Children and the Criminal Law

CHAPTER CONTENTS

Introduction

The human brain is undeveloped at birth. The developing brain is directly influenced by early environmental enrichment and social experiences. Experiences can change the brain throughout life, but experiences in the first three years of life organise the brain. The type of experiences an infant has is crucial. Experience wires the brain and ongoing repetition strengthens the wiring.

The brain of the adolescent is remodelling from the child brain and transforming into the adult brain—a process that takes until at least 24 years of age in healthy development. The emotional part of the teen brain has more intense responses in day-to-day firing than that of an adult, because emotional regulation is still developing. Surges in neurotransmitters (dopamine) drive thrill-seeking behaviour in order to obtain rapid rewards

If trauma or chronic stress has occurred in a teen's life, brain development is disrupted and delayed and often disorganised and unintegrated, but they are experiencing the same changes and remodelling as the healthy teen brain, only in chaos (Hoehn, 2013).

In recognition of the above, in Queensland a child under 10 years is not criminally responsible at law for anything they do, or fail to do. Once a child turns 10, they are subject to the criminal justice system, and they can be charged with virtually any offence an adult can be charged with. There is some variation in the legal process in dealing with child offenders by way of recognition that those under 18 are still young and developing, and are vulnerable in a system dominated by adults.

From mid-February 2018, the upper age limit for the youth justice system in Queensland has been raised to 17 years—making it the same as the rest of Australia and in line with Australia's international obligations. This means that a person who has turned 10 years of age but had not turned 18 at the time they allegedly did something which is against the law will be dealt with in the youth justice system. For this chapter, the term 'child' means a person who has turned 10 years of age but not yet turned 18.

Up to this time, 17-year-olds have been treated as adults under the criminal law. There will be a number of young people who are 17 on the day this change occurs who are already in the system and their matter has not been finalised by the court, they may have been sentenced to a supervised community order with Corrective Services or they may be in prison on remand or sentence. There is a special set of rules for these young people (transitional arrangements) and if this affects you, you should speak to a lawyer about what this means for you. If you are alleged to have broken the law when you were 17 but were not charged or ordered to appear in court until after the change of age limit, you will go to the Childrens Court.

The Department of Child Safety, Youth and Women (DCSYW) has responsibility for youth justice policy and programs.

Youth Offending

It is important to understand the context of youth offending, that is:

- the problem
- the extent of the problem

- the reasons giving rise to the problem
- the way the problem is addressed.

Statistics show that the number of individual juveniles found to have committed an offence by a court in 2014–15 fell by 6% compared to the previous year, and represents only 0.8% of the 10 to 16-year-old population (*Balanced Justice*, 2013).

Most young people who come into contact with the police before the age of 18 will not become 'career criminals'; their contact will be short lived and relatively minor, and they will grow out of offending from late adolescence (*Snapshot 2011: Children and Young People in Queensland / Commission for Children and Young People and Child Guardian*).

The small group of repeat offenders tends to have common characteristics:

- low socioeconomic status
- low educational attainment
- significant physical and mental health needs
- substance abuse
- a history of childhood abuse and neglect (Australian Institute of Health and Welfare, 2011).

The Youth Justice System

Under the Queensland *Criminal Code Act 1899* (Qld) (Criminal Code), there is an irrebuttable presumption that a child under 10 years of age cannot commit a criminal offence, and therefore no criminal proceedings can be brought against a child under 10 (s 29(1) Criminal Code) (although there could be grounds for the intervention of Child Safety Services).

Where a child has reached the age of 10, but has not yet reached the age of 14 years, there is a rebuttable presumption that the child is not criminally responsible.

As well as establishing the child has broken the criminal law, the prosecution must establish that the child had the capacity to know the conduct was wrong (s 29(2) Criminal Code).

Where a person has turned 18 or 19 either at the time of being charged or sentenced for an offence committed when under 18, the legislation sets out when they will be dealt with in the Childrens Court and when in an adult Magistrates Court (pt 6 div 11 *Youth Justice Act 1992* (Qld) (Youth Justice Act)).

However, as a general principle, a court must always have regard to the fact that the offender was a child when the offence was committed, and the sentence cannot be greater than what the offender would have received if punished as a child in relation to:

- imprisonment
- fine
- compensation and restitution (s 144(2)-(3) Youth Justice Act)

Legal representation

A child appearing in court as a defendant is able to instruct a lawyer to represent them in the same way as an adult. The child is the client and parents cannot override instructions given by the child.

