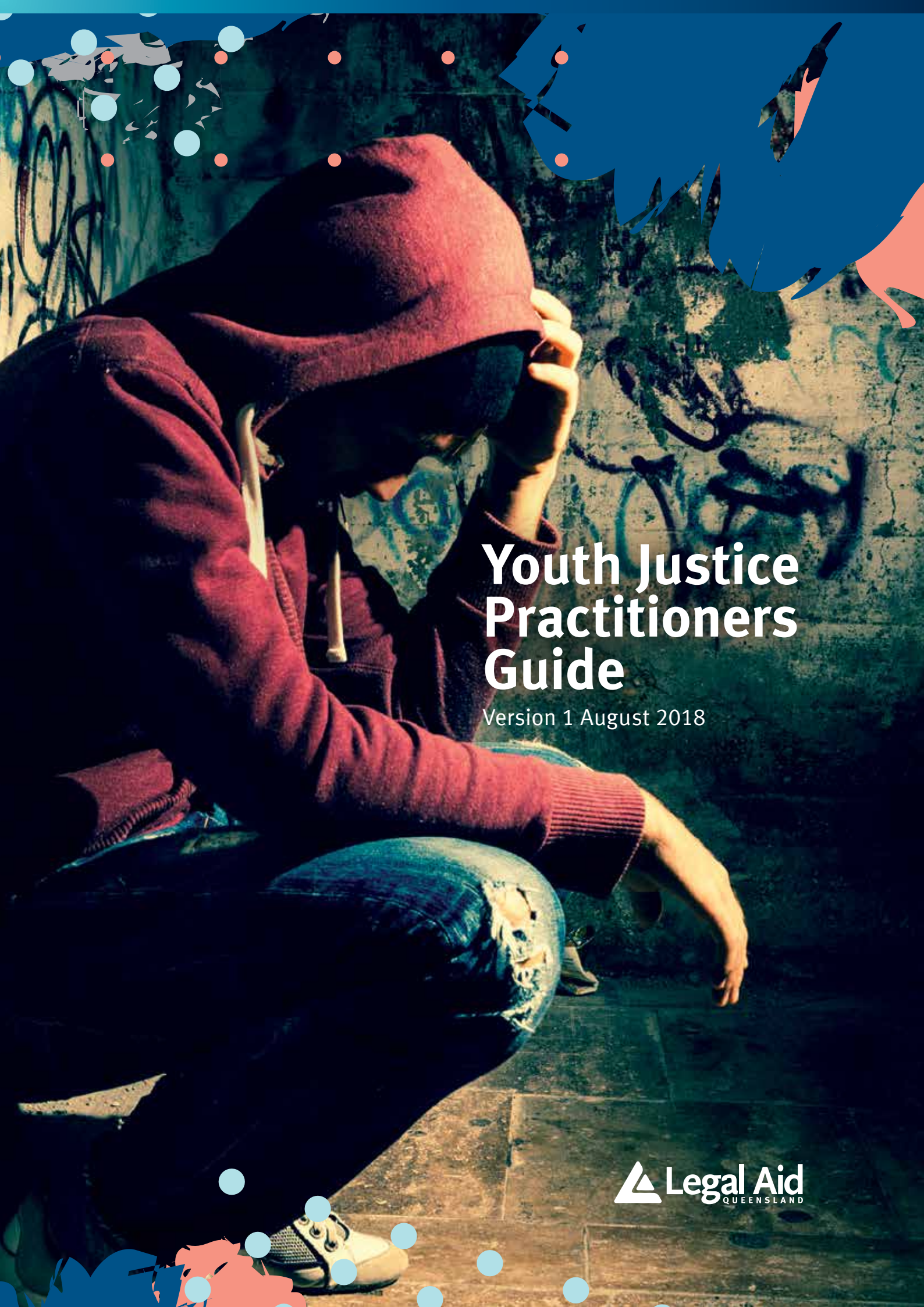

# Youth Justice Practitioners Guide

Version 1 August 2018

Legal Aid QUEENSLAND

# Contents



This guide relates to the legislation and system of youth justice operating in Queensland. If a section is cited without an Act being specified, the section refers to the *Youth Justice Act 1992* (Qld) (Youth Justice Act). The Department of Justice (Youth Justice Services) (previously the Department of Communities) will often be referred to as 'the department'.

# Foreword

The Childrens Court is a specialist court established by the *Childrens Court Act 1992*. In its criminal jurisdiction it deals with young people (aged 10 – 17) accused of criminal offences. The Court is constituted by a Magistrate (Childrens Court) or a District Court Judge (Childrens Court of Queensland).

The Court's criminal jurisdiction is governed by the *Youth Justice Act 1992* which sets out a charter of Youth Justice Principles (Schedule 1). The Court is not simply an adult court in miniature. There are specific procedures and sentencing regimes which are a Code in relation to proceedings against young people.

It is incumbent on practitioners who appear in the Childrens Court to be aware of the specific provisions of the Act, its principles and procedures. To that end, Legal Aid Queensland has developed a Youth Justice Practitioners Guide for the use of both defence and prosecution representatives. It sets out in a clear and logical manner the workings of the Act, the principles that apply to procedures pursuant to it and the roles of Youth Justice Services in the Department of Child Safety, Youth and Woman, and Legal Aid Queensland.

The document is an electronic only publication which will enable its timely update. It is presented in a format that allows easy printing.

I congratulate Legal Aid Queensland and in particular its Youth Legal Aid team on the production of this guide. I commend its use to both prosecution and defence.

M. Shanahan DCJ
**President Childrens Court of Queensland**
**May 2018**

# Introduction to youth justice in Queensland

Lawyers must be aware of and comply with Legal Aid Queensland's *Best practice guidelines for working with children and young people*.

## Principles of youth justice

The principles of youth justice are listed in the Charter of Youth Justice Principles in Schedule 1 of the *Youth Justice Act 1992*. These principles underlie the operation of the Act.

### *Vulnerability of children*

Children are vulnerable in dealings with people in authority. The Act provides protections over and above those of an adult. These protections should operate during an investigation or proceeding that relates to an offence.

The legal practitioner's duty is to adequately guard these rights throughout the legal process.

### *Accountability of children*

Children have a sense of right and wrong, and justice; they expect that illegal acts will have consequences. However, at the same time, due to a child's age, they may have a limited, though developing, understanding of the nature or consequences of their actions. The Youth Justice Act accounts for this developing awareness.

### *Diversion*

A child should be diverted from the criminal justice system wherever possible, unless the offence's nature and seriousness, and/or the child's criminal history, necessitate that a proceeding should begin. Diversionary options under the Youth Justice Act include cautioning, a restorative justice process and referral to drug diversion programs. A court can also order a young person to be diverted from the court system.

Please see Police diversionary options.

### *Fair and participatory proceedings*

Proceedings against children should be fair and just. The child should have the opportunity to participate in and understand the proceedings. Courts that deal with children need procedures and rules that children and their parents can easily understand.

### *Categories of offences*

Like adults, children can be charged with both simple and indictable offences. The child has the election in regard to all indictable offences which are not categorised as 'serious' pursuant to s 8 of the *Youth Justice Act 1992*.

### *Sentencing*

The Youth Justice Act provides an exclusive code for sentencing children (s 149). It ensures all courts deal with children according to the Youth Justice Act's objectives and principles (Charter of Youth Justice Principles, Schedule 1, and s 3).

The provisions of the Penalties and Sentences Act do not apply to proceedings against children unless specifically allowed by the Youth Justice Act.

As well as being a consequence of an offence, punishment should have a clear preventative and rehabilitative purpose. Sentences should not be made on the basis of a child's need for care or welfare support. Meeting a child's welfare needs should be separate from the sentencing process.

Welfare assistance is more likely to be effective if it is a voluntary agreement rather than a punishment. The Department of Child Safety, Youth and Women(Youth Justice Services) will address any inquiries about welfare issues.

Please see Sentencing.

### *Impact of offending behaviour on victim*

When sentencing a child, a court must consider the offence's impact on the victim, as well as the community surrounding both the victim and child offender. The Youth Justice Act allows a court to order restitution and compensation from the offender only if the child offender is able to pay it. The Act also allows an order to be made against a parent if the court deems their parenting (or lack thereof) contributed to the offending and subsequent loss to the victim. A lawyer acting for a child should not act for parents in these circumstances. Parents should be advised to seek their own independent legal advice.

## The Childrens Court of Queensland

The Childrens Court of Queensland was established by the *Childrens Court Act 1992*. The forum was specifically developed to deal with child offenders and is the District Court equivalent for children charged with indictable offences.

The District Court can still try or sentence a child on indictment if the child is also charged as an adult for an offence, or proceedings have been removed to a District Court under the Act; for example, if a child is co-accused with an adult (Youth Justice Act, ss 107–113, s 61A(2) District Court Act 1967).

If a child is charged with an indictable offence (other than a Supreme Court offence) and elects to be dealt with by a higher court, the Childrens Court of Queensland must generally deal with the charge, constituted by a judge who holds a Childrens Court commission. However, the court can be constituted by a District Court judge if no Childrens Court judge is available (Childrens Court Act, s 5(2)).

If the matter is to be a trial, the child can elect to have their matter heard either with a jury or by a judge sitting alone. The child will make this election at the conclusion of the committal hearing. The child also has the right to change this election prior to the listing of the trial (Youth Justice Act, s 103).

## Youth Justice Court officers

The Department of Child Safety, Youth and Women(Youth Justice Services) has a right of appearance in Childrens Court and Childrens Court of Queensland matters, although they are not a party to the proceedings.

A departmental officer has the right to be present in a court whenever a child appears. Officers have a right to be heard regarding the adjournment of proceedings, matters relating to the custody or release from custody of a child pending completion of the proceeding, sentence orders that may be made against a child and any matter on which the court considers that Youth Justice Services should be heard (Youth Justice Act, s 74).

## The Childrens Court

A Childrens Court will be constituted by a Childrens Court magistrate, a magistrate, or two justices of the peace (Childrens Court Act, s 5). However, s 29 of the Justices of the *Peace and Commissioners for Declarations Act 1991* (Qld) limits the power of two justices to dealing with a procedural action or a guilty plea on a simple offence. The justices cannot order detention or conditional release. One justice cannot comprise a Childrens Court and, therefore, cannot deal with a child alleged to have committed an offence.

## Who may be present at court?

### *Childrens court proceedings*

Sections 20(1) and 20(2) of the Childrens Court Act mandate who may be present at court.

The following people may be present:

- the child
- the parents or another adult member of the child's family or guardian
- a witness giving evidence
- a support person to a complainant giving evidence about a sexual offence
- a person representing a party in the proceeding
- a representative of Youth Justice Court Services
- a representative of the mass media but only if in the court's opinion there will be no prejudice to the child by having that person present
- any other person who, in the court's opinion, will assist the court
- a person who has a proper interest in the proceedings and their presence would not be prejudicial to the child.

A Childrens Court will be closed to the general public. Therefore, brothers, sisters, cousins and other family members are not permitted unless the court believes they can assist the court. Where relevant, special provisions can be made for Aboriginal or Torres Strait Islander welfare organisations or community justice groups to be present in addition to the child's family (s 20(1)(h) Childrens Court Act).

An investigating police officer or other person in charge of the case against the child is entitled to be present. Other people, such as other police witnesses, regardless of their interest in the matter, are generally not entitled to remain in court. In situations where several people are present in court, a lawyer representing the child should clarify their authority to be present. The child may be intimidated by the sight of many people in court.

### *Supreme Court and District Court proceedings (including the Childrens Court of Queensland)*

Proceedings in the Supreme Court and District Courts are not Childrens Court proceedings. While these courts are subject to the Youth Justice Act's sentencing provisions, the Childrens Court Act does not apply. Therefore, Supreme Court or District Court proceedings involving child offenders are open to the general public.

The provisions of the Childrens Court Act preventing the public from being present in court do not apply to proceedings on indictment before the Childrens Court of Queensland. However, the Childrens Court of Queensland will be declared closed for Childrens Court of Queensland bail applications (for matters not yet subject to indictment), sentence reviews and appeals pursuant to s 222 of the *Justice Act 1886*.

## Who is a child?

A child is a person under 18 years of age. For information in relation to the transition of 17 year olds to the youth justice system, please see:

PDF — Transition of 17-year-olds to the youth justice system

CPD — What lawyers need to know about the transition of 17 year olds into the Youth Justice system

Note: It is relevant to consider the age of the person at the time of the alleged offence. If the person is alleged to have committed the offence after they turned 18 years, the law governing adult offending applies.

### *When can 18 year olds be dealt with as children?*

A person will be treated as a child if they committed an offence as a child and a finding of guilt was made before they turned 19 years (Youth Justice Act, s 140). If the person committed an offence as a child and proceedings commenced after the person turned 19 years, the offender must be dealt with as an adult (Youth Justice Act, s 140(1)).

If a child offender has turned 19 years, any continuing proceeding must proceed on the basis that the offender will be sentenced as an adult (Youth Justice Act, s 140(2)). However, an offender must not be treated as an adult if the court is satisfied that there was undue delay on the part of the prosecution in starting or completing the proceeding (Youth Justice Act, s 140(4)).

