of the victim of the offence (if they are in attendance).

This means that if your client considers themselves to be the primary victim, it is a 'plea of convenience', or there is significant dispute over the facts, a Youth Justice Conference will be problematic. Additionally, some children will not have the confidence to engage in the process and will instruct you that they would rather have a more severe penalty than face a victim. However, for many children they are effective diversions away from the court system, and a useful alternative to a bond that might be breached.

The *Young Offenders Act* diversions are not available for all offences, but most. See section 8 of the Act for offences eligible to be dealt with under the Act. The two most commonly occurring offences that are not eligible are the offences under the *Crimes (Domestic and Personal Violence) Act*; Stalk/Intimidate and Breach AVO. There is currently an active legislative reform campaign to bring these offences within the diversionary scheme. In the meantime, where a young person has one or more charges that are eligible for a Youth Justice Conference, together with an excluded offence, it is often a good strategy to seek a conference for the eligible offences, as well as a caution for the ineligible offence, in light of the fact the child will be doing a conference for the offending episode in any event.

Youth Justice Conferences are not only available for low-level offending. They are available for some serious offences, including robbery. It is erroneous to view them as a 'slap on the wrist' or getting off lightly. It is very intimidating for a child to face their victim and be required to discuss their wrongdoing in a forum. Many magistrates are open to the idea of utilising Youth Justice Conferences for a range of offences, including serious offences. After all, if Youth Justice Conferences were not intended to be used for serious offences, they would not have been specifically made available for them.

[10] *Young Offenders Act* 1997 (NSW) ss36(b) – (c).

XII. Children's Court Penalties

As discussed above, it is beneficial to aim for the *Young Offenders Act* diversionary orders whenever possible.

If they are not appropriate for the matter, Children's Court penalties are found in section 33 of the *Children (Criminal Proceedings) Act*. Whenever a child is being sentenced, the principles outlines in section 6 of the Act should be kept in mind. These principles prioritise the rehabilitation of a child. Appendix 2 extracts this section of the act.

Appendix 3 is a table that roughly equates those penalties with adult penalties. They are not precisely equivalent, but designed to serve as a guide for where to pitch your submissions. The table does not include all Children's Court penalties, but the most common ones.

Suspended control orders, which are the equivalent order to an Intensive Corrections Order. If a suspended control order is breached, there is often scope to argue against the imposition of a control order as it can be argued that a child's more limited capacity for consequential thinking would tend to militate against a conclusion that a breach of a suspended control order was contumelious.

A paper on this specific topic is available from the Children's Court page of the criminalcpd.net.au website.

The imprisonment of children in a juvenile justice centre by the Children's Court is referred to as a 'control order'. Section 33(2) of the *Children (Criminal Proceedings)* Act provides that 'the Children's Court shall not [sentence a child to control] unless it is satisfied that it would be wholly inappropriate to deal with the person' by an alternative penalty. This is a higher bar than the 'section 5 threshold' in the *Crimes (Sentencing Procedure) Act*. It is sometimes useful to draw the court's attention to this when making bail applications for children.

Section 25 of the *Children (Criminal Proceedings)* Act prohibits a Court from sentencing

a child to a term of imprisonment or control unless a background report has been prepared, tendered and taken into account in the sentence proceedings. Again, this is a matter that is sometimes overlooked.

XIII. Conviction

The law of admissibility of guilt findings in respect of children is essential knowledge for all criminal law practitioners. This is because the law has application to offenders across their lifetime. If you are representing an adult on sentence who has matters on their bail report as a child, it is easy to overlook that those convictions may be inadmissible. This is the error that occurred in *Dungay v R* [2020] NSWCCA 209.

Section 14

Section 14(1) of the *Children (Criminal Proceedings)* Act prohibits a Court from recording a conviction for a child under the age of 16 years and provides a discretion to record a conviction if the child is 16 years or older and under 18 years. However, this section does not limit the power of a court to record a conviction if they are dealing with a child (of any age) for an indictable offence that is not disposed of summarily (see section 14(2) CCPA).