A number of community legal centres, including the Youth Advocacy Centre Inc., South West Brisbane Community Legal Service and YFS Legal, provide free specialist legal advice and representation for young people in the Childrens Court. The Aboriginal & Torres Strait Islander Legal Service specialises in assisting Aboriginal and Torres Strait Islander young people.

Legal Aid is automatically available to children charged with indictable offences (matters which could be dealt with by a higher court). A merit test is applied to applications involving simple offences. It is the policy of Legal Aid not to take the assets of the parents of the child into account, and therefore children under 18 generally meet the financial test for aid.

Youth justice services and officers

The Minister for Child Safety, Youth and Women has portfolio responsibility for the Youth Justice Act. The DCSYW includes youth justice services which manage the youth justice system, including the operation of the two youth detention centres at Wacol (Brisbane) and Cleveland (near Townsville).

There are youth justice services centres throughout Queensland which have responsibility for children who the court has sentenced to community-based orders (e.g. community service orders, probation orders) and those released from detention centres on conditional release orders. Offenders undertake a range of activities as part of their orders to address education, employment and health, and other issues relevant to the child concerned.

Youth justice officers also play a role in the court process.

Police

As for all criminal matters, police are the gateway to the criminal justice system for young people.

Interaction with police

A child does not have to go with police to a police station unless they are under arrest. The police can arrest a child:

- in relation to an identified offence or offences
- to question the child about certain offences.

It is often an offence for anyone (adult or child) to refuse to provide name, address and date of birth, and it is therefore wise to provide these. Otherwise, a person (including a child) does not have to answer questions by the police or make any statement.

For traffic matters, any person must, if asked by police:

- produce their licence
- identify (if possible) any driver alleged to have committed an offence

- give the police details of an accident.

Police questioning

Except for simple offences, a statement made to police by a child must be made with a support person present at the time for it to be able to be used as evidence in court (s 29 Youth Justice Act). The reason for a support person is to redress the power imbalance between the child and the police.

Police statements

A statement in this context includes any conversation a child may have with a police officer (beyond providing their name, address and age). The most obvious example is where there is a formal record of an interview given by a child at a police station.

Conversations between a child and a police officer conducted elsewhere are also capable of being statements by the child, and include conversations secretly recorded by way of concealed tape recorder or video camera.

In certain circumstances, the requirement to have a support person present may also apply where a child makes or gives a statement to a person other than a police officer.

Support persons

A support person for a child is defined in the Youth Justice Act by reference to the *Police Powers and Responsibilities Act 2000* (Qld) (PPR Act) (sch 6) as including:

- a parent of the child, including a person who has lawful custody of a child or a person with day-to-day control of a child
- a lawyer acting for the child
- a person acting for the child and employed by an agency whose primary purpose is to provide legal services
- an adult relative or friend nominated by the child
- a justice of the peace upon police request if none of the above are available.

It is always open to the child to nominate who they want, and this could be a youth worker or other trusted adult. In practice, the police often select the support person. A common example is the use of justices of the peace who are often unknown to the child.

The Youth Justice Act does not define the role of the support person but it has been noted that the support person should provide general comfort and support to the child, and ensure that the child being interviewed is not placed under undue pressure, which includes:

- ensuring the child knows what is happening and understands their right not to answer questions
- attending to practical matters (e.g. appropriate time and length of the interview, appropriate toilet and meal breaks)
- attending to the need to take medication and any other medical issues

- ensuring the appropriateness of the language used for that child
- ensuring an appropriate questioning process (e.g. not to ask more than one question at a time)
- the support person should not be someone who is intimidating in relation to the child which would mitigate against the child feeling supported. This could include a parent.

However, a court can allow a child's statement to be used in evidence where a support person was not present if it is satisfied there were proper and sufficient reasons for the absence of a support person and in the circumstances the statement should be admitted (s 29(2) Youth Justice Act).

Commencing court proceedings

Before taking a matter to court, the police must consider:

- taking no action
- diverting the child from court by:

    cautioning the child

    referring the offence to a restorative justice process

    providing an opportunity to attend a drug diversion assessment program for minor drugs offences

    providing an opportunity to attend a graffiti removal program for a graffiti offence (s 11(1) Youth Justice Act).

If police consider that taking one of the above steps is appropriate, then they must take that course of action.

In deciding the above, the police must consider:

- the circumstances of the alleged offence
- the child's criminal history, any previous cautions the child has received, or any other actions taken in relation to the child for any other criminal matters (s 11(2) Youth Justice Act).