If, after finding a child guilty, the court cannot sentence the child because the child has escaped, failed to appear without reasonable excuse or failed to return from a leave of absence during a detention sentence, and has since turned 19 years, the court must sentence the offender as an adult (s 140(3)).

Section 141 gives the court discretion in treating an offender who has allegedly committed an offence as a child and had proceedings commence as a child, as an adult if the offender has previously been dealt with in the adult court system and has turned 19. The court must sentence the offender as an adult if he or she is found guilty.

However, Youth Justice Act, note s 144(2), which indicates that, notwithstanding the person being sentenced as an adult, the sentencing court must consider that the person was a child at the time of the offence and not give a harsher sentence than the person would have received as a child.

### *Over 18 years—the effect of orders*

The court may make an order against a child even when that child will be an adult before the order's effect has ceased. The order will continue to apply as if the person was a child. Generally, any other proceedings arising from the order, including breaches of the order as an adult, must proceed as if the person was still a child (Youth Justice Act, s 142).

Section 143 gives a court a discretion, when dealing with a proceeding under an order made as a child, to convert a child order to a corresponding adult order. Order conversion can occur only if the person:

- is 19 years when the proceeding arises out of the childhood order, or
- has committed an offence as an adult (18 years old and over), which is being proceeded against, or a sentence order has been made regarding the offence.

A conversion will occur only in the case of probation or community service orders. They will be converted to adult probation and adult community service orders. If this occurs, the person will be subject to all the terms and conditions of that adult order. Order administration will then transfer from The Department of Child Safety, Youth and Women (Youth Justice Services) to the Department of Corrective Services.

Practitioners should obtain clear instructions about their client's attitude to having their order converted to an adult order.

A conversion may mean that the person will deal with only one government agency for order administration. However, if the conversion occurs due to an order breach, the order will be converted to the adult order for the remainder of the breach proceedings.

Be aware that the *Penalties and Sentences Act 1992* (Qld) requires a conviction to be recorded upon breach of an adult order (s 12(6) of the Penalties and Sentences Act). However, a conviction cannot be recorded for a breach of a child order that has been converted to an adult order. Additionally, a defendant who breaches a child order before the order is converted to an adult order cannot be charged with an offence pursuant to s 123 of the Penalties and Sentences Act.

## When can a child be identified?

'Identifying information' is "information that identifies the child, or is likely to lead to the identification of the child, as a child who is being, or has been, dealt with under this Act" (Youth Justice Act, Schedule 4). The Childrens Court Act defines any representative of the mass media as a person who may be permitted to be present at a Childrens Court only, if in the court's opinion, the person's presence would not be prejudicial to the interests of the child. Although the meida can publish details of the case and sentence, identifying the child in any manner is an offence punishable by 1000 penalty units for a corporation, or 100 penalty units or two years' imprisonment for an individual. The only exception is where publication has been permitted by a court order, or under written authority from the chief executive to ensure a person's safety (Youth Justice Act s 301 (2)(a) & (b) and s 301 (3)).

## Representing children charged with criminal offences

### *Practitioner relationship with a young client*

There are different considerations when appearing for children than when appearing for adults. However, as always, lawyers are duty-bound to obtain the best result for their client in the circumstances.

Personal views about what would benefit the child should not influence a practitioner's submissions to the court, for example, 'a probation order might provide an opportunity to address family problems'. Practitioners should ensure all submissions made to the court are directed towards obtaining the best result for the client based on the Youth Justice Act's principles.

### *Taking instructions*

Great care should be taken by practitioners to obtain proper instructions from a child client. It is not uncommon for a child to be confused and overwhelmed by proceedings. It is important to properly explain court terminology and court processes. The court has a duty to ensure the child understands the nature of the alleged offence including matters that have to be established before they can be found guilty, court procedures and the consequences of any order that may be made (Youth Justice Act, s 72).

In practice, the court will expect the lawyer representing the child to have explained proceedings (Youth Justice Act, s 73) and will often ask whether these matters have been explained to the child.

### *Family involvement*

Practitioners act for the child, not the parent, and must take instructions from the child.

A child may be unduly influenced by friends or relatives. The child's family must understand that it is the child who is being represented.

Instructions should be sought from the child as to whether they want to have their parent or guardian present in the interview. Parents, guardians and child safety officers do not have the right to be present during an interview with the child.

If a child changes instructions after consulting with a parent, care should be taken to clarify the child's instructions with them alone. If the child is overly influenced by friends or family, they may give conflicting instructions. In such cases, it may be prudent to withdraw from the matter.

In contrast, sometimes the presence of a parent can help identify the difficulties involved in a child's case. Assess the benefit and appropriateness, or otherwise, of a parent's presence in the interview.

During proceedings, the court may seek the parents' views. These may conflict with the child's instructions, so it is useful to obtain details of their views prior to court.

### *Parent required to be at court*

A parent's presence is generally required in court when a child appears. To ensure the parents can attend, a court may recommend the department provide financial assistance to the child's parents (s 69(2)). The court has discretion to adjourn proceedings to allow the parents to attend court. Practitioners should be aware of this practice, as a child may be disadvantaged if extended remands occur to ensure that parents attend (Youth Justice Act, s 70).

It is usual practice for a Childrens Court magistrate to refuse to deal with a matter without the presence of a parent. A court is more likely to deal with a matter in the absence of a parent if the child is living independently, the offence is simple in nature or the child is aged 16 years or older.

In some cases, the court may order a parent to appear before it. A notice will then be issued and served on the parent (Youth Justice Act, s 70). If the parent fails to comply with the order, they may be liable to prosecution for non-compliance (Youth Justice Act, s 71).

Be aware that the child's instructions may conflict with information provided by the parent. Accordingly, if asked to act for the parent who has been charged with an offence due to their non-compliance, practitioners should consider whether a conflict of interest will arise. It is usually prudent to not act for the parent in these circumstances.

## Representing Indigenous children

Lawyers should be aware of and comply with Legal Aid Queensland's *Best practice guidelines for lawyers providing legal services to Aboriginal and Torres Strait Islander clients*.

When dealing with Indigenous clients, practitioners need to be aware of the communication styles of some Indigenous people. An adversarial system is alien to many Indigenous cultures. Therefore, the process of asking direct questions and expecting direct answers may not be the most effective way to obtain proper instructions from an Indigenous client.

Some hints for duty lawyers:

- Respect the client's silence and pauses, as they do not usually indicate a lack of cooperation. Ask a question and then wait for your answer.
- Exchange reciprocal personal details to maintain a real dialogue with your client. This is standard protocol in a Indigenous community. Letting the client see their lawyer as a real person with a personal life can reduce some communication barriers.
- Be aware that, if a child is intimidated or confused about a situation, they will often respond with 'gratuitous concurrence'. This means the child may give answers they think the practitioner wants to hear, generally to try to escape a stressful situation as soon as possible. Many cases of gratuitous concurrence have occurred during police interviews with Aboriginal suspects. Therefore, with Aboriginal clients, it is

particularly important for lawyers to obtain clear instructions from their client about any admissions they have made to police.

- Lawyers acting for a child should not try to speak 'Aboriginal English' if the lawyer is not an Aboriginal person. The child should be taken through the police evidence, with the lawyer explaining clearly what the police say happened. Lawyers should wait for agreement or disagreement about each element of the evidence.
- Ensure the client understands that they choose whether to plead guilty or not guilty and that no one can take that right away from them.
- Ask one question at a time. Double-barrelled questions often confuse clients.
- Be sensitive. An Aboriginal child may not want to discuss certain cultural issues. In some cases, it may be helpful to have a general discussion with a relative regarding background information. While this information may not be included as part of the client's instructions, it may enhance your understanding of the issues.
- Be aware that some young Aboriginal people feel that looking into the eyes of an authority figure is disrespectful. Avoiding eye contact with their lawyer may be a way for an aboriginal child to show respect.

Recommended reading—Eades, D. *Aboriginal English and the Law*, Continuing Legal Education Department of the Queensland Law Society Inc, 1992.

There is a Youth Murri Court in some parts of Queensland that allows the sentencing of young Aboriginal and Torres Strait Islander offenders with input by community elders.

## Criminal responsibility—doli incapax

This is an important defence that can be easily overlooked but has a large impact on children charged with criminal offences.

Under s 29 of the *Criminal Code Act 1899* (Qld), a child under 10 years of age cannot be held criminally responsible.

A child under 14 years of age is presumed not to be criminally responsible.

The prosecution can rebut the presumption of the lack of capacity to know they should not do the act only by calling proper admissible evidence. The decision of R v F; ex parte Attorney-General [1998] QCA 97 discusses the issues and evidential requirements. In the initial police interview, police will often address this issue by trying to establish by admission that the child knew their conduct was 'wrong'.

Practitioners should bear in mind both the offence for which the child was charged and the necessary capacity for the offence that must be proved. For example, if a child is charged with being a party to an offence, the court has accepted that acting as a 'lookout' requires proof that the child had the capacity to know that this, not the primary offence (ie 'the act done by the child'), was wrong. See the decision of His Honour Judge McGuire in *R v J* (Unreported, Childrens Court of Queensland, No 75 of 1996, 20 June 1996).

For a recent example see RP v The Queen [2016] HCA 53.

# The police investigation

## Police questioning

The *Police Powers and Responsibilities Act 2000* (Qld) (PPRA) regulates police conduct during questioning. Section 5 of the PPRA makes it clear that Parliament intends for police to comply with the Act's provisions.

Sections 245–268 of the PPRA govern police procedure when interviewing a person charged with an indictable offence. These provisions require the police to allow the person to:

- communicate with a friend or relative
- contact a lawyer and arrange for them to attend the interview.

Specifically, when questioning children, the police must not question a child unless:

- before questioning has started, the child has had the opportunity to speak to a support person of their choice in private, and
- the support person is present during questioning.

## Identifying particulars when a child is not arrested

The Youth Justice Act permits police to apply to a Childrens Court magistrate (after a child has been charged with an offence) to take identifying particulars for a particular range of offences (Youth Justice Act, s 25).

Before a police officer can make the application, they must notify the child, the parent (unless the parent cannot be located after making reasonable inquiries) and the Chief Executive (Youth Justice Services) about the application.

A court can determine the application in the child's absence if it believes the application has been served correctly (Youth Justice Act, s 25(4)).

Under Youth Justice Act, s 25(6), a "court may order the identifying particulars to be taken if it is satisfied, on the balance of probabilities", that:

- someone has committed the charged offence and there is reasonable suspicion that the child is the offender
- forensic evidence of identifying particulars is available from the crime scene that are the same particulars as those sought
- the order must be made for proper investigation.

If the court does make an order, the child must submit to having the identifying particulars taken with a support person present. If the child does not comply with the order within seven days (if they are not in custody), he or she can be charged with an offence pursuant to Youth Justice Act, s 25(9) of the Youth Justice Act.

If the investigation for which the identifying particulars were taken does not result in a sentence against the child, the person who applied for the particulars must destroy them (Youth Justice Act, s 27(1)). If they fail to do so without reasonable excuse, they will be liable to breach of discipline action under *The Police Service Administartion Act 1990*.

## Admissibility of statements or identifying particulars

"In a proceeding for an indictable offence, a court must not admit into evidence against the defendant a statement, [usually a recorded interview], made or given to a police officer by the defendant when a child, unless the court is satisfied a support person was present with the child at the time and place the statement was made or given" (Youth Justice Act, s 29).

If a support person was not present either during any statement the child made for an indictable offence or at the time identifying particulars were taken (Youth Justice Act, s 26), the evidence is prima facie inadmissible unless:

- "the prosecution satisfies the court there was proper and sufficient reason for the absence of a support person when the particulars were taken; [for example, their presence may have resulted in an accomplice avoiding apprehension or the support person is excluded under the PPRA,] and
- the court considers that, in the particular circumstances, the particulars should be admitted into evidence".

Despite the presence of a 'support' person, the statement still may not be admissible. In *R v C* (CA 437 of 1996, Fitzgerald P, McPherson JA and Helman J, 22 April 1997), the Court of Appeal ruled that, despite the presence of a justice of the peace, which satisfied the requirements of s 9E(2) (the previous equivalent to Youth Justice Act, s 29(2)), the child's statement was ruled inadmissible by way of the court's discretion as legislated under Youth Justice Act, s 9E(5). The justice of the peace did not understand the child interviewee's rights; was described as an unreliable witness; and was in a poor physical state.

The Court of Appeal has further ruled that s 9E (now Youth Justice Act, s 29) applies to statements made to police officers, not statements made to people acting under the direction of police officers (see R v T and M; ex parte Attorney-General [1999] 2 Qd R 424).

Note: Section 29 does not apply to simple or regulatory offences, or any statement made by a child defendant after the child has turned 18.

## The support person

Generally, children require special protection because of their immaturity and lack of understanding about their legal rights. Section 29 refers to a support person for police questioning and Youth Justice Act, s 26 refers to a support person of their choice for obtaining identifying particulars.

