

# Young offenders

## CHAPTER OUTCOMES

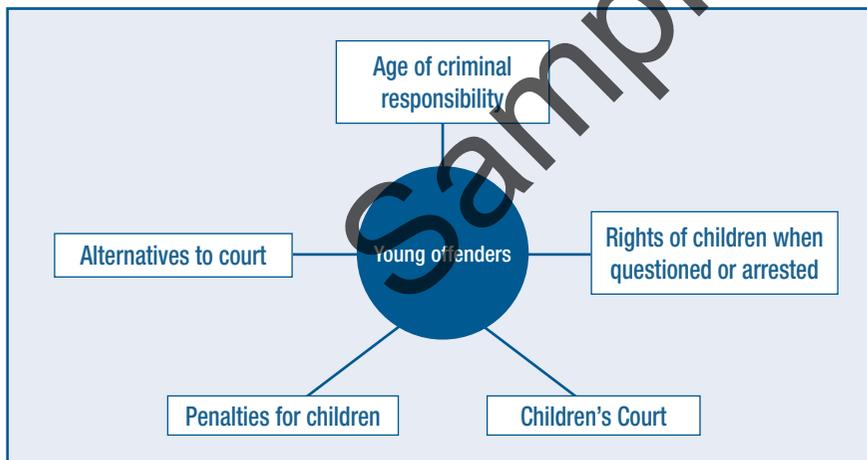
- H1 Identifies and applies legal concepts and terminology
- H3 Analyses the operation of domestic and international legal systems
- H5 Explains the role of law in encouraging cooperation and resolving conflict, as well as initiating and responding to change
- H6 Assesses the nature of the interrelationship between the legal system and society
- H8 Locates, selects, organises, synthesises and analyses legal information from a variety of sources including legislation, cases, media, international instruments and documents
- H9 Communicates legal information using well-structured and logical arguments
- H10 Analyses differing perspectives and interpretations of legal information and issues

## PRINCIPAL FOCUS

In this chapter students examine issues around young people and criminal law. In particular the age of responsibility, the rights of children and the role of the Children's Court are a focus.

## THEMES AND CHALLENGES

- The role of discretion in the criminal justice system
- Issues of compliance and non-compliance in regard to criminal law
- The extent to which the law reflects moral and ethical standards
- The role of law reform in the criminal justice system
- The extent to which the law balances the rights of victims, offenders and society
- The effectiveness of legal and non-legal measures in achieving justice



## SUMMARY OF LEGISLATION

*Bail Act 1978* (NSW)  
*Children's Court Act 1987* (NSW)  
*Children (Criminal Proceedings) Act 1987* (NSW)  
*Children (Protection and Parental Responsibility) Act 1997* (NSW)  
*Children and Young Persons (Care and Protection) Act 1998* (NSW)  
*Crime and Disorder Act 1998 c. 37* (UK)  
*Evidence Act 1995* (NSW)  
*Graffiti Control Act 2008* (NSW)  
*Health Records and Information Privacy Protection Act 2002* (NSW)  
*Juvenile Offenders Legislation Amendment Act 2004* (NSW)  
*Law Enforcement (Powers and Responsibilities) Act 2002* (NSW)  
*Mental Health (Forensic Provisions) Act 1990* (NSW)  
*Privacy and Personal Information Protection Act 1998* (NSW)  
*Young Offenders Act 1997* (NSW)

## SUMMARY OF CASE LAW

*Police v. Raymond* (Flood CM) June 2007  
*R v. AN* [2005] NSWCCA 239  
*R v. CKT* 1999 NSW (unreported)  
*R v. GDP* (1991) 53 A Crim R 112  
*R v. Hoang* [2003] NSWCCA 237  
*R v. JTB* [2003] NSWCCA 295  
*R v. LMW* [1999] NSWSC 1128 (the *Corey Davis* case)  
*Tapueluelu v. R* [2006] NSWCCA 113

## SUMMARY OF INTERNATIONAL LAW

Convention on the Rights of the Child (CROC) (1989)  
 International Covenant on Civil and Political Rights (ICCPR) (1966)

## 5.1 Age of criminal responsibility

Children are subject to the same criminal law as adults. However, they are treated quite differently by the legal system when they commit a criminal offence. Every effort is made to provide the young with the opportunity to start their adult lives in a positive fashion, without having to feel that, because of minor breaches of criminal laws in their past, society will always discriminate against them.

In New South Wales, a child under the age of ten years is regarded as too young to form criminal intent (*mens rea*). This is referred to as *doli incapax*. A young child may be physically capable of committing what is normally regarded as a crime, but they are not able to fully understand the consequences of their actions. As a result, the *Children (Criminal Proceedings) Act 1987* (NSW) states that a child under ten years of age cannot be charged with a criminal offence.



***DOLI INCAPAX*** When a child is too young to form criminal intent



Throughout all Australian legal systems children under the age of ten are considered to be too young to form criminal intent (*mens rea*)

Though there is no minimum age requirement for a child to give evidence, it is also unusual for a child under ten years to be used as a witness. In the case *R v. JTB* [2003] NSWCCA 295 the court had to decide whether a witness aged eight years could give 'evidence' without being sworn in and enquiries being made about her understanding of the proceedings. Section 21 of the *Evidence Act 1995* (NSW) provides that a witness in a proceeding must either take an oath or make an affirmation before giving evidence. The young girl was not sworn in, but the judge tried to explain to the girl that the proceedings would be conducted in court. This resulted in a sexual assault conviction against the girl's grandfather being quashed in the Court of Appeal.

Between the ages of ten and 14 years, a presumption exists that a child is not able to form criminal intent. This presumption applies in all Australian criminal jurisdictions. However, it is conditional and may be rebutted by proof that the child understood the wrongfulness of what they were doing.

If the prosecution firmly believe that a child in this age range has carried out a criminal act and understood the serious nature of their offence, this would have to be established in court. It is not sufficient that a child knows that their conduct was mischievous or naughty.

## CASE LAW *R v. BP & SW* [2006] NSWCCA 172

This Court of Criminal Appeal case involved an appeal against the conviction of one boy aged 11 and another aged 12 years at the time of the alleged offences. The boys, though young, had been found guilty of aggravated sexual assault in company (a gang attack on a 16-year-old girl).