Police Diversion of Child Offenders from the Court System

Caution

The Youth Justice Act notes that the purpose of cautioning is to divert children from the criminal justice system (s 14 Youth Justice Act), but does not describe when or for what offences a caution should be given. A police officer can only administer a caution if the child:

- admits the offence and
- consents to being cautioned (s 16 Youth Justice Act).

If practicable, the caution must be given in the presence of:

- a parent

- another adult chosen by the parent or the child.

If the child is a member of an Aboriginal or Torres Strait Islander community, the police officer can request that the caution be administered by a respected elder of the relevant community (s 17 Youth Justice Act).

The police officer administering or requesting the caution must:

- be authorised to administer cautions or do so in the presence of an officer who is authorised
- ensure that the child and the parent or adult attending with the child understand the purpose, nature and effect of the caution.

In practice, a caution is most often used for first-time offenders or, if more than once, generally for minor offences. It generally involves a meeting between police, the child and the parent or adult chosen by the child where:

- the child's behaviour is considered and why that is an offence
- the child may apologise to the victim if the child and victim are willing to participate in this
- the child receives an admonishment from the police officer
- a notice of caution is given to the child.

Police will consider whether a child has previously received a caution or cautions when considering what action to take in relation to any later offending.

Restorative Justice Process

The Youth Justice Act also does not describe when and for what offences a restorative justice process would be appropriate. A police officer may refer an offence for a restorative justice process if the child admits committing the offence and the police officer considers:

- a caution is inappropriate
- a restorative justice process would be more appropriate than prosecution
- a convenor will be available for the conference (s 22 Youth Justice Act)
- the nature of the offence
- the harm suffered by anyone because of the offence
- whether the interests of the community and the child would be served by having the offence considered or dealt with at a restorative justice process (s 22(4) Youth Justice Act).

Police must tell the child about the process and consequences if they do not participate properly. The police then refer the matter to the chief executive of the DCSYW, who, in practice, delegates to a youth justice officer with responsibility for restorative justice processes.

The restorative justice process is to be a conference (s 31(2) Youth Justice Act) or, in specific circumstances, an alternative diversion program. A conference is a formal meeting organised by an accredited convenor. It aims to allow a child who has committed an offence and other concerned

people to consider or deal with the offending in a way that is of benefit to all concerned (s 33 Youth Justice Act). Those entitled to be present are:

- the child and at the child's request:
  - their lawyer
  - an adult member of the family
  - another nominated adult
  - the child's parents
- the convenor and:
  - a police officer
  - any other person chosen by the convenor to assist
- the victim and at the victim's request:
  - their lawyer
  - a member of their family
  - a support person (s 34 Youth Justice Act).

A victim is entitled to attend but does not have to consent to, or participate personally, in the conference.

The conference process involves:

- a discussion of the offence
- the impact and consequences for those affected
- ways in which the child can repair the damage or harm caused to the victim.

If successful, there can be an agreement by the child to do something designed to redress their offending behaviour and to assist the child to take responsibility for their actions. This could include:

- making an apology to the victim, orally or in writing
- performance of voluntary or community work
- repair of or payment for any damage caused.

The convenor must ensure that the agreement is not unreasonable or more onerous than if a court had dealt with the matter.

If the conference is successful, the matter is ended and the child cannot be prosecuted. It does not form part of the child's criminal history. However, police will consider previous cautions or conferences when deciding how to proceed if a child appears to be involved in any future offending.

If the conference is not successful or the child does not comply with the agreement made at the conference, the police officer has the same options as to how to proceed with the offence as they did

prior to the matter going to a conference. The police officer must consider the child's participation in the conference and anything the child has done to comply with the agreement in deciding what to do.

Alternative diversion program

If police make a restorative justice referral and a conference cannot be convened (for reasons other than the child not being contactable after reasonable inquiries, or the child not wishing to participate), then the Youth Justice officer and the child can agree on to the child's participation in some activities to help the child understand the harm their behaviour has caused and to take responsibility for the offence. These activities include:

- remedial actions
- activities to strengthen the child's relationship with their family or community
- educational programs.

The program cannot treat the child more severely than the Sentencing Principles (s 150 Youth Justice Act) allow and must be put into writing and signed by the child (s 38 Youth Justice Act).

Any admissions made during a restorative justice process cannot be used in other proceedings (s 40 Youth Justice Act).

Police drug diversion program

The police drug diversion program is provided for under s 379 of the PPR Act and generally consists of a drug assessment, and education and counselling session that lasts up to two hours. Children are eligible for the session, including children who have previously been cautioned for a minor drug offence.