According to Schedule 6 of the PPRA, the support person must be:

"for a child—

- a parent or guardian of the child; or
- a lawyer acting for the child; or
- a person acting for the child who is employed by an agency whose primary purpose is to provide legal services; or
- an adult relative or friend of the child who is acceptable to the child; or
- if the child is Aboriginal or Torres Strait Islander and no-one mentioned in subparagraphs (i) to (iv) is available—a person whose name is included in the list of support persons and interpreters; or
- if no-one mentioned in subparagraphs (i) to (v) is available—a justice of the peace, other than a justice of the peace who is a member of the Queensland Police Service or a justice of the peace (commissioner for declarations)".

However, police officers are not required to permit or cause people to be present if the officers suspect them, on reasonable grounds, of being an accomplice or complainant of the offence being investigated, or being likely to become an accessory.

See also Siddon v State of Western Australia [2008] WASC 100, R v Phung [2001] NCWSC 115, *R v R* and T [2009] QDC 425 and R v L [2009] QDC 426, in relation to the role, actions and appropriateness of the support person who was present during the interview between police and the child.

# Police diversionary options

## Overview

The fifth principle of the Charter of Youth Justice Principles in Schedule 1 indicates that, where appropriate, children who offend should be diverted from the criminal justice system unless the nature of the offence and the child's criminal history indicate that a proceeding for the offence should be started.

A police officer, before starting a proceeding against a child for an offence other than a serious offence, must first consider whether in all the circumstances it would be more appropriate to do one of the following:

- take no action
- administer a caution to the child
- refer the offence to Youth Justice Services for a restorative justice process
- offer the child drug diversion if the offence is eligible to be referred
- give the child an opportunity to attend a graffiti removal program in accordance with s 379A of the Police Powers and Responsibilities Act.

In considering whether a diversionary option is appropriate, police should consider (Youth Justice Act, s 11(1)):

- the circumstances of the offence
- the child's previous history
- whether the child has received any previous cautions and if the child has been in any way dealt with for an offence under any Act, the other dealings.

It is necessary for a police officer to delay proceedings so they can comply with s 11(3) of the Youth Justice Act.

## Taking no action

Police must consider taking no action. In practice, this would occur only for a first or minor offence and would amount to informally cautioning the child.

## Cautioning

A caution is a warning given to a child by police regarding an offence they have committed. If police administer a caution, the child is not liable to be prosecuted for the offence. There is no exclusion to the type of offence for which a child can be cautioned. However, cautions have been administered for serious offences and this is specifically allowed under s 11(7) of the Youth Justice Act.

Children should be advised of the full consequences of agreeing to be cautioned. To receive a caution there must be an admission of guilt by the child. A caution does not make up part of the child's criminal history (Youth Justice Act, s 21(4)) and therfore are not admissible in court proceedings. There are different opinions about whether they are admissible as part of bail applications.

The cautioning process is outlined in ss 16–20 of the Youth Justice Act. A police officer must follow the following process:

- the child must admit guilt to police (Youth Justice Act, s 16(1)(a))
- the child must consent to being cautioned (Youth Justice Act, s 16(1)(b))
- the child must be given a notice certifying that they have been cautioned (Youth Justice Act, s 20)
- the cautioning procedure may involve an apology to the victim (Youth Justice Act, s 19)
- if practical, the police must arrange for a parent, an adult chosen by the child, or a person chosen by the parent, to be present during the cautioning process
- if a child is a member of the Aboriginal and Islander community, police must establish whether a responsible person from that community is available and willing to administer the caution, and if so, request that they do so.

## Applications to dismiss a charge where a caution should have been administered or no action taken by a police officer

The court may dismiss the charge if it is satisfied that, instead of being charged, the child should have been cautioned or the police should have taken no action. The court may then administer the caution itself or direct that a caution be administered to the child (s 21(3)).

Section 21(2) specifically allows the court to consider any other cautions administered or police referred restorative justice processes made where an application is made to dismiss a charge. The information relating to previous cautions can be released to the court only after the s 21 application has been made. Before making an application under s 21, practitioners should approach the police prosecutor for available details of previous cautions, diversions (including restorative justice processes) and court appearances.

To make an application for dismissal, the child should first plead guilty to the offence. If the court accepts the application for dismissal, the court will set aside the child's plea, dismiss the charge and administer the caution.

## Police referred restorative justice processes

The police have the power to refer an offence committed by a child to a restorative justice process (Youth Justice Act, s 22). It is a precondition of referring an offence that the child admits their guilt. The police officer is not allowed to refer the matter to a restorative justice process unless the child indicates their willingness to comply with the referral. The police officer must also be satisfied that a caution is not appropriate in the circumstances and that a proceeding should commence unless the referral is made.

A referral can be returned by Youth Justice Services to the police under certain circumstances (Youth Justice Act, s 32).

A restorative justice process will be conducted as a facilitated conference between the child and the complainant. It is not a precondition for a referral that the victim has agreed to participate in the restorative justice process. The convenor of the conference must however ensure a degree of victim participation in the process by either having the victim attend, using a pre-recorded statement of the victim, or by having a representative of an organisation that advocates on behalf of victims attend the conference.

The aim of the conference is to allow a child who commits an offence and other relevant persons to consider or deal with the offence in a way that benefits all (Youth Justice Act, s 34).

A conference is deemed to be successful if a conference agreement is made at its conclusion. A conference agreement is where the child admits committing the offence and undertakes to address the harm caused by the child in committing the offence (Youth Justice Act, s 36).

*Note: Section 36(3) states that "the conference agreement may not provide for the child to be treated more severely for the offence than if the child were sentenced by a court or in a way contravenes the sentencing principles in section 150". This is particularly relevant in relation to:*

- *restitution, when the child has limited capacity to pay*
- *community service, where the child is ineligible or limited to a particular number of hours under s 175.*

If a conference is unable to be convened but the child is still willing to comply, a restorative justice process can still proceed by using an alternative diversion program (Youth Justice Act, s 38). An alternative diversion program is facilitated by Youth Justice Services and is designed to help the child understand the harm caused by their behaviour and give them an opportunity to take responsibility for the offence they have committed.

The agreement is not part of the child's criminal history but, as mentioned earlier, may be used as evidence of capacity (Youth Justice Act, s 147) or when considering whether it is appropriate to take action pursuant to s 21 or 24A of the Youth Justice Act.

If the child contravenes any agreement made or the referral is returned by Youth Justice Services, police may consider options under s 24(3) of the Youth Justice Act ie taking no action, cautioning the child, referring to another restorative justice process or starting proceedings.

## Applications to dismiss a charge where a matter should have been referred to a restorative justice process by a police officer

The court can dismiss the charge and refer the matter to a restorative justice process (Youth Justice Act, s 24A). It is not necessary that the child admitted committing the offence to police or not. In deciding this application, the court can have regard to any previous cautions or restorative justice process agreements. The referral and subsequent agreement does not form part of the child's criminal history.

The procedure for seeking dismissal is the same as when seeking a caution to be administered under s 21 of the Youth Justice Act, although the child's agreement with a referral to a restorative justice process will be required.

## Drug diversion referral by police

An investigating officer has the power to refer a child to a drug diversion program pursuant to s 379 of the Police Powers and Responsibilities Act. It is important to remember that although s 11 of the Youth Justice Act allows a police officer to divert a child to a drug diversion program, the power and provisions governing the referral are contained in the Police Powers and Responsibilities Act. The provisions about the child's eligibility are different to those contained under a court referred diversion program.

If a child does not comply with the notice directing them to attend a drug diversion program, they can be charged with the offence of Contravene a Requirement (Police Powers and Responsibilities Act, s 791).

## Referral to a graffiti removal program by a police officer

An investigating officer has the power to refer a child to a graffiti removal program pursuant to s 379A of the Police Powers and Responsibilities Act. It is important to remember that although s 11 of the Youth Justice Act allows a police officer to divert a child to a graffiti removal program, the power and provisions governing the referral are contained in the Police Powers and Responsibilities Act. The provisions about the child's eligibility are different to those contained under a court-referred diversion program.

If a child does not comply with a notice directing them to attend a graffiti removal program they can be charged with the offence of Contravene a Requirement (Police Powers and Responsibilities Act, s 791).

# Starting a proceeding

## Starting a proceeding

The proceeding against a child, other than for a serious offence, must be by way of complaint and summons or notice to appear unless otherwise provided by the Act (Youth Justice Act, s 12).

## Notice to appear

If police suspect that a child has committed or is committing an offence, they may serve a notice to appear on the child (Police Powers and Responsibilities Act, s 382).

The notice must contain certain information, including the particulars of the offence that the child is alleged to have committed (Police Powers and Responsibilities Act, s 384). The police must serve this notice on the child discreetly (ie not at or near the child's place of employment or school (Police Powers and Responsibilities Act, s 383). Police must also promptly advise the child's parent (unless, after reasonable inquiry, they cannot be found) and the Department of Child Safety, Youth and Women (Youth Justice Services) (Police Powers and Responsibilities Act, s 392).

Note: The definition of parent includes someone who is apparently the parent of the child.

Under the *Justices Act 1886* (Qld), a notice to appear is treated as equivalent to a complaint and summons (Police Powers and Responsibilities Act, s 388). If, after the correct service of the notice to appear, the child fails to appear in court, the court may issue a warrant for their arrest (a Police Powers and Responsibilities Act warrant) (Police Powers and Responsibilities Act, s 389).

The court has discretion to delay issuing or executing a warrant to give a child the opportunity to appear (Police Powers and Responsibilities Act, s 389(5)). Further, the bail and custody provisions of the Youth Justice Act apply to a child arrested on a warrant under this section.

If a court is not satisfied that the child was served with the notice as required, the court must strike out the notice to appear (Police Powers and Responsibilities Act, s 390). However, this does not prevent another proceeding being started against the child.

## Complaint and summons

A complaint and summons should be discreetly served on a child to require them to appear before the court to answer the complaint of an offence (Youth Justice Act, s 43). The complaint must also be served on their parent and The Department of Child Safety, Youth and Women(Youth Justice Services) (Youth Justice Act, s 43) similar to the notice to appear.

In practice a complaint and summons pursuant to the Justices Act is only used by Youth Justice Services in relation to proceedings for breaches of community based orders.

## Simple offences

A court may hear and determine a proceeding instituted by complaint and summons against a child for a simple offence in the absence of the child (Youth Justice Act, s 46(1)). In this case, the court can make an order only imposing a fine on the child and only if the child has advised the court in writing of their capacity to pay a fine of the amount ordered or larger (s 46(2)).

## Arrest

A child should be detained in custody (whether on arrest or sentence) only:

- as a last resort
- in a facility suitable for children, and
- for the least time that is justified in the circumstances (Charter of Youth Justice Principles, Schedule 1, Principles 17 and 18).

Generally, a proceeding against a child must be started by complaint and summons or notice to appear, as mentioned above. However, this does not affect the police's power to arrest a child in accordance with s 365 of the Police Powers and Responsibilities Act without a warrant if the offence is serious or for other offences, when the following conditions apply:

- if the police officer believes, on reasonable grounds, that it is necessary to prevent the child repeating or continuing the offence, or committing another offence
- to obtain or prevent the loss or destruction of evidence
- to prevent the fabrication of evidence
- to ensure the child appears before the court (Bail Act, s 13(1)(a)).

Police also continue to have the power to arrest for questioning under s 403 of the Police Powers and Responsibilities Act or if there is a warrant issued under the Bail Act.

Police also have power to arrest a child pursuant to s 367 of the Police Powers and Responsibilities Act if the police officer suspected the child is likely to contravene, has contrived or is contravening a condition of their bail undertaking.

If a child is placed under arrest, the police must notify the Department of Child Safety, Youth and Women (Youth Justice Services) and the child's parents as mentioned above (Police Powers and Responsibilities Act, s 392).

# Bail

The provisions of the Bail Act apply to children however they are subject to the provisions in the Youth Justice Act (Youth Justice Act, s 47).

## General bail provision relating to children

In granting bail the court must ensure that the child will (Youth Justice Act, s 48(2)):

- surrender into custody
- not commit an offence
- not endanger others' safety or welfare
- not interfere with a witness or otherwise obstruct the course of justice.

If the court or police officer is of the opinion that the child presents as an unacceptable risk in relation to these matters, then the child must be remanded in custody (Youth Justice Act, s 48(5)).

When considering the matters in the Youth Justice Act, s 48(2) the court must consider the following matters (Youth Justice Act, s 48(3):

- the nature and seriousness of the offence
- the child's character
- the child's criminal history
- the child's home environment and other background information
- the history of previous bail grants
- the strength of evidence against the child relating to the offence among any other relevant matters
- any other relevant matter.

Further, under s 48(7), an officer must keep the child in custody if they believe the child's safety would be endangered because of the alleged offence if they were released and there is no other reasonably practical way of ensuring the child's safety. The Youth Justice Act was amended to clarify the use of this discretion.

Children cannot be remanded in custody for their safety merely because they are addicted to drugs or have a history of self harm. These are welfare issues distinct from the proper considerations for release of a child on bail for an offence.