The provision does not make explicit whether the reference to the age of the child is to their age at the date of the offence, or the date at sentence. That legal issue remains undetermined judicially,[11] but there is good support for the proposition that the relevant date is the age on the date of the offence. Having regard to the principles in section 6, the *Children (Criminal Proceedings) Act* is arguably beneficial and remedial legislation. Such laws are to be given a 'liberal' construction, and one which promotes the beneficial intent of the legislation.[12] On this basis, the interpretation best supported by legal principle is:

1. a court cannot convict a child who was younger than 16 years old on the date of the offence, unless that child is being dealt with at law; and
2. a court has a discretion whether to convict a child who was at least 16 years but younger than 18 years old on the date of the offence, unless that child is being

[11] In *R v AR* [2022] NSWCCA 5, the Court of Criminal Appeal commented at [20]: *"On the hearing of the appeal, submissions were addressed to the question of whether "the age of 16 years" referred to in s 14(1)(a) means the age of the child at the date of the offence or at the date of sentencing. It is not necessary to resolve the question… whatever event may be intended by sub-s (1)(a) as the event at which a child's age should be determined, that issue of interpretation has no bearing on the present appeal."*

[12] *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2016] HCA 50; [2016] 260 CLR 232 at [32]; *IW v City of Perth* (1997) 191 CLR 1 at 12, 39; [1997] HCA 30.

dealt with at law.

The court is not bound to focus attention on the matters required to decline to impose a conviction in the *Crimes (Sentencing Procedure) Act*, and it would be erroneous for a court to approach the question of whether to record a conviction in the same way as whether to decline to convict an adult offender. The court's discretion whether to record a conviction against children between the ages of 16 and 18 is at large.

There are many good reasons why a court would decline to proceed to recording a conviction. A child's first offence is one example, but sometimes a child who already has convictions recorded for other, more serious matters, but has shown a de-escalation in offending, might be extended leniency for longer periods of compliance or a decrease in seriousness of offending. This reasoning accords with the principles of section 6 of the *Children (Criminal Proceedings) Act.* It is not uncommon for children to have committed many offences as a child, but emerge from childhood with no recorded convictions, in recognition that as a child matures, they may begin to make better choices and take up opportunities that remain available to them because they do not have a criminal record.

Section 15

Section 15 provides that a child's previous convictions are not admissible in certain circumstances. It provides:

> (1) The fact that a person has pleaded guilty to an offence in, or has been found guilty of an offence by, a court (being an offence committed when the person was a child) shall not be admitted in evidence (whether as to guilt or the imposition of any penalty) in any criminal proceedings subsequently taken against the person in respect of any other offence if—
>
> (a) a conviction was not recorded against the person in respect of the firstmentioned offence, and
>
> (b) the person has not, within the period of 2 years prior to the commencement of proceedings for the other offence, been subject to any judgment, sentence or order of a court whereby the person has been punished for any other offence.
>
> (2) Subsection (1) or (3) does not apply to any criminal proceedings before the Children's Court.
>
> (3) The fact that a person has been dealt with by a warning, caution or youth justice conference under the *Young Offenders Act 1997* (being in respect of an

> alleged offence committed when the person was a child) is not to be admitted in evidence (whether as to guilt or the imposition of any penalty) in any criminal proceedings subsequently taken against the person in respect of any other offence.

Are matters on a Children's Court record admissible?

When acting either for a child, or for an adult who committed offences as a child, it is essential to carefully review their record and consider the admissibility of the matters within it.

1. Has there been at least two years between the last time the person was 'subject to any judgment, sentence or order of a court whereby the person has been punished for any other offence' prior to being charged with the offence that they now face sentence for?
2. If yes:
    a. are there offences on the person's record committed when they were younger than 16 years and dealt with summarily? These are not admissible on sentence.
    b. Are there offences on the person's record committed when they were at least 16 years old but younger than 18 years, and dealt with summarily? Does the criminal history show that convictions were recorded for these?

As is obvious, the assessment is not always straightforward. Taking the example from *Dungay,*[13] the appellant committed at least 15 offences as a child, between the ages of 14 and 18. All were dealt with in the Children's Court. He was convicted of some offences but not others.[14] He also had a minor adult history. Because there had been a gap of more than two years since Dungay had completed a good behaviour bond imposed by the Local Court, and being charged with the offences for which he was sentenced in the District Court, some of the matters on his criminal history as a child were not admissible on sentence, and some were. The District Court had regard to the entirety of his record at sentence. It was an error to do so, and the applicant's appeal was upheld in the Court of Criminal Appeal.

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[13] Dungay's record as a child was set out at paragraphs [36] to [42] of the judgment.

[14] This was not evident on his criminal history. Determining whether he had been convicted required an examination of the court papers for those matters from the children's court.

Was the child convicted?