The issue in dispute was *doli incapax*. The appeal sought a Court review of the need for the prosecution to prove beyond reasonable doubt that children between ten and 14 years of age knew what they were doing was seriously wrong, not merely naughty or mischievous.

The Appeal Court was also asked to consider whether the original judge's directions to the jury regarding *doli incapax* were adequate and whether it was reasonable that a jury could find the accused boys guilty, given their ages. Their appeal was dismissed.

There have been instances where one child has caused the death of another, but even in such cases, the Director of Public Prosecutions has been most reluctant to bring the matter before the courts.

## CASE LAW *R v. LMW* [1999] NSWSC 1128 (the *Corey Davis* case)

In this case, some young boys were playing near the Georges River in Sydney. One of the boys, ten years of age at the time the offence was committed, threw six-year-old Corey Davis into the water knowing that he could not swim. Corey's death received an enormous amount of media coverage, especially after the Children's Court ruled the offender not guilty of manslaughter as he had not understood the consequences of his actions (*doli incapax*).

The matter was referred to the DPP, who, at first, was not prepared to undertake any legal proceedings against the offender. However, the case continued to be highlighted in the media. Public reaction was very negative towards the offender and what was perceived as a lack of justice. The DPP eventually responded to public pressure and charged the offender with manslaughter. The case was held in a **closed court** in the Supreme Court and was quickly dismissed.

**CLOSED COURT** A case where members of the public and media and are not permitted entry to the court to view proceedings

The public's need to see that justice was done was satisfied. However, no child under 14 years of age has ever been found guilty by a jury in New South Wales for causing the death of another person.

## THE JAMIE BULGER CASE

In this world famous case from Britain two ten year old boys abducted a two-year-old child from a shopping centre, tortured and brutally killed him. The abduction had been filmed by the shopping centre's security system. The case received widespread media attention due to the film footage and the details of how Jamie had been treated by the two boys. There was also a sense of panic in the community about the rising incidence of crimes committed by young children.

In 1994, the House of Lords ruled that the presumption in law that young children could not be responsible for their actions was still valid. However, the public were not satisfied and the government responded with the *Crime And Disorder Act 1998 c. 37* (UK) which abolished the rebuttable presumption of *doli incapax* for children aged between ten and 14 years. In effect, this means that a child over ten years of age in England will be tried in very similar fashion to an adult.

The Bulger case highlights the ongoing tension between society's need to feel that young children and other vulnerable members of the community are safe and the offenders' needs to have their rights protected. It also raises the issue of whether new laws should be introduced retrospectively. The offenders in this case were released from detention in 2001 and assumed new identities and new lives.

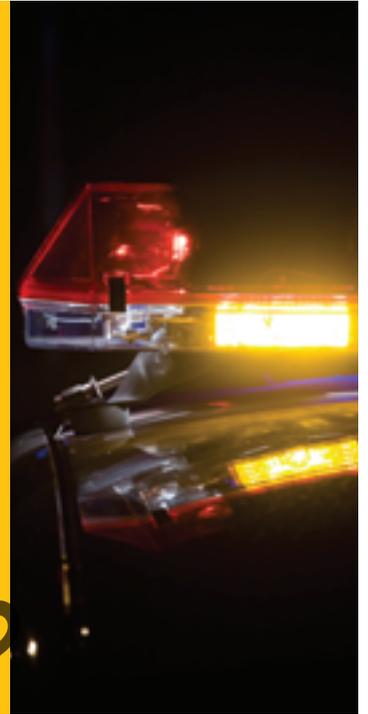
Children achieve the age of criminal responsibility when they reach 14 years of age. This means that they are considered old enough to commit a criminal act (*actus reus*) and are capable of having criminal intent (*mens rea*). This is known as *doli capax*.

## REVIEW

- 1 Explain why a child who is less than ten years of age cannot be charged with a criminal offence.
- 2 Why is it difficult for the police to secure a conviction of a child who is between ten and 14 years of age?
- 3 Explain in your own words, the difference between conduct that is mischievous or naughty and conduct that is criminal.
- 4 Describe the role that children can play as witnesses.
- 5 At what age may a child provide witness evidence?

## LAW IN ACTION

- 1 Examine the case *R v. LMW* [1999] and complete the following activities.
  - a Outline the facts of the case.
  - b Explain why the DPP eventually launched proceedings in the case.
  - c Why do you think this case was heard in a closed court?
  - d What was the outcome of the trial?
- 2 Compare the outcome of the case *R v. LMW* [1999] with that of the Jamie Bulger case in the United Kingdom.
- 3 To what extent does the principle of *doli incapax* have an impact on the provision of justice? Use examples to support your arguments.



## 5.2 The rights of children when questioned or arrested

Children are vulnerable and therefore have special rights when dealing with the police. Their welfare and safety will be of paramount concern. For example, although adults can be interviewed by the police for four hours (and applications can be lodged to extend this time), children should be interviewed for no more than two hours.

Police have the power to ask young persons to move on if they are impeding the free flow of pedestrian traffic on a footpath, or if there is a reasonable belief they are about to engage in a violent act: s. 19 of the *Children (Protection and Parental Responsibility) Act 1997* (NSW).

However, this law is subject to continual complaints from young people. Many children state that they are forced to move on when gathering with friends at shopping centres and car parks, without any apparent justification. This may be an example of the clash between the need for social order and the expression of individual rights. It may not be easy for the police to keep some situations under control when young people congregate in an area.

### THE CRONULLA RIOTS IN 2005

Cronulla is a very popular beach in Sydney's south, particularly with young people. In November and December 2005, it became the scene of gang violence and several attacks on individuals and the police. Participants in the attacks were mainly teenagers

and persons in their twenties from various suburbs in Sydney.

There had been racial tension between groups for several weeks over who could use the beach and this escalated when young people sent multiple text messages to their friends to join

in the affray. Radio and television commentaries on what was happening at the beach indirectly swelled the numbers of young people going to the area. On one day alone, more than 5000 angry young people converged on the beach. Several people had to

be hospitalised after being attacked by groups of people. For innocent bystanders, the events would have

proved quite frightening, especially as many people were attacked simply because of their appearance.