The "show cause" provisions of the Bail Act do not apply to children (Bail Act, s 16(5)).

## Police powers in relation to bail

A child who has been arrested and is in police custody must either be granted bail or released into the custody of their parent or guardian unless the police officer is required by the Youth Justice Act or another Act to keep the child in custody (Youth Justice Act, s 48(4)).

If an officer declines to release the child, the arrested child must be brought promptly before the Childrens Court (Youth Justice Act, s 49) unless they are being detained for questioning or breath testing, or have been arrested under a warrant requiring them to be brought before another court.

Police who are authorised to grant bail to a child in accordance with the Youth Justice Act may instead release the child into the custody of the child's parents or permit them to go at large without bail (Youth Justice Act, s 51(2)). Before releasing the child, the police officer must either give the child a notice to appear or a release notice advising the child of the time and place the child is required to surrender into the court's custody.

If granted bail, it is now possible for deposits of money and sureties to be attached to the bail of children (Youth Justice Act, s 52(3)). Bail should be on the child's own undertaking without sureties and deposit of money or other security, unless the officer believes it would be appropriate in the circumstances (Youth Justice Act, s 52(2)).

Police can impose other conditions to address the child's risk of re-offending, endangering the safety or welfare of others, or interfering with witnesses. However, these must not be more onerous than necessary and must be supported by written reasons apart from residential or reporting conditions (Youth Justice Act, s 52(4–6)).

If the child has been released without entering into a formal undertaking, a warrant can still be issued if the child fails to attend court (Youth Justice Act, ss 51(f) and 57).

## Court bail

The court has the power to grant or extend bail in accordance with the Bail Act. The court also has the same powers as the police to release the child into the custody of a parent or allow them to go at large (Youth Justice Act, s 55) and must consider the same matters (Youth Justice Act, s 48).

When a child applies for bail before a court, the court must consider the likely sentence order should the child be found guilty or plead guilty to an offence (Youth Justice Act, s 48(3A)).

Children can be released at large for indictable offences. This release is subject to the condition that the child surrender into the court's custody at their next court appearance and that a warrant can be issued if they fail to appear. However, if a child is released at large without bail and fails to appear, this is not an offence against the Bail Act.

A court can grant bail by audio-visual or audio link if the child agrees and the court is satisfied that the child has had an opportunity to obtain independent legal advice (Youth Justice Act, s 53).

## 'Show cause' does not apply to children

Section 16 of the Bail Act no longer applies to children (Bail Act, s 16(5)). However, the rest of the section is embodied in s 48 of the Youth Justice Act and has been mentioned above. The most important aspect is that children are no longer subject to the 'show cause' provisions of the Bail Act and that the prosecution is responsible for persuading the court that the child poses an unacceptable risk.

## Breaching bail conditions is not an offence for children

A child does not commit an offence if they breach a condition of their bail (Bail Act, s 29).

A child can be charged with an offence against the Bail Act only if they fail to appear in accordance with a bail undertaking. However, this situation does not apply to adults who breach a condition of bail granted for childhood offences. An adult on bail for childhood offences will be dealt with as an adult under the Bail Act for both breaching bail conditions and failing to appear.

If a child has been released on bail with certain conditions and fails to comply, they may be apprehended and brought before the court (Police Powers and Responsibilities Act, s 367). Before arresting a child for breach of bail, police must first consider whether it is appropriate to apply to the court to revoke the child's bail without arresting the child. If the child is brought before the court, the court may choose to review the original conditions or revoke bail on the substantive charges. The court may only take this action pursuant to s 29A of the Bail Act if the court is satisfied the child has breached or is likely to breach their bail conditions. The breach of the bail condition is not an offence and should not be reduced to a bench charge sheet.

## Revoking bail

A court has the power to revoke bail on application from the prosecution (Bail Act, s 30). The magistrate has the power to revoke bail if the court considers there is a risk that the child will continue to breach their bail conditions.

It is important for practitioners to remember that the Bail Act is subject to the provisions of the Youth Justice Act. It can be argued that before a court can take action under s 29A or s 30 of the Bail Act the court must be satisfied that the child's risks of reoffending, failing to appear, interfering with witnesses and/or endangering the public's safety have become unacceptable. Failure to take this step may amount to a child being punished for breaching their bail conditions through the revocation of their bail rather than an assessment of the effect of the bail breach on the risks outlined in s 48(2) of the Youth Justice Act.

## Bail programs

A bail application can be adjourned pending a conditional bail program being prepared. The Department of Child Safety, Youth and Women(Youth Justice Services) is responsible for developing a program that focuses on the child's offending risk factors. These bail programs are not mentioned in the Youth Justice Act—they have been created by the department. A basic conditional bail program can be prepared by Youth Justice Services on the same day as the child's appearance.

The purpose of a conditional bail program is to mitigate those risks mentioned in Youth Justice Act, s 48(2) of the Youth Justice Act.

While such a program places more onerous conditions on the child, the program may be the only avenue that enables the child to be granted bail. A conditional bail program should be tailored to suit the child and address the issues underlying their offending behaviour (such as personal development activities to help the child reintegrate into their community). It may include involvement in an existing group project or activity (such as a job skills development course).

The conditional bail program must be included as a condition of the child's bail. If it is not, the child will not be obligated to comply with the program. The program maximises a child's opportunities for bail and effectively supervises the child in the community while they are on bail. A conditional bail program does not provide secure custody of the child.

## Bail applications to the Childrens Court of Queensland and Supreme Court

A Childrens Court judge may grant, enlarge, vary or revoke bail for a child's offence at any time, whether or not the child has appeared before the Childrens Court judge previously. A Childrens Court judge may grant bail after a magistrate has refused bail notwithstanding that the Childrens Court of Queensland is not listed as a "court of review" in the Bail Act. A Childrens Court judge has jurisdiction to grant bail for all indictable offences, including murder (Youth Justice Act, s 59).

Youth Legal Aid offers a service that conducts 'stand-alone' bail applications in the Childrens Court of Queensland or Supreme Court on behalf of children referred to them by legal practitioners. Contact 1300 65 11 88 or laqyouth.ccqbail@legalaid.qld.gov.au.

## Remand in custody

Children who are refused bail must be remanded to the custody of The Department of Child Safety, Youth and Women (Youth Justice Services) (Youth Justice Act, s 56). After being remanded, the child will be placed in a youth detention centre managed by the department. There are two detention centres in Queensland namely Brisbane Youth Detention Centre and Cleveland Youth Detention Centre. After remanding a child in custody, the court must order the police to deliver the child into the care of the department as soon as practical.

If a child is serving a period of detention and is remanded in custody for other charges, s 218 of the Youth Justice Act does not apply. A child is not entitled to credit for time spent in custody on remand while serving a detention order.

# Elections, committals and procedural matters

## Overview

Offences are categorised differently within the Childrens Court jurisdiction. The category of offence determines which courts have jurisdiction to hear a matter.

The Youth Justice Act divides offences into four categories:

- Supreme Court offences
- indictable offences
- indictable offences that are categorised as 'serious'
- simple or regulatory offences.

## Right of election—which court?

### *Supreme Court offences*

Schedule 4 defines a Supreme Court offence as "an offence for which the District Court does not have jurisdiction to try an adult because of the District Court of Queensland Act, section 61" (namely where the maximum term of imprisonment that can be imposed exceeds 20 years, but the offence is not one of those exempted under s 61(2)). Examples are murder, attempted murder and drug charges that can not proceed to the Childrens Court of Queensland.

A Childrens Court magistrate has no jurisdiction to deal with these matters except by way of a committal proceeding.

All Supreme Court offences are committed for trial (or sentence) to the Supreme Court (Youth Justice Act, s 95).

### *Indictable offences*

From 1 July 2003, any indictable offences (other than Supreme Court offences) dealt with on indictment proceed to the Childrens Court (District Court of Queensland Act, s 61A). An exception may be where a child has an adult co-accused or other adult offence in the District Court.

Previously, a Childrens Court judge could hear only "non-serious" offences where the child was also facing trial or sentence for a serious offence. As a result of amendments in 2002, the Youth Justice Act now allows a Childrens Court judge jurisdiction over all indictable offences, whether for trial or sentence, regardless of where the offences were committed (except for Supreme Court offences) (s 99).

Despite the expanded jurisdiction of the Childrens Court of Queensland it is in practice, rare for a "non serious" indictable offence to be commited to the higher court in the absence of a linked serious offence. Most "non serious" offences are dealt with by way of either trial or sentence before a Childrens Court magistrate at the election of the child.

Note: The child can elect to have a trial with or without a jury in the Childrens Court (as long as the child is represented).

### *'Serious' indictable offences*

Any matter involving a serious offence must proceed to the higher court by way of either a committal hearing before a Childrens Court magistrate (s 81(2)) or an ex-officio indictment.

A magistrate does not have the power to determine a serious indictable offence.

Section 8 of the Youth Justice Act defines a serious offence as:

"a. a life offence; or

b. an offence of a type that, if committed by an adult, would make the adult liable to imprisonment for 14 years or more".

An offence is 'not serious', notwithstanding that the maximum penalty may be 14 years or more, if:

"a. it is a relevant offence under the Criminal Code, section 552BA; or"

"b. it is an offence that is the subject of a charge to which the Criminal Code, section 552A or 552B applies; or"

"c. under the *Drugs Misuse Act 1986*, section 13, proceedings for a charge for the offence may be taken summarily; or"

"d. under the *Drugs Misuse Act 1986*, section 14, proceedings for a charge for the offence may be taken summarily".

The Youth Justice Act distinguishes between children who are legally represented and those who are not. (The relevant sections are ss 82–96.)

### *Proceedings for indictable offences (child has the election)*

In committal proceedings for indictable matters in which the child has the election, the child must make one of the following elections before the committal proceeds:

- elect to have the proceedings held as a committal hearing
- proceed as a summary trial to be heard by a magistrate (Youth Justice Act, s 83)
- elect to have the matter proceed as a summary plea of guilty (Youth Justice Act, s 93(2)(a) & (3)).

For non serious indictable offences, the child has the right of election in all matters, despite the provisions of any other Act regarding any right of election that may be conferred on any person (Youth Justice Act, s 78). As a result, a child still has the right to elect indictment on charges that adults no longer have due to the amendment to Youth Justice Act, s 552 of the Criminal Code following the Moynihan reforms.

A Childrens Court magistrate must refrain from the inappropriate summary hearing of an indictable offence; that is, the court must be "satisfied that the charge can be adequately dealt with summarily by the court" (Youth Justice Act, s 77).

If, during the proceedings, the court decides the matter cannot be adequately dealt with summarily, the matter must continue as a committal hearing.

The court must explain the nature of the election to the child. The child must give consent before the matter can proceed as a summary hearing or summary plea of guilty. If the child does not consent, the matter must proceed as a committal hearing.

### *Children who are not legally represented*

Sections 85–86 of the Youth Justice Act apply to children who are not legally represented. If a child charged with an indictable offence other than a serious offence appears unrepresented before a court, the proceedings must be conducted as a committal proceeding.

After the prosecution has put forward all evidence, the child can elect to have the proceedings continue as a committal or have the matter heard and determined summarily.

Again, the court must explain the nature of the election to the child. The child must give consent before the matter can proceed as a summary hearing or summary plea of guilty.

Once the committal proceedings have been completed, whether for serious or non-serious indictable offences, the magistrate will ask the child to enter a plea to the charge.

If the child enters a guilty plea to a serious offence the child will be committed for sentence to a Childrens Court judge (s 92).

If the child enters a guilty plea to a non-serious offence, the child may elect to be:

- committed for sentence by a Childrens Court judge (including a District Court judge sitting as a Childrens Court judge)
- sentenced by the Childrens Court magistrate (Youth Justice Act, s 93). The child must consent to being sentenced by the Childrens Court magistrate.

### *Matters at the conclusion of a committal*

Like adults, children have the right to enter a plea at a committal hearing's conclusion. The child will then be committed for trial or sentence depending on the plea entered.

Unlike adults who must make an application pursuant to s 600 of the Criminal Code to vacate a plea of guilty made at the conclusion of the committal hearing, a child has the right to withdraw a plea of guilty entered at committal.

A child can withdraw a guilty plea entered at the conclusion of a committal hearing before a Childrens Court judge (Youth Justice Act, s 106). Evidence of a plea entered at the committal cannot be lead in evidence by the prosecution at any subsequent trial.

If the child does not enter a guilty plea (ie enters a plea of not guilty or no plea), they will be committed for trial to a court of competent jurisdiction (Youth Justice Act, s 96).

Under s 98, if the child is committed for trial before a Childrens Court judge and is legally represented, the child may elect to be committed for trial to a Childrens Court judge sitting either with or without a jury.

If the child is not legally represented, the court will commit them to trial to a Childrens Court judge sitting with a jury (Youth Justice Act, s 98(5)).

In all relevant cases, the court must explain to the child, and any parent who is present, the child's right to elect whether their matter will be heard by a Childrens Court judge sitting with or without a jury. Practitioners have a duty to explain to the child the nature of the election and the differences between the options, and obtain instructions outlining the child's understanding of the matter and the child's election.