One complexity in making this assessment is that the record of a child dealt with between the ages of 16 and 18 is often silent on whether a conviction was recorded. In those cases, the conviction for an offence must be proven by the prosecutor for the offence to be admissible, because it is a matter adverse to the offender.[15] The prosecutor may do this by obtaining the papers of the earlier matters to determine whether a conviction was noted as having been recorded. There is no conclusive judicial determination on the position in respect of conviction if the record is silent. However, there is support for the proposition that in cases of silence, no conviction was recorded.[16] In our view, the correct position is that unless the prosecution can demonstrate a conviction was recorded, the offences are not admissible.

[15] *R v Olbrich* [1999] HCA 54; [1999] 199 CLR 270 at [27].

[16] See discussion of the meaning of 'conviction' in *R v AR* [2022] NSWCCA 5 at [21]-[27]; as well as the liberal approach to be taken to benficial legislation: *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2016] HCA 50; [2016] 260 CLR 232 at [32]; *IW v City of Perth* (1997) 191 CLR 1 at 12, 39; [1997] HCA 30.

XIV. Bail

As a very broad, very general observation, children are not the most diligent observers of bail conditions. The same *Bail Act* applies to children as to adults, with minimal variation or exceptions within the act for children. The *Bail Act* does not make explicit special provision for a child's lesser ability to apply consequential reasoning. It equally does not make explicit provision for taking into account the much lower likelihood that a child would receive a custodial penalty for a particular offence than an adult. These matters are left to you as an advocate to persuade courts of, when making your application. For example, the likelihood of a custodial penalty is a relevant factor the court must take into account pursuant to section 18(1)(i).

For these reasons, and others, some children are remanded in custody for breaches of bail, charged with offences for which they will not ultimately receive custodial penalties. Once children are advised that a control order is unlikely, instructions to change their pleas to guilty often swiftly follow, in spite of defences to the charges being. It can be hard for children to choose the long-term benefit of being found not guilty of an offence, in the face of a way out of the cell they are sitting in.

What is the solution to this problem? Your best chance of success is trying to persuade the court to impose reasonable bail conditions. It is important to pay careful attention, and sometimes to draw the court's attention, to sections 17 and 20A of the *Bail Act* 2013 (NSW):

> *17(2) …a bail concern is a concern that an accused person, if released from custody, will:*
>
> *a) fail to appear at any proceedings for the offence, or*
>
> *b) commit a serious offence, or*
>
> *c) endanger the safety of victims, individuals or the community, or*
>
> *d) interfere with witnesses or evidence.*

Children who are charged with frequent, minor offences (such as low-level intimidation or shoplifting offences), are often caught by 17(2)(b), because of the operation of section 18(2)(c):

18(2) The following matters (to the extent relevant) are to be considered in deciding whether an offence is a serious offence under this Division (or the seriousness of an offence), but do not limit the matters that can be considered:

a) whether the offence is of a sexual or violent nature or involves the possession or use of an offensive weapon or instrument within the meaning of the Crimes Act 1900,

b) the likely effect of the offence on any victim and on the community generally,

c) the number of offences likely to be committed or for which the person has been granted bail or released on parole (my emphasis).

However, it can be argued that, in comparison to the offences contemplated by section 18(2)(a), a multiplicity of low-level offending is of lesser concern and warrants fewer bail conditions than more serious offences. It is then helpful to turn to section 20A:

20A Imposition of bail conditions

1. *Bail conditions are to be imposed only if the bail authority is satisfied, after assessing bail concerns under this Division, that there are identified bail concerns.*
2. *A bail authority may impose a bail condition only if the bail authority is satisfied that:*
    a) *the bail condition is reasonably necessary to address a bail concern, and*
    b) *the bail condition is reasonable and proportionate to the offence for which bail is granted, and*
    c) *the bail condition is appropriate to the bail concern in relation to which it is imposed, and*
    d) *the bail condition is no more onerous than necessary to address the bail concern in relation to which it is imposed, and*
    e) *it is reasonably practicable for the accused person to comply with the bail condition, and*
    f) *there are reasonable grounds to believe that the condition is likely to be* On a close reading of section 20A, it is apparent that each

> of the 6 sub-sections must be met before a bail condition can be lawfully imposed. It can be useful to argue, for example by reference to section 20A(b), that it is not reasonable and proportionate to impose onerous conditions for minor offending. If the condition is not reasonable and proportionate, it is not permitted to be imposed by the Act.