Crowds also swarmed around police vehicles, stomping on them and not allowing them to proceed into some of the worst trouble spots. An ambulance trying to assist injured people had its windows smashed and its panels kicked in by the crowd.

Broken beer bottles were strewn all around the area. The police had to use capsicum spray to disperse some groups who were attacking others and destroying property.

The media were criticised for publicising the ongoing fights and drawing attention to racial vilification. Charges were laid for affray, assault on the police and offensive conduct.



In December 2005 riots involving up to 5000 people, including many young people, broke out in Cronulla.

**RACIAL VILIFICATION**  
To incite violence against a person due to their race

### Point to ponder

The police should always let a child suspected of committing a crime speak to a lawyer, usually on the Legal Aid Hotline, before conducting an interview at a police station.

Under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), the police have the power in New South Wales to demand the name and address of juveniles and proof of identity. The Act requires the police to also identify themselves.

A child does not have to answer questions unless they are driving a car, drinking alcohol in a public place, suspected of being involved in or have witnessed a serious crime, travelling on public transport or are involved in a car accident. The police can ask a child to accompany them to the police station, but can only insist if the child has been arrested.

A child may be searched, but not strip-searched, if the police reasonably suspect they have in their possession drugs, stolen goods or a weapon. If the police arrest a young person they will take them to the nearest police station and must contact their parents or another adult before conducting an interview, as required in s.22 of the *Young Offenders Act 1997* (NSW).

When police wish to question a juvenile then a parent, guardian or solicitor must be present, as required in s.13 of the *Children (Criminal Proceedings) Act 1987* (NSW). A statement taken by police from a person under 18 years of age is inadmissible in court unless there was an independent adult present. Similarly, a police interview with a child suspect must have an adult present. In some cases where no family members or friends are available, Salvation Army or other community support personnel may be used. If a child is under 16 years of age, permission from a parent or guardian is required before another person can be appointed to witness the interview. If the child is over 16 years of age, the child must agree to the choice of an adult witness. In *R v. CKT 1999* (NSW) (unreported), the police conducted an interview with a murder suspect without the presence of a supporting adult, believing he was over 18 years of age, only to find out later this was not the case. Therefore evidence gained during the questioning could not be admitted into court.

## Use of on-the-spot fines

The *Crimes Act 1900* (NSW) was amended in 2007 to allow certain relatively minor offences to attract on-the-spot fines from the police. Many of these minor offences are more commonly committed by young offenders.

The offences that can receive on-the-spot fines include:

- minor fraud
- shoplifting
- possession of stolen goods
- offensive conduct
- offensive language
- obstructing traffic
- unauthorised entry of a vehicle or boat.

Fines for these offences range from \$150 to \$350. A person issued with a fine has 21 days to pay it, and there will be no additional costs imposed nor any criminal record created. Any fingerprints taken by the police will be destroyed.

The fines operate in the same way as parking fines. If a recipient wants to challenge the allegation against them they can go to court. A failure to succeed with an appeal may result in a recorded conviction.

## GRAFFITI AND DEFACING OF PUBLIC AND PRIVATE PROPERTY

A contemporary criminal justice issue mainly concerned with young persons is the use of graffiti and the defacing of buildings. In response to growing public concerns, the state government introduced the *Graffiti Control Act 2008* (NSW).

The key reforms included under the Act are listed below.

- It is now an offence to possess implements such as marker pens or etching implements with the intention of using them to damage or deface premises.
- The police now have powers to issue on-the-spot fines to retailers who fail to properly secure their

spray paint can displays, or where spray paint cans are sold to persons under 18 years of age.

- Existing graffiti legislation has been consolidated under this one Act.
- The Act also replicated the scheme set out under sections 67A–67C of the *Local Government Act 1993* for the carrying out of graffiti removal work by local councils. It enables penalty notices to be issued for the offence of selling spray paint cans to minors and for the offence relating to the unsecured display by retailers of spray paint cans.



The *Graffiti Control Act 2008* (NSW) restricts the sale of spray paint.

## The Young Offenders Act 1997 (NSW)

The *Young Offenders Act 1997* (NSW) aims to provide alternatives to court proceedings and is designed to foster restorative justice and the rehabilitation of the child. Under the Act, police may issue warnings, official cautions and arrange youth justice conferences.

The Act covers summary and indictable matters that are usually heard before a magistrate in the Children's Court.

The Young Offenders Act reflects a change in the legal system's approach towards juvenile offenders. It attempts to change the emphasis from punishment,

while at the same time not simply making children unaccountable for their actions. It also follows a trend towards community acceptance that all stakeholders have a part to play in resolving youth crime issues.

The emphasis is on making young offenders responsible for their actions. They need to be made aware of the damage caused by their actions. The Act affirms the rights of victims and tries to empower them through their involvement in conferences so that they feel their voice is heard and that changes may be made to the system. The Young Offenders Act was clearly designed to reduce the time and costs involved in dealing with juvenile justice issues. It also aimed to reduce the number of children being kept in detention centres.

### Principles of the *Young Offenders Act 1997*

The principles that guide persons exercising functions under the Young Offenders Act are as follows:

- a The least restrictive form of sanction is to be applied against a child who is alleged to have committed an offence, having regard to matters required to be considered under the Act. The aim of the Young Offenders Act is not to punish young offenders any more than is necessary.
- b Children who are alleged to have committed an offence are entitled to be informed about their right to obtain legal advice and to have an opportunity to obtain that advice. This is usually available from Legal Aid, but there are many other legal services available for children.
- c Criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter. For example, the use of youth conferences for minor criminal breaches should be encouraged.
- d Criminal proceedings are not to be instituted against a child solely in order to provide any assistance or services needed to advance the welfare of the child or his or her family or family group.
- e If it is appropriate in the circumstances, children who are alleged to have committed an offence should be dealt with in their communities in order to assist their reintegration or rehabilitation and to encourage family and community ties.
- f Parents are to be recognised and included in justice processes involving children. Parents are to be recognised as being primarily responsible for the care and development of children.
- g Victims are entitled to receive information about their potential involvement in, and the progress of, action taken under the Young Offenders Act. (A similar right is held by all victims of crime, to be notified of police progress in a prosecution.)
- h The over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system should be addressed by the use of youth justice conferences, cautions and warnings.