When advising clients on which option to elect, practitioners should consider who would be the appropriate arbiter of fact in the case. Trial by jury should not be put aside lightly and the child should elect to be dealt with by a judge sitting without a jury only after careful consideration.

The child will have an opportunity to change their election to be tried by jury or by judge alone once the matter is before the Childrens Court (Youth Justice Act, s 103). The child must do this before they enter a plea.

## Simple offences

A Childrens Court magistrate has jurisdiction to hear all simple offences involving children, whether for trial or sentence. The procedure is similar to that in the Magistrates Court.

## Committal proceedings where there is an adult co-accused

In a committal proceeding, a magistrate may act as both a Childrens Court magistrate, in relation to charges brought against a child, and a justice, in relation to charges brought against an adult co-offender. This will occur only in cases where, if the child concerned were an adult, the committal proceedings against each accused would have been conducted at the same time (Youth Justice Act, s 107).

The prosecution may apply for a child to be committed to a District Court or the Supreme Court so that a joint trial can be held with an adult co-accused (Youth Justice Act, s 108).

## Ex-officio indictment power preserved

The Crown have the power to present an ex officio indictment against a child (Youth Justice Act ss 10(b), 42(3)(c) and Criminal Code s 561.

A request can be made to the Crown for a matter to proceed by way of an ex-officio indictment. For further information, contact the Office of the Director of Public Prosecutions.

## Transmission of summary charges to a higher court

Since 1 July 1997, with the introduction of s 651 of the Criminal Code, a person charged with a criminal offence has been able to transmit a summary charge to the District Court or Supreme Court for sentence. A person may use this mechanism to have a large number of 'connected' summary offences dealt with at the time of the higher court sentence. The 2002 amendments to the Youth Justice Act clarify that this mechanism is available when a child is to be sentenced by a Childrens Court judge (Youth Justice Act, s 100).

Practitioners should note the Supreme Court Practice Direction No. 5 of 2002 and District Court Practice Direction No. 3 of 2002.

Section 651 requires the child to enter, or intend to enter, a plea of guilty in the Childrens Court. The Crown must also consent to the matter being dealt with in the higher court.

Indictable charges, including all offences listed in the Criminal Code, cannot be transmitted via s 651 due to the child's right of election in relation to all charges that are not summary or regulatory in nature. Indictable offences committed by children do not fit within the definition of "summary offence" (Criminal Code s 651(7)). A child cannot elect to have the charges dealt with summarily and then apply to the Childrens Court to have the matters joined with other offences that are already subject to an indictment in a higher jurisdiction. If a child has committed fresh offences close to the sentencing date in the higher court, practitioners should request an ex officio indictment and a partial brief from the police prosecutor with the view of proceeding quickly via committal hearing in order to expedite the matter.

## *Mental Health Act 2000* (Qld)

The *Mental Health Act 2000* (Qld) applies to a child as it does an adult (Youth Justice Act, s 61). This Act relates to people suffering from mental illness who are involved in criminal proceedings.

Note: If a child is charged with a simple offence, they cannot be referred to the Mental Health Court unless they are also charged with an indictable offence.

# Court ordered diversionary options

If a child enters a guilty plea, the court has the option to divert the child rather than proceed to sentence.

For an application to dismiss a charge and caution a child, or an application to dismiss a charge and refer for a restorative justice process, see ss 21 and 24.

## Court diversion referral (s 164)

Section 164 allows the court to make a referral to a restorative justice process and will end the court proceeding for the process to take place. There does not necessarily have to be victim participation in this process, and provided the process is successful, the charge/s will not form part of the child's criminal history (Youth Justice Act, s 154(3)).

## Court referred drug assessment and education sessions (s 172)

The court has the power to refer a child to drug diversion. Practitioners should be aware that there are significant differences in the process for drug diversion for children compared to adults.

Only offences which are eligible (Drugs Misuse Act, ss 9, 10(2), 10(4) and 10(4A)) can be diverted.

The child has to agree to the diversion. Children will be deemed to be ineligible if they have been convicted of a disqualifying offence, if they have a charge for a disqualifying offence pending or two previous diversion alternatives have been given to the child (Youth Justice Act, s 168(2)). A list of disqualifying offences is provided in Youth Justice Act, s 170.

The court can divert an eligible drug offence to an assessment and diversion session after the child pleads guilty to the offence. It is incumbent on a lawyer representing a child to ensure the child is eligible before the proceeding starts. Practitioners can get a copy of the referral application from the court registry. The completed document should be returned to the registry staff so they can contact an eligible drug diversion provider.

Rather than sentence the child, the court will adjourn the proceeding to a date after the assessment and education session is scheduled (Youth Justice Act, s 172(3)).

If the child attends the session, the proceedings come to an end and the child will not have to attend court again for the offence. The provider will issue a notice to the court once the child has attended the session. Once it has received the notice from the provider, the court deems that the child is guilty of the offence without a conviction being recorded (Youth Justice Act, s 174(3)and (4)).

# Sentencing

## Introduction

The Penalties and Sentences Act does not apply to the sentencing of children. A child can only be sentenced under Part 7 of the Youth Justice Act.

One of the key differences between adults and children charged with offences is the different sentencing regime that applies to children. All practitioners who appear for children must have a sound knowledge of both the different sentencing principles and sentencing options in order to effectively discharge their duty to the child.

These differences extend to the length of community based orders, the pre-requisites for detention orders, the power to record convictions and the different powers that courts have when a child is in breach of their orders.

## Pre-sentence reports

A key difference between the adult and youth jurisdictions is the availability of court ordered pre-sentence reports. Pre-sentence reports are prepared by The Department of Child Safety, Youth and Women(Youth Justice Services) and must be presented promptly to the court in document form. However, they need not be provided in fewer than 15 working days.

The contents of the report are mandated by regulation.

### *When must a court order a pre-sentence report?*

Pre-sentence reports are mandatory before the court can make:

- a detention order (Youth Justice Act, s 207)
- a conditional release order (Youth Justice Act, s 223)
- an intensive supervision order (for 10 to 13-year-old children only) (Youth Justice Act, s 203).

The court, at its discretion, may also order a pre-sentence report only after a child has pleaded or has been found guilty of an offence (s 151). Although the court has a broad discretion to order a report in all instances, the ordering of a report is usually confined to circumstances where a court is considering a detention order. Reports can also be ordered in circumstances where the court wishes to obtain more information about a child's background that would extend in detail past the oral submission of the defence lawyer and the Youth Justice Services court officer.

It may be appropriate for a practitioner to argue against ordering a pre-sentence report due to the delay in having the child sentenced. The court will adjourn the matter while the report is being prepared. This means a child can be remanded in custody during the preparation. If it is unlikely that a period of custody is appropriate, practitioners should argue vigorously that a pre-sentence report is not warranted in the circumstances. Practitioners should consider making a bail application for the child if a pre-sentence report is ordered.

The court must provide a copy of the report to the defence and the prosecution as soon as practical (s 153(1)). This enables practitioners to obtain instructions about the report's contents and highlight relevant matters in sentence mitigation. The court may give directions about the report's distribution and disclosure. If the disclosure of the report's details could harm the client, practitioners may make submissions to the court to limit such disclosure (Youth Justice Act, s 153(3)).

### *Contents of a pre-sentence report*

The department has guidelines about what information should be included in a pre-sentence report. The guidelines are consistent with the Youth Justice Regulation 2003 (Qld), s 6(1).

The report must contain all of the following information:

- "the child's full name, address, date of birth and occupation
- the source of the information on which the report is based
- the circumstances of the offence to which the report relates
- the child's placement between the start of the proceeding and the date of the report
- details of all community based orders or detention orders made against or for the child
- if the chief executive is aware of a corresponding order made against or for the child—details of the corresponding order
- an assessment of factors the chief executive considers may have contributed to the child committing the offence
- the child's attitude to the offence and to the victim of the offence
- if the chief executive is aware of any consequences that have happened to the child as a result of the act or omission that constitutes the offence—details of the consequences
- information about sentencing options".

In the case of conditional release or intensive supervision orders, the pre-sentence report must outline the child's suitability for the order and whether an appropriate program is available for the child.

The regulation does not require the Department of Justice and Attorney-General (Youth Justice Services) to make a recommendation about sentencing. However, the report will canvass a range of sentencing options and discuss their appropriateness.

Note: The department does not act as an advocate for the child. Therefore, practitioners must consider the pre-sentence report's contents critically before making submissions on sentence.

Section 151(3) of the Youth Justice Act states that "the court may request that the report contain specified information, assessments and reports relating to the child or the child's family or other matters".

Common requests include psychiatric, psychological and/or medical assessments. Agencies other than Youth Justice Services prepare these reports and delays of several months usually result. Consequently, practitioners should carefully consider whether such a report is necessary.

Section 151(4) specifically prohibits a pre-sentence report containing Youth Justice Services' opinion about how the publishing of a child's identifying information under s 234 would impact the child. Section 234 allows the sentencing court to make an order allowing identifying information about a child to be published in cases of serious violent offences.

Arguably, other information that should not go into the report includes any matters for which the child may currently be on remand and details of previous cautions.

Practitioners should note s 151(9), which indicates that, if a pre-sentence report is required, the department may give the court additional material to consider with a report prepared for another sentence proceeding on the same day. This avoids having to order an additional pre-sentence report about additional offences that are ready to be dealt with on the sentencing date of previously listed matters. Also note s 7 of the Youth Justice Regulation.

### *When a client disagrees with the content of the pre-sentence report*

If the child disputes any content of the pre-sentence report, practitioners may request an order under s 152 of the Youth Justice Act, requiring the presence of the report's author. If the court grants the order, the report's author may be required to give evidence on oath. Practitioners will require precise instructions from the child in relation to the issues in dispute.

## Sentencing principles

Section 150 contains the sentencing principles for children. A court must have regard to:

- the general principles applying to the sentencing of all persons, subject to the *Youth Justice Act 1992*, and the youth justice principles, and
- the special consideration subsection (2), and

- the nature and seriousness of the offence, and
- the child's previous offending history, and
- any information about the child including a pre-sentence report, provided to assist the court in making a determination, and
- if the child is an Aboriginal or Torres Strait Islander person – any submissions made by a representative of the community justice group in the child's community that are relevant to the sentencing of the child (the Act gives some examples of the type of information that can be included here (Youth Justice Act 1992, s 150(g) (i)(ii)(iii)), and any impact off the offence on a victim including harm mentioned in information relating to the victim given to the court under s 15 of the *Victims of Crime Assistance Act 2009*, and
- a sentence imposed on the child that has not been completed, and
- a sentence that the child is liable to have imposed because of the revocation of any order under this Act for the breach of conditions by the child, and
- the fitting proportion between the sentence and the offences.

### *General sentencing principles that apply to all persons*

The reference to the general sentencing principles that apply to all persons does not mean that the sentencing provisions of the Penalties and Sentences act apply. The Court of Appeal has ruled that this phrase refers to general sentencing principles that existed prior to the Penalties and Sentences Act being enacted (R v W; ex parte Attorney-General [2000] 1 Qd R 460; [1998] QCA 281.

Examples of these general principles would include the principles of totality, parity, remorse and cooperation with prosecuting authority and the administration of justice.

The concept of extra curial punishment (for instance any punishment imposed by a parent or an expulsion school) also fall within this principle.

### *The youth justice principles*

The court must have regard for the youth justice principles outlined in the charter in Schedule 1 (s 150(1)(b)). Principles which would impact on sentencing include:

- That the community should be protected from offences (Principle 1)
- A child who commits an offence should be:
  - held accountable and encouraged to accept responsibility for the offending behaviour (Principle 8)
  - dealt with in a way that will give the child the opportunity to develop in responsible, beneficial and socially acceptable ways (Principle 8)
  - dealt with in a way that strengthens the child's family (Principle 8)
  - dealt with in a way that allows the child to be re-integrated into the community (Principle 16)
  - detained in custody for an offence, whether on arrest or sentence, only as a last resort and for the least amount of time that is justifiable in the circumstances (Principle 17).

### *Special considerations*

The Youth Justice Act (s 150(2)) outlines the special considerations that apply to the sentencing of children. An understanding of these special considerations and an ability to ally them in a sentencing proceeding is vital for practitioners acting for children within the youth jurisdiction.

These special considerations are:

- a child's age is a mitigating factor when determining whether or not to impose a penalty, and the nature of the penalty imposed
- a non-custodial order is better than detention in promoting a child's ability to reintegrate in the community, and
- the rehabilitation of a child found guilty of an offence is greatly assisted by the child's family and opportunities to engage in educational programs and employment, and
- a child who has no apparent family support or opportunities to engage in educational programs and employment should not receive a more severe sentence because of the lack of support or opportunity; and
- a detention order should only be imposed as a last resort and for the shortest appropriate period.

*Do mandatory sentences apply to children?*

The Youth Justice Act specifically requires a court sentencing a child to consider any provision of any Act which mandates either an amount of money or sentence as a minimum penalty for the offence. If any other Act does mandate a specific penalty for an offence then the court sentencing the child must regard that penalty as a maximum penalty for the offence.