Graffiti removal program

If a child is arrested for, or is questioned by a police officer about a graffiti offence, the police officer may, at any time before the child goes to court about the graffiti offence, offer the child the opportunity to attend a graffiti removal program instead of going to court (s 379A PPR Act). The child must:

- admit having committed the offence during an electronically recorded interview
- have been at least 12 years of age at the time of the offence.

Police then directly refer the child to a graffiti removal program for two hours. If the child completes the program, that is the end of the matter. Otherwise, police can take further action including going to court.

Police Prosecution of a Child

If police decide to prosecute a child in relation to an offence, it is expected that they should give the child a 'notice to appear' on the spot or issue a 'complaint and summons' (s 12 Youth Justice Act). Police are only to arrest and charge a child where it is necessary to:

- prevent further offending

- protect any evidence relating to an offence
- ensure the child comes to court (s 13 Youth Justice Act).

The child's parents (or Child Safety Services if the child is in care) and the youth justice services should be provided with the complaint and summons that advises them of the details of the proceedings (s 43(2) Youth Justice Act, s 392 PPR Act).

Bail

If police decide to proceed by arresting and charging the child with an offence (s 48 Youth Justice Act), they also have to decide the question of bail, that is whether or not to release the child pending their appearance in court. The general principle that detention should be a last resort is relevant to bail as well as sentence.

The provisions of the *Bail Act 1980* (Qld) (Bail Act) apply to children, but the Youth Justice Act makes some specific comment:

- A child arrested and refused watch-house bail must be brought promptly before a Childrens Court (s 49 Youth Justice Act).
- Where a child is arrested and held in custody in a police station or watch-house, and cannot be promptly brought before a Childrens Court, the child must be granted bail or released from custody (s 50(1) Youth Justice Act).
- Children must, where practicable, be held for the intervening period in a detention centre (s 54(2) Youth Justice Act). A child cannot be kept in an adult prison on remand (s 56(7) Youth Justice Act).

In Brisbane, children will normally be brought as soon as possible before the Brisbane Childrens Court which sits every weekday. The Brisbane Magistrates Court will also sit in the Childrens Court jurisdiction on Saturday mornings in relation to urgent matters.

Taking identifying particulars

If a child is arrested, police may take the child's identifying particulars such as palm prints, fingerprints, handwriting, voice prints, footprints, a photograph of the person's identifying features (e.g. scars or tattoos) and photographs generally (s 467 PPR Act).

Where a child is given a notice to appear or a complaint and summons (i.e. they are not under arrest) in relation to offences designated as 'arrest offences' (i.e. offences for which the police have the power to arrest the child without a warrant), the police can take identifying particulars but have to apply for an order from a magistrate to do so first. Notice of the application must be given to the child and their parents, or the Department of Communities, Child Safety and Disability Services if they are in care (s 25(3) Youth Justice Act). In this situation, a support person must be present during the taking of the identifying particulars if they are to be admissible in court (s 26 Youth Justice Act).

If the child is found not guilty of the charges by the court or is not given a sentence (e.g. the court decides the child should have been cautioned), the identifying particulars must be destroyed (s 27 Youth Justice Act).

Taking a DNA sample with consent

Police may ask a child who is at least 14 years old for consent to a forensic procedure (consent to take a DNA sample). The police must ensure that any consent is fully informed (s 454 PPR Act).

The child must be given the opportunity to speak to a support person in private before making a decision, and a support person must be present when any consent is given (s 450 PPR Act).

If a child is under 14, police may ask a parent of the child to consent to a forensic procedure other than the taking of a sample of the child's blood (s 451 PPR Act).

Taking a DNA sample by court order

For an indictable offence, police may apply to the Childrens Court for an order authorising a sample be taken from the child for DNA analysis (s 488 PPR Act). The court must be satisfied:

- an indictable offence has been committed
- the child is reasonably suspected of having committed the offence
- a DNA analysis may tend to prove or disprove the child's involvement in the offence.

The Childrens Court

Queensland has a specific Childrens Court jurisdiction that deals with youth justice and child protection matters established under the Childrens Court Act.

While the Act modifies the magistrate and district court jurisdictions and processes when they are dealing with children charged with criminal offences to some extent, overall the court process for a criminal matter involving a child defendant is generally no different to that for an adult. Applications for bail, adjournments, mentions, trials and sentences are dealt with in much the same way. The police prosecute matters at the Magistrates Court level and the Director of Public Prosecutions takes those cases that go to the Childrens Court of Queensland and the Supreme Court.