### Youth justice conferencing

The criminal justice system favours the use of youth justice conferences. These are informal gatherings where offenders, victims, family members and the police are able to participate. The victim and their family are able to express their hurt and anger at the harm caused by the actions of the young offender. The emphasis is on restorative justice and the offender needs to show a willingness to apologise, financially compensate or undertake community work if the conference is to succeed.

The Department of Juvenile Justice supplies trained convenors for these conferences. They encourage those affected by the criminal activity to have their say. Often the offender will provide an outline of what happened from their point of view and then the victim can explain the harm done to them. This not only involves, for example, details of an assault, but includes how it made them feel and how they may have lost confidence in their day-to-day lives. The victim's family often have aspects of the trauma caused by the offender that they wish to have reviewed. The convenor will then encourage the parties to come up with an outcome plan. This needs to be primarily worked out by the offender and victim. Both must be satisfied with the plan.

However, support is required by all concerned parties to arrange the implementation of the plan.

It should be noted that victims do not have to participate in these conferences. Many will choose not to confront the offender, and not all conferences achieve the desired outcome. The conference can be postponed if it helps to resolve any problems that remain after the first meeting.

## Court appearances

If a child maintains their innocence to a crime, a Court Appearance Notice will be issued and they will need to appear in court for a first hearing, where they will be asked to plead guilty or not guilty. If they, after receiving legal advice, plead not guilty, they will need to return to court at a later date, where witnesses, including the police, will be called to provide evidence. The presiding magistrate has to decide if any charges have been proven.

If a child is over 14 years of age and is charged by the police, the police may take photographs and fingerprints, which are destroyed if the charges are dismissed in court. Police may also need to decide, once a child is charged, whether to approve bail until the child appears in court. The senior officer on duty will decide if bail should be granted on the basis of:

- the seriousness of the offence
- family and community ties
- likelihood of the child appearing in court.

Bail may be unconditional or conditional. If conditional, the child may have to report to the local police station on a weekly basis, be back at home by a certain time each day and have an adult who vouches for them. A surety or cash amount may have to be lodged. Bail can be forfeited if the child does not attend court on the set day.

In 2008, amendments were made to s.22A of the *Bail Act 1987* (NSW). By preventing repeat bail applications and 'judge shopping', the amendments have, along with a police crackdown on juvenile offenders, had the effect of increasing the number of children in detention, creating severe overcrowding problems at child detention centres.



**JUDGE SHOPPING** An attempt to have a case heard by a judge who is known to be lenient in similar cases

### CASE LAW *Police v. Raymond* (Flood CM) June 2007 (NSW)

In this case, a 14-year-old boy was granted bail on condition that he resided as directed by the Department of Community Services. However, accommodation was not arranged for him and he remained in custody. The child was

declared homeless pursuant to s.120 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW). An application was then made for a variation to the conditions of bail, removing the condition that 'the child resides as directed by the

Department of Community Services'. The case illustrates how, due to overstretched resources, the system can fail to adequately address the need to keep young persons in a safe environment.



## REVIEW

- 1 Describe the differences between the rights of children and adults in regards to police interviews.
- 2 Outline the powers granted to police by the *Children (Protection and Parental Responsibility) Act 1997* (NSW).
- 3 Explain the issues for young people created by this Act.
- 4 Describe the causes and results of the Cronulla riots in 2005.
- 5 What is the purpose of on-the-spot fines?
- 6 Describe the *Graffiti Control Act 2008* (NSW).
- 7 Outline the purpose of the *Young Offenders Act 1997* (NSW).
- 8 Describe the purpose of youth justice conferencing.
- 9 Outline the rules relating to the appearance of children in court.

## LAW IN ACTION

- 1 Make a fact sheet for children about their rights and responsibilities in relation to criminal law, including police interviews.
- 2 Write a short report explaining the principles of the *Young Offenders Act 1997* (NSW).
- 3 Examine the case *Police v. Raymond* (Flood CM) June 2007 (NSW) on page 73 and complete the following activities.
  - a Outline the bail conditions placed on the boy.
  - b Explain why the child was not able to be released on bail.
  - c What issues for justice and equity does this case raise?

## 5.3 Children's Court: procedures and operation

The Children's Court is a specialist court. It deals with a wide range of issues involving children, from welfare, care and protection issues to criminal matters.

A person who is under the age of 18 years at the time they commit an offence will generally have their case heard in the Children's Court. The accused may be 19 or even 20 years old by the time their case is considered in court. In certain circumstances, though over 18 years of age, offenders may be sentenced to a juvenile detention centre if it is believed that is more appropriate or safer for them. This created a problem when bail laws were tightened, as more offenders were being held in detention centres and the overcrowding led to persons over 18 years being removed from detention centres and placed in adult prisons.

However, if a young person is charged with a serious criminal offence such as murder or sexual assault, despite being perhaps only 16 or 17 years old, the charges will be referred to the Supreme Court.

The Children's Court follows its own procedures, which are especially designed to be less intimidating for children. There is as little formality as possible and legal technicalities are kept to a minimum. Proceedings are not conducted in an adversarial manner. However, studies show that children do not say a lot in court and leave most matters to their legal advisors.

If a child is being held in a juvenile justice centre on a day they should be making a court appearance, they are able to attend court via an audio-visual link instead of physically appearing before the court.

Log on to the Pearson Places website and follow the links to find more information about the Children's Court.



### Point to ponder

Article 14(4) of the International Covenant on Civil and Political Rights states that 'in the case of juvenile defendants, the procedures shall be such as will take account of their age and the desirability of promoting their rehabilitation'.

# THE EFFECTIVENESS OF THE CHILDREN'S COURT

The Children's Court promotes several values to aid the effectiveness of its operation. These are discussed below.