An example of this is the sentence for murder. Although a child can be sentenced to life imprisonment for murder, the offence itself must be considered particularly heinous before the maximum penalty can be imposed. Even if the offence is deemed heinous by the court, imposing a life sentence is not mandatory.

## Sentence orders

Section 175 of the Youth Justice Act outlines the sentence orders available to the court. Section 176 outlines the penalties that the court may impose on a child if found guilty of a 'serious offence'.

## Reprimand (s 175(1)(a))

A reprimand has its ordinary meaning and means a 'severe reproof, especially a formal one by a person in authority'.

A reprimand is administered by the court to the child and forms part of a child's criminal history. The Department of Child Safety, Youth and Women (Youth Justice Services) has no role in this order's administration.

No conviction can be recorded when a child is reprimanded.

The court generally uses this option if it is the child's first court offence or the offence is relatively minor. The court is not precluded from ordering reprimands for indictable offences as opposed to summary offences.

## Good behaviour order (ss 175(1)(b), 188, 189)

A good behaviour order requires the child to demonstrate good behaviour (ie abstain from further violating the law) for the order's duration (s 188). The order can be made for no longer than one year. The Department of Child Safety, Youth and Women(Youth Justice Services) has no role in the supervision of this type of order.

If a child re-offends during the period of the good behaviour order, the court that deals with the subsequent finding of guilt may consider the order breach when imposing a penalty for the new offence. However, the initial order cannot be disturbed (s 189).

No conviction can be recorded with this order.

## Fines (ss 175(1)(c), 190–192)

A court can make a fine order only if it believes the child (not the child's parents) has the capacity to pay a fine (Youth Justice Act, s 190).

A court has discretion to impose a conviction when ordering a fine (s 183).

If the court considers a fine order and considers ordering the child to pay compensation or restitution, the court must examine the resources available to the child. If it decides the child has insufficient funds to pay both, the court must give preference to ordering the child to pay only the compensatory order (Youth Justice Act, s 156).

A court can order the child to pay the fine over a period of time. It can also specify they pay the fine in specific instalments to a proper officer of the court (Youth Justice Act, s 191).

A child can apply to a proper officer of the court to have the payment period extended. The officer can grant an extension subject to any conditions they consider just (Youth Justice Act, s 309).

If the proper officer is the registrar, sheriff, deputy sheriff, or under sheriff or clerk of the court, the powers may be delegated to a public service officer employed in the court's registry (Youth Justice Act, s 313).

Any unpaid fines or restitution against a child can be recovered though civil action with the state as the plaintiff. The order can then be enforced through the civil courts (s 310). A court cannot order a default period of imprisonment for failure to pay the fine. If a child fails to pay the fine, a proper officer of the court can apply to cancel the fine order and ask the court to make a community service order against the child (Youth Justice Act, s 192).

A court may convert the fine to community service hours using the formula in s 192(5).

If, after applying the formula, the court finds that the community service hours are fewer than 20 hours, it cannot convert the fine (s 192(7)).

If the hours are more than the number allowed for sentence under ss 175 or 200, the court must reduce the number of hours to the maximum hours available.

A court may make a community service order only if the:

- child is willing to comply with the order
- court considers that the child is suitable for such an order, and
- court is satisfied that suitable community service can be provided (Youth Justice Act, s 195).

Although The Department of Child Safety, Youth and Women(Youth Justice Services) has no role in the administration or contravention of a fine order, it must present a report about the availability and suitability of a community service program.

## Restorative justice orders (ss 164,165, 175(1)(da), (db), 192A–192D)

Restorative justice orders are a conference process that have been reintroduced as a sentence option and are arranged and conducted by the Department of Justice and Attorney General (Youth Justice Services). The court can refer matters to a restorative justice process as part of the sentencing proceedings in the following ways:

- pre-sentence referral (s 165 and 175(1)(da)) and
- sentence based referral (ss 175(1)(db) and 192A & B).

### *Pre-sentence referral (ss 165 and 175(1)(da))*

Section 165 is a presentence referral to allow the court to consider the child's participation in a restorative justice process before sentencing them. The offence is adjourned for the process to be conducted, and upon returning to court, the court can order the child to complete their obligations under any agreement that was reached. Where this occurs, the order will form part of the child's criminal history. Section 175 (1)(da) allows the court to order that the child performs their obligations under the agreement reached at the pre-sentence restorative justice process.

The court may have regard to the requirements and factors set out in s 163 in deciding whether to refer the child to a restorative justice process.

### *Sentence based referral (ss 175(1)(db) and 192A&B)*

Section 175(db) allows the court to order the child to participate in a restorative justice process. This allows the court proceedings to end, but the child has the ongoing obligation to participate in the process. Both orders under s 175(1)(da) and (db) can be combined with any other sentence orders (Youth Justice Act, s 178C). This type of order will form part of the child's criminal history.

Before making an order, the court must be satisfied the child understands the process, is willing to comply, is a suitable person to participate in the restorative justice process and that the order is appropriate in the circumstances (Youth Justice Act, s 192A(1)). In determining that the order is appropriate, the court can consider the nature of the offence, the harm suffered by anyone because of the offence and that it is in the interests of the community for the child to participate in the process (Youth Justice Act, s 192A (2).

## Probation (ss 175(1)(d), 193–194)

Probation is a community-based supervision order administered by The Department of Child Safety, Youth and Women(Youth Justice Services). Before a probation order is made, the child must indicate that they are willing to comply with the order's terms.

Note: A probation order can be made only if the legislative penalty for the offence includes a period of imprisonment (Youth Justice Act, s 175(2)). Therefore, for example, if a child is convicted of the regulatory offence of shoplifting, the court has no power to order probation.

The court has discretion to record a conviction, whether or not it is for a serious offence (s 183).

The maximum probation period varies according to the court that is making the order and the type of offence. (maximum limits apply to combined orders.)

A magistrate can make a probation order for a period of up to one year.

After finding a child guilty of an offence, if the magistrate considers that a probation period of greater than one year would be appropriate, they may commit the matter to the Childrens Court judge for sentencing (Youth Justice Act, s 186).

A judge can make an order for a period of up to two years if the offence is not classified as serious.

If it is a serious offence, a judge can make a probation order for a period of up to three years.

A probation order may also contain special conditions. The court can make these if it believes this will prevent the child repeating the offence or committing further offences. The court must relate these conditions to the offence for which the order was made and support the conditions with written reasons (s 193(4)). For example, a condition that a child attends drug counselling may be appropriate if the commission of the offence was directly related to the child's drug habit.

Practitioners should ensure there is sufficient nexus with the offence and special conditions imposed. For example, if defacto parenting conditions are included, such as a requirement to do household chores, practitioners should advocate against that inclusion. Conditions such as drug and alcohol rehabilitation, family counselling or curfews may also not satisfy the requirements of the Youth Justice Act if there is insufficient nexus with the offence before the court.

The department monitors most special conditions. The court can now order a child to perform a probation condition in another state.

## Graffiti removal orders (ss 176A, 194A–194L)

The Youth Justice Act includes mandatory graffiti removal orders for children who commit a graffiti offence. A graffiti offence means an offence against s 469(9) (Schedule 2) of the Criminal Code.

The court must make a mandatory graffiti removal order unless it is satisfied the child is not capable of complying with the order because of a mental or physical capacity.

When deciding on the number of hours the court must take into account the age, maturity and abilities of the child against whom an order is being made.

The child must be at least 12 before an order can be made.

The maximum number of hours is:

- if the child has not yet attained 13 years – 5 hours
- if the child is 13 years or older, but has not attained 15 years – 10 hours
- if the child is 15 years or older – 20 hours.

A child who is found guilty of two or more graffiti offences may be sentenced to multiple graffiti removal orders. However, the total number of hours cannot be more than the maximum allowed for a single graffiti removal order (Youth Justice Act, s 194F).

The orders are to be performed cumulatively unless otherwise ordered. If a child is subject to community service and graffiti removal orders, and the total number of unpaid hours exceeds the maximum allowable (100 hours if the child has not attained 15 years, 200 hours in all other cases), the order for the hours in excess of the maximum will have no effect.

## Community service orders (ss 175(1)(e), 195–202)

The court can order a child to perform unpaid community service in certain circumstances.

However, the court cannot order a child who has not reached the age of 13 at the time of sentencing to perform community service (Youth Justice Act, s 175(1)(e)).

A community service order can be made only if the legislative penalty for the offence includes a period of imprisonment (s 175(2)).

Before making such an order, the court must be satisfied that the child is suitable for, and willing to perform, community service and that the department can provide community service that is suitable for the child (s 195).

When making a community service order, the court has discretion to record or not record a conviction (s 183).

The court may make two or more community service orders if the child has two or more offences, and may also make a community service order against a child who is already subject to an existing community service order (s 199).

The number of hours the court can order depends on both the child's age at the time of sentencing (s 175(1)(e)) and whether there are outstanding community service orders (s 200). The result is that:

- if the child is 13 or 14 years, the total maximum number of hours (including any outstanding hours) that the child can be ordered to perform is 100
- if the child is 15 years or over, the total maximum number of hours (including any outstanding hours) is 200
- in both cases, the minimum number of total hours must not be fewer than 20 (Youth Justice Act, s 200).

These maximums are the maximum number of hours a child can be subject to at any one time. Any hours ordered in excess of the maximum are of no effect (Youth Justice Act, s 200(4)).

During the order period, the child must perform community service as directed by the department in a satisfactory way and must not violate the law (Youth Justice Act, s 196). The child must complete the community service within one year of the order being made unless the court or proper officer of the court extends the order (Youth Justice Act, s 198).

The community service order ends when:

- the child performs the number of hours specified in the order
- the order is discharged upon contravention action, or
- the period within which the order must be performed expires.

## Intensive supervision orders (s 175(1)(f) and division 9, ss 203–206)

An intensive supervision order addresses the offending behaviour of a child who is at risk of progressing further into the criminal justice system through an early intervention framework. If a child has not reached 13 years at the time of sentencing, the court may make an intensive supervision order for a period of up to six months. This additional sentence order was introduced by the 2002 amendments (Youth Justice Act, s 175(1)(f)).

"A court may make an intensive supervision order for a child only if—

- the child expresses willingness to comply with the order; and
- the court has ordered a pre-sentence report and considered the report; and
- the court considers the child, unless subject to an intensive period of supervision and support in the community, is likely to commit further offences having regard to the following—
  - i. the number of offences committed by the child, including the child's criminal history;
  - ii. the circumstances of the offences;
  - iii. the circumstances of the child;
  - iv. whether other sentence orders have not or are unlikely to stop the child from committing further offences" (s 203(1)).

The pre-sentence report provided by the department and considered by a court before it makes an intensive supervision order "must include comments—

- outlining the potential suitability of the child for an intensive supervision order; and
- advising whether an appropriate intensive supervision program is available for the child" (Youth Justice Act, s 203(2)).

The legislation's intention suggests this order would be appropriate only if the child has failed to respond to a probation order and continued to offend. Unless the circumstances are exceptional, a child should be given the opportunity to comply with the probation conditions before this intensive sentencing option is undertaken.

An intensive supervision order must require the child to participate in an 'intensive supervision program' for the 'program period' as directed by the department and, during the period of the order:

- abstain from violating the law
- comply with every reasonable direction of the department
- report and receive visits as directed by the department (Youth Justice Act, s 204).

The court can impose any further conditions in the intensive supervision order that it considers necessary to prevent the child re-offending. However, the requirement to comply with the condition must relate to the offence for which the order was made and be supported by written reasons.

## Conditional release orders (ss 175(3), 221)

A conditional release order (which replaces the previous immediate release order or IRO) is similar to an adult intensive correction order. The court makes a detention order against a child, and then immediately suspends the order and makes an order that the child be released from custody immediately (Youth Justice Act, s 220).

The conditional release order requires the child to participate in an intensive, structured program (the 'conditional release program') for up to three months (Youth Justice Act, s 221). This program is organised by the department. Once the child has completed the program period, they are no longer liable to serve any of the detention period (Youth Justice Act, s 224).

The court cannot order a conditional release order without ordering a pre-sentence report (Youth Justice Act, s 207).

A conditional release order is an order of detention and, for that reason, may be imposed only as a last resort (*R v C & M* [2000] 1 Qd R 636; [1998] QCA 252).

The pre-sentence report will include:

- information outlining the potential suitability of the child for release from detention under a conditional release order and
- advising whether an appropriate conditional release program is available on the child's release under the order (Youth Justice Act, s 223).

The pre-sentence report should provide detail about the program, as discussed by the Court of Appeal in *R v F & P* [1997] QCA 98.

The conditions of a conditional release order include that the child must participate in a program as directed by The Department of Child Safety, Youth and Women(Youth Justice Services) and abstain from violating the law (Youth Justice Act, s 221).

The court may also specify conditions and requirements that it considers necessary to prevent further offending behaviour of any kind. Again, these conditions must relate to the offence for which the order was made and be supported by written reasons (Youth Justice Act, s 221(4)).