Careful consideration of section 20A should lead to the conclusion that the following heavily favoured conditions are unlikely to be permitted to be imposed under the Act for minor offending:

- Obey all reasonable conditions of parents or carers
- 6pm – 6am curfew; or spend each night at home
- Attend school every day
- Attend all juvenile justice or doctor's appointments
- Non-association conditions

These 'aspirational' bail conditions may reflect what police, or the court, would like children to do, rather than reflecting the considerations outlined in section 20A. A repeated rebuff when you resist such conditions, or apply to vary them, is an enquiry of you as to why a child needs to be out late at night, or why they would find it difficult to attend school. These are not questions posed by the *Bail Act*. Equally, nothing in the *Bail Act*, or the second reading speech for the bill, contemplated children being detained in custody for not attending school.

In the second reading speech of the *Bail Bill 2013*, then Attorney-General Greg Smith noted: *'The Law Reform Commission noted in its report concerns expressed by many stakeholders about the increasing use of bail conditions to address issues related to the welfare of the accused rather than achieving the traditional aims of bail, such as ensuring the accused's attendance at court. The Government agrees that there needs to be appropriate guidance in the legislation regarding the permissible purposes for bail conditions and the restrictions which apply to them so that unnecessary conditions are not imposed.'*

Despite the stated aims of the Act, the onerous conditions continue to be imposed.

However, there is scope in the current law to resist the imposition of unduly onerous bail conditions wherever possible, to try to avoid your client's winning case being defeated by 'the system'. I encourage you in this endeavour.

Section 28 of the *Bail Act* 2013

Section 28 is intended to reduce the problem of juvenile remand. In cases where a magistrate is minded to grant bail, but for the fact that the child has no accommodation, the court can grant bail with a condition under section 28 that the child is not to be released until suitable accommodation is found by a 'government service.' In practice this is the Department of Communities and Justice (DCJ), (previously FaCS) through either Child Protection or Youth Justice.

The court may seek your input about which service is appropriate to direct the order to. If you are aware that DCJ have parental responsibility for a child, or the child is young and does not have current Youth Justice supervision, then DCJ Child Protection will generally be the appropriate service. If a child is under the supervision of Youth Justice, is over 16, or doesn't have a child protection history with DCJ, Youth Justice are more likely to be the appropriate agency to locate accommodation.

After granting bail with this condition, the court will re-list the matter every two days while the young person remains in custody, for the relevant service to advise the court of what efforts have been made to obtain accommodation.

XV. Arrest as a Last Resort

Arrest should still be considered a last resort in NSW (see for example *DPP (NSW) v Mathews-Hunter* [2014] NSWSC 843, and Jane Sanders' paper 'Police Powers of Arrest and Detention (Feb 2018)'. The principle of arrest as a last resort has even more force when combined with s8 of the *Children (Criminal Proceedings) Act*, which provides that proceedings against children should generally be commenced by "attendance notice". This section appears to create a presumption that proceedings against children should be commenced without resort to arrest and bail. We would argue that arrest, particularly of young people, should be avoided wherever possible and instead a court attendance notice be utilised for bringing an alleged offender before a court and that where an unnecessary arrest occurs it is improper/possibly unlawful pursuant to s 138 of the *EA.* If you think a young person has been arrested unlawfully you should make a referral to a civil lawyer. Legal Aid NSW provides free civil law advice.

A Final Word

Working in the Children's Court can be a heady mix of complex law, colourful clients, unique challenges and traumatic backstories. It is a jurisdiction in which it is occasionally possible to feel you may be doing something to hold back the tide of injustice, however fleetingly.

Appendix 1

Serious Children's Indictable Offences

***Children (Criminal Proceedings) Act* 1987, s3:**

(a) homicide,

(b) an offence punishable by imprisonment for life or for 25 years,

(c) (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*),

(d) (c1) an offence under the *Firearms Act 1996* relating to the manufacture or sale of firearms that is punishable by imprisonment for 20 years,

(e) (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

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

***Children (Criminal Proceedings) Regulation* 2021, r4:**

An offence arising under section 80A of the Crimes Act 1900 in which the victim of the offence was under the age of 10 years when the offence occurred is prescribed as a serious children's indictable offence.