## ACCESS

Access to information, advisors, legal representation and court support is of great importance to young offenders and their families. The Children's Court aims to rehabilitate young offenders rather than punish them, so efforts are made to ensure children can participate in proceedings, have legal advice and maintain contact with parents and other family members.

## EQUALITY, FAIRNESS AND INTEGRITY

Equal and fair treatment of all offenders is important if the criminal justice system is to be effective in its dealings with young offenders. Many young persons feel that their families, the police and 'the system' have all let them down in the past. If these young people are to be rehabilitated, they must be able to see that they will receive fair treatment and not suffer discrimination on the basis of sex, ethnicity, age or appearance. The workings of the criminal justice system must be transparent for the parties to a case and young persons need to be made aware of their rights.

The Children's Court aims to provide a regular forum at each Children's Court for stakeholder feedback. In theory, this means that solicitors, parents, community groups and the police will all be given the opportunity to contribute to the court's deliberations concerning what should be done to promote the rehabilitation of a young offender. Any changes to court procedures or practices are also publicised to help all stakeholders understand the operation of the Children's Court.

## ENFORCEABILITY

Criminal law needs to be enforced. However, child offenders should not be regarded as simply an area of responsibility for the police. The Department of Juvenile Justice and the Children's Court encourage the involvement of all concerned parties – the stakeholders – to play a role in correcting criminal behaviour in young people. Parents, family members, government departments, community groups and the police all share some common responsibility in encouraging compliance with the law. From an early age, children learn to follow rules such as respecting other people and their property. These values need to be widely supported in the community so that children grow up respecting the law.

An area of inconsistency in the application of the law is shop stealing. While some stores call the police immediately and ask for offenders to be charged, others have a policy of not contacting the police.

## ISSUES OF TIME AND COST IN DELIVERING JUSTICE

The Children's Court refers to 'expedition' and 'timeliness'. It is particularly important that court cases involving children are conducted efficiently and as quickly as possible, consistent with ensuring justice. Though resource efficiency is always an aim of the criminal justice system it should not detract from ensuring fair and just legal outcomes.

## APPEALS AND REVIEWS

Young persons may appeal against any court's ruling, assuming there are grounds for the appeal. However, given that efforts are made to deal with most small crimes out of court or in the Children's Court before a magistrate, appeals over minor criminal matters are less likely. Appeals are more likely when a young person has been found guilty of a very serious offence.

## Children's Court magistrates

Children's Court magistrates are carefully selected and trained to be sensitive and exhibit an ability to relate to young persons. There are currently 13 children's magistrates presiding in seven specialist Children's Courts in New South Wales. There are also five children's registrars appointed under the Act to assist in the administration of matters before the Children's Court.

The role of each magistrate in criminal cases is to consider the evidence put before the court and make a determination based upon it, the relevant legislation and case law. This is in line with procedures followed in Local Courts.

Under s.11 of the *Children (Criminal Proceedings) Act 1987* (NSW), it is an offence to publish or broadcast the name (or other identifying details) of a child involved in criminal proceedings. Occasionally, the media breach this requirement and they are not always prosecuted for breaching the rights of the child concerned.

### Point to ponder

In regional and rural New South Wales, Children's Courts sit in the Local Court and are presided over by the Local Court magistrate or a children's magistrate from Sydney.

### Point to ponder

A child under the age of 16 years found guilty of an offence in the Children's Court will not have a conviction recorded against them.

## Background reports

If a child is found guilty of an offence, or pleads guilty, the magistrate usually adjourns the case for a period of two to six weeks and asks for a confidential background report or Juvenile Justice report to be prepared in time for the child's next court appearance. The report can, in certain circumstances, be mandatory. In *R v. Hoang* [2003] NSWCCA 237, the Court of Criminal Appeal ruled that s.25 of the *Children (Criminal Proceedings) Act 1987* is a mandatory provision and required a Juvenile Justice Report be prepared.

To prepare a report, the child's parents should contact the Juvenile Justice Office suggested by the court and an officer will arrange to visit the child's home and interview the child and their parents. Following this, a report will be prepared on the child's education, work history, support groups, nature of their offending behaviour and their future needs. The report will also include recommendations on sentencing of the child.

## SENTENCING PRINCIPLES IN THE CHILDREN'S COURT

The main aim of sentencing is to allow for the rehabilitation of a young offender. This was established at common law in *R v. GDP* (1991) 53 A Crim R 112. This view also reflects the influence of international law, notably the UN Convention on the Rights of the Child (CROC), which obliges Australian courts to treat the best interests of the child as the paramount consideration in all matters involving children (Article 3). Children should be able to participate in decision-making (Article 12) and the imprisonment of children must be an absolute last resort, with other penalties more in line with rehabilitation being considered appropriate (Articles 37 and 40).

Sentencing guidelines used in the Children's Court are very different to those used in adult courts. In New South Wales the following sentencing principles are applied to children who commit criminal offences.

- The Children's Court takes all measures practicable to ensure that a child or young person has every opportunity to be heard and participate in proceedings and that the proceedings, decisions or rulings are understood by the child or young person.
- Though children who commit offences are held responsible for

their actions, consideration must be given to their dependency and immaturity, so they are to be given guidance and assistance.

- Wherever possible, the education or employment of a child should proceed without interruption.
- Offenders, wherever possible, should be able to continue living in their own home.
- The penalty imposed on a child for any particular offence should not be greater than the penalty that would be applied to an adult in similar circumstances.



### REVIEW

- 1 Describe the purpose and jurisdiction of the Children's Court.
- 2 When will a young offender appear in front of the Supreme Court?
- 3 Describe the role of the magistrates of the Children's Court.
- 4 Outline the purpose of a background report.
- 5 Describe the sentencing principles adopted by the Children's Court.

### LAW IN ACTION

- 1 Write a short report outlining the key issues affecting the effectiveness of the Children's Court.
- 2 Discuss the view 'that failing to punish young offenders severely will only encourage more crime'.
- 3 Take on the role of a senior officer in the New South Wales Attorney-General's Department. You have been given the task of recruiting a new Children's Court magistrate. What personal and professional attributes would you be looking for in a new magistrate in this court?