The child must indicate that they are willing to comply with the order's terms (s 222). If the child does not abide by the terms of the conditional release order, they may be liable to serve the detention period for which the conditional release order was made. The child must fully understand the gravity of contravening the conditional release order before they indicate their willingness to participate.

A conditional release order can be varied or revoked in the interests of justice.

Any fresh offences that the child commits during a conditional release order are a breach of the conditional release order.

## Detention (ss 175(1)(g),176)

A fundamental principle of youth justice is that a child should be detained in custody only as a last resort and for the least amount of time justified in the circumstances (Youth Justice Act, s 150(2)(d) and Article 17, Charter of Youth Justice Principles, Schedule 1). A court may make a detention order only if it believes detention is the only appropriate order after considering all other available sentences and the desirability of

not holding a child in detention (Youth Justice Act, s 208). Further, a court that imposes detention must give written reasons for making the detention order (Youth Justice Act, s 209).

A court can make a detention order in relation to an offence only after requesting and considering a pre-sentence report (s 207).

Unless the court orders otherwise, a child will not be released until they have served 70 percent of the detention sentence. The court may order that the child be released from detention after serving 50 percent or more but less than 70 percent of the detention ordered under special circumstances. This is an order, not a recommendation. After they have served the relevant portion of the sentence, the child must be released on a supervised release order (Youth Justice Act, s 227).

The maximum period of detention depends on the sentencing court's jurisdiction and the offence's classification. If the court is not constituted by a judge, the maximum detention period that can be ordered is one year (Youth Justice Act, s 175(1)(g)(i)).

Note also that a magistrate can request a delegation of sentencing power or refer a case for sentencing to a Childrens Court judge (Youth Justice Act, s 186).

A child must serve a sentence of detention concurrently with any other sentence unless the court orders otherwise under s 213 (Youth Justice Act, s 212). Note also the limitations on cumulative orders in s 214.

Further, due to the 2003 amendments, a detention order imposed on a child for failing to appear under the Bail Act is not automatically cumulative (as it is for adults) because s 33(4) of the Bail Act no longer applies to children (Youth Justice Act, s 33(5)).

## Remand time to be treated as detention on sentence

Section 218 requires that any time a child spends in custody on remand be counted as part of any detention period ordered in relation to the offence. This includes any detention ordered due to a re-sentencing arising from a contravention. However, if a child is simultaneously being held in custody on remand and serving a sentence, the child will not be entitled to remand credit.

Section 218 does not require the court to state or record the remand period to be taken into account on sentence.

The department automatically accounts for such time when determining the child's release date under a supervised release order.

When a child offender is dealt with for multiple offences in the same sentencing exercise, the child is not to be deprived of the total credit for pre-sentence detention for any of the offences the court deals with on that day. The Court of Appeal has determined that, when a child is to be sentenced for multiple offences and has undergone pre-sentence detention for one or more of the offences, s 218 entitles the child to credit for that detention for all offences (*R v CDR* (No. 2) [1996] 1 Qd R 69).

Note: The time spent in custody must be time spent 'pending the proceeding' for the offence or offences that are for sentence. For example, any pre-sentence custody before a community-based order is made cannot be credited towards new offences that breach that order (*R v GT* [1997] 2 Qd R 183).

## Combination of orders

A court may make more than one type of order for an offence (s 177). The combination is at the discretion of the sentencing court but there are guidelines for certain combinations.

Section 178 refers to the combination of probation and community service orders for one single offence. The court must make these as separate orders and cannot make one conditional on another. If the child contravenes either order and re-sentencing for the original offence occurs, both orders will be discharged.

Section 179 indicates that the combination of an intensive supervision order with detention or probation is prohibited for a single offence.

Section 180 allows for the combination of probation and detention for a single offence. In this case, the maximum detention period allowed is six months. No conditional release order can be made if the court wishes to combine these orders. The probation order can be effected only after release from detention and cannot operate for longer than one year after that time.

## Restitution and compensation

The Youth Justice Act does not contain any provision that allows a court to make paying restitution or compensation a condition of a child's community-based order.

Rather, the court may make an additional (but separate) order that the child pay either:

- compensation for property loss to an amount no greater than that equal to 20 penalty units
- restitution or compensation for injury suffered by any other person to any amount (Youth Justice Act, s 235(2)).

Note: The court should make the order only if satisfied that the child has the capacity to pay the amount (s 235(5)). If a child indicates that they have a capacity to pay and becomes the subject of such an order, the order remains in force until the child complies with it, even if they are unable to pay.

A court has no power to order a default imprisonment period for non-payment of restitution or compensation. The restitution or compensation amount can be recovered through civil action. The plaintiff is the person to whom the compensation is payable (Youth Justice Act, s 310).

## Recording convictions

Section 183 clearly indicates that a court cannot record a conviction against a child except where the penalty is a fine, community-based order or detention (Youth Justice Act, ss 183(2)–(3)).

Before recording a conviction, the court must consider the matters included in s 184—the nature of the offence, the child's age and previous criminal history, and the impact that a conviction will have on the child's rehabilitation generally, or finding or retaining employment.

Defence practitioners should always make submissions resisting a conviction being recorded against a client, as it may significantly harm the child's current or future employment and rehabilitation prospects. This is one of the most important principles in the Youth Justice Act.

For a discussion of the principles to be applied when determining whether or not to record a conviction, see *R v SCU [2017] QCA 198*. See also the judgement of Robertson DCJ in the matters of DRH, BES and TKL (Unreported, Childrens Court of Queensland, CSM

No 16 of 2000, Robertson J, 13 April 2000). See also *R v SEEM* [2011] QChC 032.

If a court makes an order under s 176(1), (2) and (3) (penalties for serious offences), the court has discretion in deciding whether or not to record a conviction (Youth Justice Act, s 183(3)).

Note: The recording of a conviction by a magistrate falls within the definition of sentence order and, as such, can be subject to an appeal to a Childrens Court judge.

## Criminal history

Practitioners should be aware of the effect of any findings of guilt in a client's criminal history, both in the Childrens Court and adult court proceedings.

A court's finding of guilt against a child is part of the child's criminal history, whether or not a conviction was recorded. An exception is made for those matters referred to a restorative justice process under s 163 where an agreement has been made or an alternative diversion program that has been successfully completed. These do not form part of a child's criminal history.

For adult proceedings, findings of guilt as a child where no conviction was recorded cannot be disclosed (s 148). An exception to this is where, in sentencing an adult, a sentence where no conviction was recorded can be disclosed if it is necessary to mitigate the adult sentence (s 148(3)). An example would be where a totality argument is relevant.

Further, "if a person is found guilty as a child of an offence, the person is not taken to have been found guilty as an adult of the offence merely because of the making of a declaration under s 143(4)" (Youth Justice Act, s 148(4)). That section allows a court to declare a childhood sentence order to be a corresponding adult order and make all necessary changes to make it a corresponding adult order.

A court that subsequently sentences a child for any offence as a child may consider the child's previous offending history (ss 150, 154). Any person with a duty to consider whether a child should be remanded in custody pending court proceedings may consider the child's criminal history.

If a child has been acquitted of a charge or the Crown has chosen not to prosecute a matter, the child may apply to the Commissioner of Police to have all identifying particulars (defined in s 4), destroyed (s 27).

## Variation and contraventions of orders

On application, the Youth Justice Act allows contravention action and variations of community-based orders, such as probation, community service, intensive supervision and conditional release orders. The relevant sections of the Youth Justice Act that apply are given under Division 12 for contraventions and variations (ss 236–252). Breaches are not defined as separate offences for a child.

## Breach of a good behaviour order

A court that deals with a person for an offence committed during the period of a good behaviour order may consider the breach when determining sentence (Youth Justice Act, s 189(1)). However, a court must not take any action in relation to a breach of a good behaviour order (Youth Justice Act, s 189(2)).

## Commencing proceedings for breach of community-based orders

If a child is subject to a current community-based order and the department believes that the child has contravened the order, it must warn the child of the consequences of further contravention, including possible breach proceedings (Youth Justice Act, s 237). This warning is not required if the department does not know where the child is and cannot reasonably find out (Youth Justice Act, s 237(3)).

If the department believes a child has continued to contravene the community-based order, it may apply to the Childrens Court magistrate for a finding that a breach has occurred (s 238). "The application may only be made during the period of the order" (Youth Justice Act, s 238(3)).

The application is generally commenced by serving a complaint and summons on the child (s 238(2)). If the child's whereabouts are unknown or there is reason to believe the child would not comply with a complaint and summons, an application can be made for a justice to issue a warrant for the child's arrest (Youth Justice Act, s 238(6)).

## General options available to magistrate on the breach application

Generally, all breach applications commence before a magistrate.

Section 240 indicates the magistrate may take action and make orders in line with s 245 (for breaches of probation, community service and intensive supervision orders) or s 246 (for breaches of a conditional release order). This applies even if a higher court made the community-based order.

The magistrate may order the child to appear before the higher court if, considering the circumstances, they believe that the order should be discharged (Youth Justice Act, s 240(3)(a)).

Section 241 applies if a higher court is to deal with a breach matter, and the same action can be taken and orders made under ss 245 or 246.

## Breach by re-offending

If a child is found guilty of an indictable offence they committed while subject to a community-based order, s 242 allows any court to deal with the breach in the same way as if the breach was commenced by a complaint and summons as explained above.

A higher court can re-sentence on any community-based order made by a Childrens Court magistrate in dealing with the breach (Youth Justice Act, s 243).

## A court's power to act on breaches of probation, community service and intensive supervision order

Section 245 applies here and indicates that a court must consider any period of compliance (Youth Justice Act, s 245(4)). Section 249 also indicates that, if a court discharges a community-based order of probation, community service or intensive supervision order and re-sentences a child, the court must consider the reasons that the original community-based order was made and anything the child has done to comply with that order (Youth Justice Act, s 249).

For breach matters, a court may make an order under s 245 even though, at the time it is made, the community-based order is no longer in force because its duration period has ended (Youth Justice Act, s 245(5)). Therefore, for this purpose, the community-based order is taken to be continuing in force until a proceeding on the breach is determined (Youth Justice Act, s 245(6)).

Section 245 allows a court to take action on any breach as follows:

For a probation order:

- extend the period of the order, as long as the extended period is not longer than the period for which the order could have originally been made under s 175 or s 176
- vary the requirements of the order
- discharge the order and re-sentence the child for the original offence
- take no further action on the undertaking of the child to comply with the order.

For a community service order:

- increase the number of hours, as long as the total is not more than the number allowed under s 175
- extend the community service period for up to one year more
- vary the requirements of the order
- discharge the order and re-sentence the child for the original offence
- take no further action on the undertaking of the child to comply with the order.

For an intensive supervision order:

- extend the period for up to six months
- vary the requirements of the order
- discharge the order and re-sentence the child for the original offence
- take no further action on the undertaking of the child to comply with the order.

## A court's power to act on breach of conditional release order and supervised release orders

Section 246 allows a court to take action on any breach as follows:

- revoke the conditional release order and order the child to serve the sentenced period of detention (the court must reduce the detention period by a period that the court considers just after considering everything the child has done to conform with the conditional release order (Youth Justice Act, s 248))
- give the child further opportunity to satisfy the order requirements by either:
  - varying the order
  - extending the program period for up to three months.

Division 12A indicates that, if the unexpired portion of a supervised released order is under 12 months, the matter can be brought before the magistrate, notwithstanding that the original sentence was made by a judge. The magistrate can give the child further opportunity to comply with the order or return them to detention.

If the period is more than 12 months, the magistrate may order the child to appear before the original sentencing court.

# Variation of community-based orders

## Variation in the interests of justice

Either the child or Department of Child Safety, Youth and Women (Youth Justice Services) may apply to the court to vary the order in the interests of justice. They must apply to a court of the same jurisdiction as the court that made the original order (Youth Justice Act, s 247).

The court may grant the application if it considers it in the interests of justice, after considering the circumstances that have arisen or become known since the order was made.

Evidence by affidavit is admissible in proceedings for applications for variation (Youth Justice Act, s 250). The court can determine the application on evidence by affidavit alone. If a court varies the order in this way, it must provide written notice to the child, department and any other lower or higher court that made the original order.

## Variation by consent

Either the child or Department of Child Safety, Youth and Women (Youth Justice Services) can apply to a proper officer of the court to vary any community-based order but not a conditional release order. The child or department must send the application to the officer of the court with a supporting affidavit deposing to the fact that both child and department consent to varying the order's terms (Youth Justice Act, s 252).

Schedule 4 defines the 'proper officer' as:

- "for the Supreme Court, a District Court or a Childrens Court judge—the registrar or a sheriff, deputy sheriff [or under sheriff] of the court; and
- for a Magistrates Court or a Childrens Court magistrate—the clerk of the court".

Section 252 prohibits a court when varying the order to consider the following amendments:

- the requirement that the child abstain from violating the law
- the period of the order (except for a community service order)
- an increase in the number of community service hours
- a reduction in the period that community service must be performed
- an amendment prohibited by the community-based order.