Appendix 2

Principles

6 Principles relating to exercise of functions under Act

A person or body that has functions under this Act is to exercise those functions having regard to the following principles:

a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,

b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,

c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,

d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,

e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind,

f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,

g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions,

h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

Appendix3

Penalty Conversion Table

Local Court Penalty ***Crimes (Sentencing Procedures) Act***	**Equivalent** ***Children (Criminal Proceedings) Act***
No equivalent	**Youth Justice Conference** (s40(1A) *Young Offenders Act)*
s9 Conditional Release Order	**s33(1)(b) good behaviour bond**
s10(1)(a) dismissal	**s33(1)(a)(i) dismissal** OR **s31 *Young Offenders Act* caution**
s10(1)(b) CRO without conviction	**s33(1)(a)(ii) discharge with bond**
s10A	**No equivalent**
s11	**s33(1)(c2)**
S8 Community Correction Order	**S33(1)(e) probation**
No equivalent (previously s12 suspended sentence)	**s33(1B) suspended control order**
Full-time imprisonment	**s33(g) control**
Fine	**S33(1)(c)Fine (max. 10 penalty units)**

Youth Justice Conferences (YJC):

- Most matters can be referred to a YJC
- When a young person completes the conference and the outcome plan agreed upon at the conference, the matter is dismissed with no conviction or further penalty: s57(2) *Young Offenders Act*
- Matters which **cannot** be referred to conference: Intimidation or Breach AVO; drug supply (except cannabis in some circumstances); some sex matters; some traffic matters: s8 *Young Offenders Act*

Appendix 4

Checklist for Children's Court Matters

Charges

1. **Check the jurisdiction is correct** by checking:
    a. Age: were they over 10 and under 18 at the time of alleged offence, and under 21 when charged?
    b. Pay careful attention if the matter is:
        i. Marked 'Si' –not a committal unless Children's Serious Indictable offence – check *Children (Criminal Procedure) Act* for details s3 – definitions
        ii. Traffic -
            1. if there are only *Road Transport Act* offences and the child is at least 16 (for a car) or 16 and 9 months (for a motorbike): jurisdiction is Local Court.
            2. if there are only *Road Transport Act* offences and the child is younger than 16 (for a car) or 16 and 9 months (for a motorbike), Children's Court.
            3. If there are other offences as well as traffic, jurisdiction is Children's Court.

2. **Assess the prosecution's case** by checking:
    a. Age at time of offence: **if the child was under 14 *doli incapax* is an element of the offence. It is often in their interest to plead not guilty**. The police often overlook or fail to rebut *doli incapax*.
    b. Admissibility of **admissions** – as well as the usual consideration, also note:
        i. Police cannot use anything said to them by a child suspect unless there was an adult present at the time – s13 *Children (Criminal Proceedings) Act*
        ii. Police must call the Youth Hotline and offer the child legal advice before questioning them. If the child tells you that they told the lawyer they didn't want to give an interview, but that after they finished the telephone call, the officer continued to question them, you can check the records of Legal Aid or the ALS to see what the lawyer said to police and recorded on the hotline advice. Possible objection s138 and/or s90 *Evidence Act*
    c. **Objections**: if the witnesses are close family, they can object to giving evidence, even if it is a DV matter (the only exception is for a spouse in a DV matter) – s18 *Evidence Act*

i. n.b. this is a discretionary issue for the court and the prosecution may try to admit statements or DVEC into evidence after an objection is upheld: *BO, Fletcher.*

3. If a child has a mental health condition, consider a section 14 *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*. The assessment of whether it's 'more appropriate' to make this order is weighted more heavily in favour of a s14 in the Children's Court.

4. If a child is pleading guilty **always consider these penalties first**:
   a. **Caution**
   b. **Youth Justice Conference** (except for intimidation or breach AVO)
   c. For traffic offence in the Local Court: Children's Court penalties, available under section 210 *Criminal Procedure Act* 1986 (NSW).

These are penalties that do not carry any consequences by way of conviction or further penalty. The court can give an unlimited number of these penalties.

Forensic Procedure Applications

1. It is **almost always in the client's interest not to consent to the order**. The prosecution have a significant hurdle to get over in the legislation for having applications granted against children. For more information, refer to the papers on the criminalcpd.net.au website.

AVOs

1. It is **usually in the child's interest to consent to a 5-month interim AVO** without admissions, which is then withdrawn provided there are no breaches (Children's Court NSW Practice Note 8, Clauses 3.6 and 3.7). This is because the 5-month interim order is often finished before the hearing date comes around.
2. Legal Aid is available to children who wish to defend an AVO application. However, the practical result is that the children can spend a number of months awaiting the hearing, subject to an interim order anyway, and then if they lose the hearing, a final AVO can be made. If the AVO is against another child, this can have consequences for a Working with Children Check for the rest of the child's life.
3. It is virtually never in the child's interest to consent to a final AVO.