## 5.4 Penalties for children

If criminal charges against a child are dismissed, no record of the charge will be kept and any fingerprints or photographs of the child will be destroyed on request.

If the court decides or the accused admits their guilt, the court can order any of the following outcomes.

- A caution may be issued, which involves no penalty and no record.
- The offender can be referred to a youth justice conference under the *Young Offenders Act 1997* (NSW).
- The offender can be fined (if they have savings or income of their own) up to \$1000 based on the child's – not their parents' – ability to pay.
- The offender can be placed on a probation order, with conditions, for up to two years.
- A community service order can be imposed, which involves up to 100 hours for children under 16 years, or up to 250 hours for those older than 16 years.
- A control order can be imposed and suspended if the child enters into a good behaviour bond. If the bond is broken, the child will have to serve the period of the control order in custody.
- A young offender can be placed on a control order to be served in detention for up to two years on any one offence and up to a maximum of three years.

### Point to ponder

Young offenders are often given community service work rather than being placed in juvenile detention.



A community service order is a penalty frequently used for young offenders.

### CONTROL ORDERS

If the court imposes a control order, it requires the offender to be sent to a juvenile justice centre. These centres are located at various venues around New South Wales. Each child is classified to decide which centre is

most appropriate. Where appropriate, an effort is made to place children in a centre near their family home.

Juveniles facing very serious charges are placed at Kariong Juvenile Correction Centre on the Central

Coast. It differs from other centres in that it is run by the Department of Corrective Services, so discipline will be tougher. Young women are sent to the Juniperina Juvenile Justice Centre at Lidcombe in Sydney. Most males

aged under 16 years are sent to the Reiby Juvenile Justice Centre near Campbelltown in Sydney's south-west. Males over 16 years are placed at centres near Gosford, Dubbo, Wagga Wagga and Grafton.

At these centres, children aged under 16 years must attend classes, as education is a high priority. Persons aged over 16 years can apply to attend classes. Emphasis is placed on learning work skills that

will enhance job prospects when the children leave the centre. Parental visits to juvenile justice centres are encouraged.

### Point to ponder

Children appearing in Children's Court for committing an offence do not receive a criminal record if they are under 16 years of age.

## CASE LAW *Tapueluelu v. R* [2006] NSWCCA 113

Moiakeola Tapueluelu was convicted of two charges of robbery, which had been carried out when he was in his early twenties. In handing down a sentence, the judge took into account Tapueluelu's previous history before the Children's Court and imprisoned him for a total of eight years, with a six-year non-parole period. This matter went to the Criminal Court of Appeal (CCA), where the applicant sought leave to appeal against the severity of the sentence. One of the grounds for appeal was that at the time of the applicant's charge before the Children's Court in 1995, he was only fifteen years old; under s.14 of the *Children (Criminal Proceedings) Act 1987*, no conviction should have been recorded, and therefore

should not have affected the current sentence. Another ground was that the judge was mistaken in believing him to be in possession of an offensive weapon during the first of the robberies for which he was now convicted.

The Court of Criminal Appeal found that lower court had erred in determining the non-parole period, as it was 'manifestly excessive'. The application for leave to appeal was granted to Tapueluelu, and his sentence and parole period were reduced.

It is worth noting that, while appeals are often based on an offender claiming a punishment is excessive, the Director of Public Prosecutions may also argue that a penalty was too lenient.

The Children's Court can impose other penalties, including:

- the offender having to pay damages for harm caused to persons or property. For example, there have been attempts to get graffiti artists to pay for the damage they cause to property
- the confiscation of illegally obtained property
- referral to the Youth Drug and Alcohol Court.

Another issue regarding penalties is what happens to young offenders once they become adults. In serious matters, a young person can go from being detained in a juvenile detention centre to an adult prison.

## ARE THERE TOO MANY JUVENILES IN CUSTODY?

In July, 2009 the New South Wales government announced a review of the state's juvenile justice system to investigate the high number of young offenders in custody.

The Australian Institute of Criminology recently released a report showing that juveniles in New South Wales are

four times more likely to be imprisoned than those in Victoria. There are currently more than 400 young people in the state's nine detention centres. Vigilant policing and changes to the *Bail Act 1978* (NSW) are identified as contributing factors. A shortage of suitable accommodation has added to the problem.

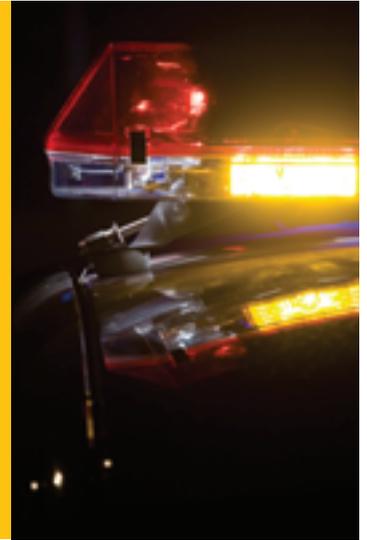
A related problem is that about 68 per cent of young persons held in detention reoffend within 12 months. It is hoped the review will identify more diversionary programs to reduce the numbers held in juvenile detention.

## REVIEW

- 1 Explain what happens in terms of a criminal record, fingerprints and photos if a child is found not guilty of an offence in the Children's Court.
- 2 Outline the range of penalties available to the Children's Court.
- 3 Describe the purpose of control orders.
- 4 What happens to juvenile offenders who are held in detention centres, once they reach 18 years of age?

## LAW IN ACTION

- 1 Examine the case *Tapueluelu v. R* [2006] NSWCCA 113 and complete the following activities.
  - a On what grounds was the appeal made?
  - b Explain the ruling of the appeal court. Do you think this ruling was a just one? Explain your response.
- 2 Discuss the extent of juvenile detention in New South Wales.



## 5.5 Alternatives to court

A young person who has spent time in a detention centre or correctional facility will find it difficult to gain social acceptance as they become an adult. A criminal record will harm employment prospects and it serves as a constant reminder of a troubled past. Many young persons become chronic offenders. They will spend time in detention centres and may find themselves in prison for offences committed once they become adults.