# Miscellaneous court powers

## Delegation of sentencing power

This power enables Childrens Court magistrates who believe that they do not have sufficient scope in the sentencing options available to them to informally request a delegation of sentencing power from a Childrens Court judge (Youth Justice Act, s 185).

If the child is not represented by a legal practitioner, a magistrate must make this request for delegation before any evidence is heard, plea entered or election made by the child (Youth Justice Act, s 185(4)).

If the child is legally represented, they must still consent to such a delegation being made at a later time. If they do not consent, the magistrate may refer the case to a Childrens Court judge for sentencing (Youth Justice Act, s 186).

A sentence ordered through this power would still be reviewable in line with the sentence review procedure discussed below.

## Referring a case to a Childrens Court judge for sentence

Under s 186, a magistrate may refer simple offences, or indictable offences that can be dealt with summarily before the Childrens Court magistrate, for sentence to a Childrens Court judge if they consider "that the circumstances require the making of a sentence order—

- beyond the jurisdiction of a Childrens Court magistrate; but
- within the jurisdiction of a Childrens Court judge" (Youth Justice Act, s 186).

If a simple offence is referred for sentence to the Childrens Court judge, a child cannot change their plea to not guilty. A child's right to change a plea on a committal for sentence to the Childrens Court judge is limited to indictable offences (s 106).

## Correcting errors—Childrens Court magistrate

Under s 128(1), a court may reopen a proceeding if "a court has—

- made a finding or order in relation to a child that is not in accordance with the law; or
- failed to make a finding or order in relation to a child that the court legally should have made; or
- made a finding or order in relation to a child decided on a clear factual error of substance".

The court may amend any relevant finding or order as necessary to take into account the above matters.

An application can be made to the court (within 28 days or by leave allowed by the court (Youth Justice Act, s 128(4)(b)), whether or not differently constituted, to reopen the proceeding or the court may reopen proceedings on its own initiative at any time.

A 'proceeding' is defined as "a proceeding for the hearing and determination of a charge of an offence" (Youth Justice Act, s 127).

The court has the power to reopen proceedings regarding an original finding and order. 'Finding or order' is defined as "a finding of guilt, conviction, sentence or other finding or order that may be made in relation to a person charged with or found guilty of an offence" (Youth Justice Act, s 128(7)).

## Court may order identifying particulars taken in addition to sentence

A court has the power, on application by the prosecution, to order that a child's fingerprints and palm prints be taken after finding them guilty for any indictable offence or under the prescribed legislation listed below where the offence is an 'arrest offence' (Youth Justice Act, s 255).

If the child is not placed into detention under the sentence order, the order must require the child to report at a stated police station between stated hours within seven days so police can obtain identifying particulars (s 255(3)).

If a child contravenes the order, a maximum penalty of 10 penalty units applies (s 255(4)).

A practitioner should argue the appropriateness of the order's use, particularly in light of the availability of s 25 of the Youth Justice Act or the powers available in the Police Powers and Responsibilities Act for children in custody.

## Orders under the *Transport Operations (Road Use Management) Act 1995* (Qld) (for children under 17)

In addition to general sentencing powers under ss 175–180 of the Youth Justice Act, a Childrens Court magistrate has discretion under s 181 to make an order under division 13 of the Youth Justice Act (s 253).

This discretion includes disqualifying a child from holding or obtaining a driver licence.

Under s 254(2), if a child is found guilty of an offence under the Criminal Code, *Transport Operations (Road Use Management) Act 1995* (Qld) or other Act, and they would be liable to be disqualified on conviction if they were an adult, the child is also liable to be disqualified on conviction to the same extent.

Further, under s 254(3) if a child is found guilty of an offence as above and a conviction is recorded, and the child would be subject to mandatory disqualification if they were an adult, the child is also disqualified to the same extent.

If the court finds the child guilty, the court has discretion under s 181 to order the child to be disqualified from holding or obtaining a driver licence for the same period as prescribed for adults. The disqualification only becomes mandatory if a conviction is recorded.

## Orders under the *Transport Operations (Road Use Management) Act 1995* (Qld) (for children 17 and over)

The Youth Justice Act 1992 (Qld) was amended earlier this year with the consequence that 17 year olds "found guilty" of certain offences must be disqualified from holding or obtaining a driver licence, to the same extent that an adult would be if the adult were convicted of the same offence – see s 254(4) YJA.

The Act defines "finding of guilt":

Means a finding of guilt, or the acceptance of a plea of guilty, by a court, whether or not a conviction is recorded.

Section 254 operates reasonably simply, but appears to have generated some confusion as to whether a 17 year old must be disqualified if they are referred to a court diversion referral restorative justice process, pursuant to s 163(1)(d)(i) YJA. A referral of that kind is not a "sentence order", within the meaning of the YJA.

A court must consider referring the matter to such a process, "If a child enters a plea of guilty for an offence" or "If a finding of guilt for an offence is made against a child…" – see s 162(1) & (2) YJA.

This is consistent with general legal principles, that hold that a finding of guilt is made when an accused enters a plea of guilty and has the allocutus administered, or is found guilty after trial.

So, a referral can only be made against a child if they are "found guilty" of an offence – be that through their own plea, or through a guilty verdict after trial. The Act therefore proceeds on the basis that an offence will only be referred to a restorative justice process if the child has been "found guilty".

If the 17 year old has been "found guilty", they are also then captured by the provisions of s 254(4) YJA, and must be disqualified to the same extent that an adult would be.

## Orders against parents

Apart from ordering a parent to attend the hearing of a matter (Youth Justice Act, s 70), the court can make certain orders against the parents of a child who has been found guilty of an offence (Division 16, ss 257–260).

If a court believes any of the following it may ask the parent to 'show cause' why they should not pay compensation:

- Compensation should be paid to any person for loss or injury.
- The parent may have contributed to the offence by not adequately supervising the child.
- The parent should be ordered to pay.
- It may ask the parent to 'show cause' why they should not pay compensation.

Section 259 sets out the characteristics and requirements of the 'show cause' hearing.

Practitioners should not act for the parent as well as the child in case a conflict of interest arises. Instead, advise the parent to seek independent legal advice.

## Transfers from detention centre to prison

The 2016 amendments have changed the age of transfer from detention to an adult correctional facility. If a person in detention turns 18 while serving a period of detention, and has six months or more remaining to serve, then they will be transferred to an adult facility (Youth Justice Act, s 276B).

The court has the power to delay any transfer, but not so that the person is in the detention centre past the age of 18 years and six months. The legislation is clear that a detainee cannot remain in youth detention past this age.

# Appeals and sentence reviews

## Appeals and sentence reviews

If a child is dealt with summarily and a sentence order is made, the aggrieved person may appeal to a Childrens Court judge using the mechanism provided by Part 9, division 1 of the Justices Act (s 117(2)).

In Division 1, all relevant references to a District Court judge are taken to be references to a Childrens Court judge (Justices Act, s 117(3)).

A District Court judge does not have jurisdiction to hear and decide an appeal unless sitting as a Childrens Court Judge (Justices Act, s 117(4)).

Section 222(1) of the Justices Act allows for appeals to a single judge of orders made by any justices or justice in a summary manner, whether upon conviction or sentence.

A complainant can appeal indictable offences dealt with summarily to the Childrens Court judge only on the basis of appealing the sentence order (Justices Act, s 222(1)).

A complainant can appeal the conviction of indictable matters dealt with summarily only to the Court of Appeal (Criminal Code, s 668D).

A decision of the Childrens Court judge is appealable to the Court of Appeal (Youth Justice Act, s 116).

## Sentence reviews

The 2016 amendments have re-introduced sentence reviews as a means of appeal (although they are strictly not an appeal).

Under s 118 a Childrens Court judge has the power to review a sentence order made by a Childrens Court magistrate.

The application must be made within 28 days (or at any other time that the court allows (s 119(2)) and is conducted as a rehearing on the merits (s 122(1)). The application can be made by the child or the department acting in the child's interests (s 119(1)(b)), or the complainant or the arresting officer.

An application for review lodged within 28 days has the effect of staying a community based order. If an application for review is lodged (within 28 days) in relation to a detention order, a separate application to stay is heard by a Childrens Court judge. The judge may grant bail and impose conditions it considers appropriate (s 121(2)).

A sentence review is an appeal for bail purposes and the Bail Act applies in these circumstances.

In conducting the review, the court may have regard to the proceedings' transcript before the Chlidrens Court magistrate and fresh evidence by way of affidavit or otherwise, and further submissions. The review must be conducted as informally and quickly as possible.

The court may confirm the order, vary the order, or discharge the order and substitute another order that is within the Childrens Court magistrate's jurisdiction.

## Appeals to the Court of Appeal

All appeals from the Childrens Court of Queensland, Supreme Court and District Court go to the Court of Appeal. Appeals can be made against conviction and sentence (Criminal Code, Chapter 67).

As with appeals against sentences involving adults, children who are appealing against a sentence must show that the sentence was manifestly excessive.

Legal Aid Queensland's Youth Legal Aid team conducts appeals and sentence reviews assessed as having merit on behalf of children referred by practitioners. Please contact 1300 65 11 88 or youthlegalaid@legalaid.qld.gov.au to make a referral or an inquiry.

# The Department of Child Safety, Youth and Women (Youth Justice Services)

## Responsibility of the Department of Child Safety, Youth and Women (Youth Justice Services)

The Department of Child Safety, Youth and Women (Youth Justice Services) is responsible for administering any community-based or detention orders made under the Youth Justice Act (s 302). In this role, the department:

- provides programs and support for young offenders to reduce the likelihood of their re-offending
- provides programs to help young offenders reintegrate into their communities
- ensures that sufficient agencies are available to provide appropriate activities for community service orders in all areas of Queensland
- helps young people and their families understand the youth justice system
- reduces the level of over-representation of Aboriginal and Torres Strait Islander young people in the youth justice system.

The department has a legislative right to appear in the Childrens Court and other specific functions (such as preparing pre-sentence reports) in relation to sentencing (s 74). Further, the department is responsible for supervising a child released from detention on a supervised release order.

When bringing applications for breach of community-based orders, the department acts in the role of prosecutor. The department is also responsible for providing and administering detention centres.

## Role of the Department of Child Safety, Youth and Women (Youth Justice Services) at court

The departmental officer attending court is responsible for gathering and collating information about the child for presentation in court. The officer liaises with the youth justice system, the child and their family.

If a matter is to proceed as a sentence, the departmental officer seeks to conduct a pre-court interview with the child. This enables the officer to assess the child and identify factors that contributed to the child's offending behaviour. The officer also has information about the child's previous contact with the department (including both youth justice and child protection matters).

The officer will make submissions to the court regarding the charge(s), the child's suitability for various orders and future departmental involvement with the child. The department's policy is not to interview a child regarding the details of an offence until the child indicates, through their legal representative, that they are pleading guilty.

## The departmental officer at court as prosecutor

The department is required to act as prosecutor in the following circumstances:

- breaches of probation, community service, intensive supervision and conditional release orders
- applications in the interests of justice to vary, discharge or re-sentence concerning probation, community service and intensive supervision orders
- applications in the interests of justice to vary or revoke conditional release orders
- applications to revoke supervised release orders
- applications to vary, by consent, probation, community service and intensive supervision orders.

# Legal aid

## Legal aid for children

Legal aid is automatically available to children charged with indictable offences.

A 'merit test' is applied to applications involving summary and regulatory offences, as well as for bail in the Childrens Court of Queensland and appeals to the Childrens Court of Queensland and Court of Appeal, to determine whether to approve a grant of aid. When processing an application for aid for a child, Legal Aid Queensland has a policy of not taking their parents' assets into account.

Duty lawyers should always ascertain whether a child has representation. If a child is not legally represented, they should apply for legal aid. If the child is remanded in detention, they should apply for legal aid so they can receive continuous representation. Practitioners should follow up the matter and confirm that the application has been processed.

## Your local Legal Aid Queensland office:

**Brisbane**
44 Herschel St, 4000

**Bundaberg**
3rd Floor, WIN Tower,
Cnr Quay & Barolin Sts, 4670

**Caboolture**
Ground Floor, Kingsgate
42 King St, 4510

**Cairns**
Level 2, Cairns Square
42–52 Abbott St, 4870

**Inala**
Level 1, Inala Commonwealth
Offices, 20 Wirraway Pde, 4077

**Ipswich**
Level 7, 117 Brisbane St, 4305

**Mackay**
Ground Floor, 17 Brisbane St, 4740

**Maroochydore**
Ground Floor, M1 Building
1 Duporth Ave, 4558

**Mount Isa**
6 Miles St, 4825

**Rockhampton**
Ground Floor, 35 Fitzroy St, 4700

**Southport**
Level 2, 7 Bay St, 4215

**Toowoomba**
1st Floor, 154 Hume St, 4350

**Townsville**
3rd Floor, Northtown
280 Flinders St, 4810

**Woodridge**
1st Floor, Woodridge Place,
Cnr Ewing Rd & Carmody St, 4114

Legal Aid QUEENSLAND

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