Anything that can reduce the likelihood of children becoming repeat offenders has merit and any diversionary programs that can reduce society's dependence on the criminal justice system should be examined for practicality and effectiveness.

### Warnings

The Young Offenders Act allows the police to issue on-the-spot warnings to young persons for minor breaches of the law. This includes creating a disturbance in public, swearing and offensive behaviour. Police record the giving of the warning but not the young person's name.

It should be noted that the police (and the courts) reflect the values of society by not extending warnings in cases where violence has occurred. Violence, in any form, is not tolerated by society. A much harsher approach is adopted towards the use of violence, and this extends to bullying acts in schools.



Warnings are used by the police to keep young offenders out of the court system.

## Cautions

A caution is a formal record that a child or young person has breached the law. This involves more serious offences, such as larceny or causing damage to property. Destruction of public property, such as street signs, bus shelters, public toilets and playground equipment, are examples of conduct that could lead to an official caution.

Cautions are only issued if the offender admits the offence, after having the opportunity to receive legal advice, usually through a Legal Aid office or a group such as the Shopfront Youth Legal Centre. Cautions are quicker and easier to administer than a formal charge and they take up less court time. Even so, they are not to be taken lightly; repeated cautions will result in a court appearance. However, the aim is to reduce the chance of this happening.

## Youth justice conferences

The Children's Court and the police may refer a young offender to a youth justice conference. These are used if an offender has committed a crime that warrants a caution or more serious penalty, such as assault or harming other persons, or damaging their property. At this conference, arranged by a convenor, an offender will be confronted by the victim who was harmed by the conduct of the offender. At the conference the child and the victim may agree to an outcome plan which is designed to make up for the harm caused by the young offender. The actions taken by an offender to compensate or try to rectify the damage they have caused is sometimes referred to as 'restorative justice'.

Referrals to Youth Justice Conferences in 2008–2009 (NSW)	
Number of referrals to a Youth Justice Conference	1915
Number of referrals resulting in a Youth Justice Conference	1658
Number of Youth Justice Conferences conducted	1441
Percentage of all referrals resulting in a Youth Justice Conference	86.6%
Total number of participants in Youth Justice Conferences	5152

Source: Juvenile Justice research, Planning and Evaluation Standard statistical Reporting database

## Community services of the Department of Juvenile Justice

According to the Department of Juvenile Justice (DoJJ), the prime focus of their community-based interventions with juvenile offenders is to address their offending behaviour in ways that have been proven to effectively reduce the risk of reoffending. Further, community programs aim to effectively supervise young offenders as they meet their legal obligations.

Community offices of the DoJJ provide the following services:

- assessment reports to assist courts determine suitable penalties and rehabilitation strategies
- supervision of juvenile offenders placed on good behaviour bonds, probation, parole orders or community service
- support for young people who have problems seeking bail and those who have been placed in remand

- provision of programs that try to remedy or reduce the risk factors that lead young people to commit crimes
- provision of specialised programs, including the Sex Offender Program and Violent Offender Program
- casework management (as directed by the courts) and networking with government and community-based organisations to provide support services for juvenile offenders.

This support can extend to finding accommodation, placing offenders in special programs to develop employment skills or modify their behaviour, and providing assistance with personal issues and their return to school. Support services are designed to be sensitive to age, gender, culture and disability.

A prime aim of all these programs or strategies is to keep juveniles in their communities, to try and maintain stable relationships with family, friends, education and employment bodies. In the long term, this will do most to provide these young persons with security, a support system and future prospects.

## Youth drug and alcohol court program

Though initiated through the courts, most of the work of the Youth Drug and Alcohol Court Program (YDAC) is community-based and directed towards diverting young offenders, especially those aged 14 to 18 years of age, from further alcohol and other drug (AOD) abuse. Young persons who plead guilty in court and have a history of substance abuse that is related to their criminal behaviour may be placed in the YDAC program. Acceptance into a program is based on referrals from Children's Court magistrates and screenings by Juvenile Justice counsellors.

If a young person is assessed as suitable, an individual, holistic program plan is developed. This is managed by representatives of DoCS, Juvenile Justice and community groups.

Initially, the young person is placed in a YDAC Induction Unit – a six-bed unit run by a non-government organisation. They remain in the unit for three to four weeks, after which they enter a residential rehabilitation program and are generally intensively supervised. The aim of the program is to help the offender deal with their drug issues and provide them with guidance and support.

If a young person fails to comply with any part of the program, this may result in a breach of bail and return to custody. However, if they successfully complete the program they will almost certainly avoid a control order, meaning they will not have to return to juvenile detention.

### REVIEW

- 1 Explain the use by the police of warnings and cautions.
- 2 What is a youth justice conference?
- 3 How are youth or juvenile justice conferences an example of restorative justice?
- 4 Describe the purpose of the community services provided by the Department of Juvenile Justice.
- 5 Outline the operation of the Youth Drug and Alcohol Court program (YDAC).

### LAW IN ACTION

- 1 Assess the benefits to society of using alternatives to the court system when dealing with young offenders.
- 2 Working in small groups, discuss whether the abuse of alcohol and other drugs is a crime, even for young persons, or a community health issue.



## CHAPTER SUMMARY

Children are subject to the same criminal law as adults. However, they are treated quite differently by the legal system when they commit a criminal offence. Under New South Wales criminal law, a child under the age of ten years is regarded as *doli incapax* – that is, too young to form criminal intent. Between the ages of ten and 14 years, this presumption still exists but it is conditional and may be rebutted by proof that the child understood the wrongfulness of what they were doing. This presumption applies in all Australian criminal jurisdictions. Once a child is older than 14 years of age they are generally regarded as capable of knowingly committing a serious crime.

Children have special rights when dealing with the police. Their welfare and safety are of paramount concern. If a child is detained for committing a crime, the police must contact their parents as soon as possible. A parent, guardian or approved adult must be present when police interview a child.

The police follow the guidelines established under the *Young Offenders Act 1997* (NSW) in their dealings with persons aged under 18 years of age. Rather than promoting the punishment of young persons, the Act aims to rehabilitate offenders. The emphasis is on keeping young offenders out of the court system and detention centres whenever possible.

For minor breaches of the law, the police will often issue warnings and cautions to young offenders. On-the-spot fines can also be imposed. The police and the courts may both arrange for an offender to attend a youth justice conference. The aim is for the victim and the offender to come to an agreement as to how the offender can make amends for the harm they have done.

If the matter is serious or if a child maintains their innocence, then a Court Appearance Notice will be issued and the child will need to appear in court to plead guilty or not guilty.

The Children's Courts are conducted by magistrates who have been especially trained to deal with issues affecting young persons. Strong efforts are made to avoid unnecessary formality in the Children's Court, and parents and children are encouraged to participate in the proceedings.

A range of minor penalties may be applied by the Children's Court, including fines and community service orders, with emphasis still being placed on the rehabilitation of the child. However, serious or repeat offences may result in a control order being issued and the offender will need to spend time in a detention centre.

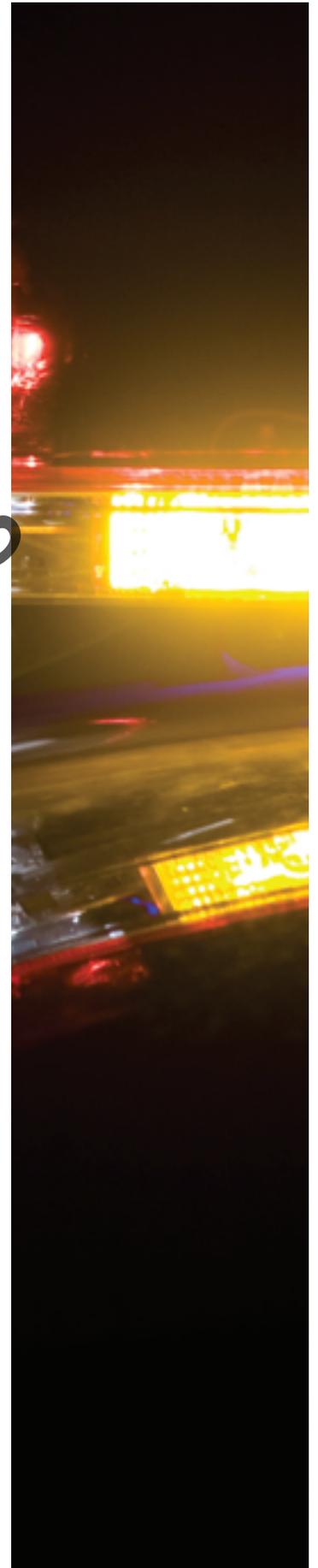
The juvenile justice system has implemented many out-of-court procedures to help address the behaviour of offenders. There is a widespread belief that New South Wales has too many children being held in detention centres and the state government is reviewing strategies aimed at keeping young offenders within their own communities as much as possible. This will assist the process of rehabilitation, as support is close at hand and restorative justice programs can be more easily monitored.

The effectiveness of the legal system's response to young persons who commit crimes is viewed differently by victims, offenders and their respective families. The general public is less concerned with individual rights and more concerned with the safety of the community, and may call for harsher penalties for young offenders. This is often a reaction to media reports that do not contain all the facts in a particular case.



# MULTIPLE-CHOICE QUESTIONS

- 1 What is the age of criminal responsibility in New South Wales?
  - A 10 years
  - B 12 years
  - C 14 years
  - D 16 years
- 2 What is the term given to situation where a child knows they have committed a crime and understands the consequences of their actions?
  - A *Doli incapax*
  - B *Doli capax*
  - C Indictable
  - D *Prima facie*
- 3 What is the presumption of *doli incapax*?
  - A Applies in all common-law jurisdictions
  - B Only applies to serious criminal matters
  - C Has been retained in New South Wales
  - D Exists only in statute law
- 4 Which of the following statements about the law is accurate?
  - A Children must be provided with Legal Aid.
  - B Parental income determines whether a child gains Legal Aid.
  - C Children gain legal assistance except in cases of sexual assault.
  - D Children are not allowed to give evidence in court.
- 5 Which of the following statements is accurate if a parent is unavailable for a police interview with a child under 16 years of age?
  - A The interview must still be conducted so the child can be released.
  - B The child can ask any adult they like to attend the interview.
  - C Taping of the interview becomes more important.
  - D The parents select an adult to attend the interview.
- 6 What happens if a young offender admits guilt to police?
  - A They can be sent straight to a detention centre if it is a serious crime.
  - B They may be issued with a caution if it is a minor offence.
  - C The matter must still always be referred to the Children's Court.
  - D It cannot be accepted if the child is under 14 years of age.
- 7 Which of the following statements about the Children's Court is accurate?
  - A It releases the names of children who commit minor offences.
  - B It allows media reporting of names in serious crimes.
  - C It does not allow media reporting of children's names.
  - D It allows parents to decide whether any names are reported by the media.





- 8 What is the main aim of the Children's Court in determining penalties to apply to children?
- A To punish in accordance with the crime committed
  - B To deter children from reoffending
  - C Not to make the penalty harsh on the parents
  - D To rehabilitate young offenders as much as possible
- 9 What is the purpose of a control order against a young offender?
- A It means they must stay home at nights.
  - B They must attend a juvenile justice detention centre.
  - C They are placed on a good behaviour bond, usually for 12 months.
  - D They are taken from their parents and must have no contact with them.
- 10 What is the purpose of a youth justice conference?
- A Offenders meet and discuss issues with their victims.
  - B The police provide a lecture to offenders.
  - C Parents can ask for their children to be sent interstate.
  - D The offender can justify their life of crime.

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## SHORT-ANSWER QUESTIONS

- 1 Outline the special rights of children in relation to criminal law.
- 2 Outline the purpose of the Children's Court.
- 3 Describe the operation of the *Young Offenders Act 1997* (NSW).
- 4 Describe the alternatives to a court appearance that the Children's Court can apply.
- 5 Explain the restrictions placed on police when interviewing children in relation to criminal matters.
- 6 Explain how the law has responded to the increase in graffiti.
- 7 Analyse the penalties available to the Children's Court.
- 8 Evaluate the effectiveness of the criminal law in dealing with young offenders.