The court must ensure that a child and parent understand as far as practicable the nature of the alleged offence, including:

- the matters that must be established before the child can be found guilty
- the court's procedures
- the consequences of any order that may be made (s 72 Youth Justice Act).

Magistrates

As for all criminal matters, almost all prosecutions against young people aged 10 to 16 years will commence in a Magistrates Court but with the magistrate convening a Childrens Court.

The roles of magistrates

Hear committals for serious (indictable) offences and Supreme Court offences

The magistrate decides whether there is sufficient evidence that:

- a serious offence has been committed

- it may have been committed by the child before the court.

A 'serious offence' is an offence for which an adult could be imprisoned for 14 years or more (with a small number of exceptions) and which is not a Supreme Court offence (which is the most serious of criminal offences).

If the magistrate believes there is sufficient evidence, the matter is sent on to be dealt with by the relevant higher court.

As with adult matters, the Crown may proceed by way of *ex officio* indictment (where there has been no committal or where the magistrate has decided not to commit a matter) (s 101 Youth Justice Act).

Hear and decide 'non-serious' indictable offences

All matters commence as a committal hearing, but the child can decide that they want a magistrate to deal with their case rather than it being sent on to a judge provided that:

- the magistrate is satisfied that the matter can be adequately dealt with by them
- the child has been advised of their right to have their matter dealt with by a Childrens Court judge (sitting with or without a jury if the child is pleading 'not guilty').

A child defendant has the sole right of election and where appropriate, a child charged with an indictable offence can be referred to the Mental Health Court (s 61 Youth Justice Act).

Sentence 'non-serious' indictable offences

Where a child pleads guilty to a non-serious indictable offence, the child can decide whether they want the magistrate to sentence them or a judge (s 93(2) Youth Justice Act).

Where there is a plea or finding of guilt after a trial, the magistrate can still refer the sentencing of a child to a Childrens Court judge if the magistrate considers the circumstances of the case call for a sentence beyond what the magistrate can impose under the Youth Justice Act (s 186 Youth Justice Act).

Hear and decide simple offences

Some criminal matters are considered sufficiently minor that they have to be dealt with by a magistrate. A magistrate can do this in the absence of the child, but if they find the case proved, the only sentence they can impose is a fine and only if the child has provided information in writing about their capacity to pay a fine (s 46 Youth Justice Act).

Sentence simple offences

Where a child pleads guilty to a simple offence, the magistrate must sentence the child.

Instead of a single legally qualified magistrate, a Magistrates Court may be constituted by two non-legally qualified justices of the peace who can:

- deal with a simple offence where the child pleads guilty
- deal with procedural matters.

Two justices cannot sentence a child to detention or an immediate release order (s 67 Youth Justice Act).

Judges

The Childrens Court of Queensland comprises District Court judges who have also been appointed as Childrens Court judges. A Childrens Court judge can deal with all indictable offences which the child has elected to have dealt with by a judge and must deal with serious offences (except Supreme Court offences).

The child can choose whether their case is heard by a Childrens Court judge alone or with a jury (s 98 Youth Justice Act).

Child co-offenders will be tried by judge and jury unless all co-offenders elect judge alone. If a child is not represented, there must be a jury. There must also be a jury if the judge decides that in the particular circumstances it is more appropriate for the child.

Judges can grant bail when a child has either not made a bail application or had bail refused by a magistrate (s 59 Youth Justice Act). This right exists in addition to the right to apply to the Supreme Court.

Children and Court Processes

Open and closed courts

A Childrens court that is presided over by a magistrate is a closed court for youth justice proceedings (s 20 *Childrens Court Act 1992* (Qld)). The court must only allow people with a direct interest in the matter before the court in the room such as:

- the child defendant
- the prosecutor
- the victim or their representative
- the defence lawyer
- the parent(s)
- the witness(es)
- a youth justice officer
- the arresting police officer
- a representative of a Community Justice Group where the child identifies as Aboriginal or Torres Strait Islander.

The court can give permission for an academic doing relevant research, the media or for specific people with an interest in the proceedings, but, as with the victim, the court must exclude them if it considers their presence would be prejudicial to the interests of the child.

The Childrens Court of Queensland and the Supreme Court, which are presided over by a judge, are open courts and members of the public and media can sit in the court.

However, no one can publish information which would identify the child in criminal proceedings before a magistrate or a judge (s 301 Youth Justice Act) (see also Publication of identifying information below for the exception to this rule).

The Childrens Court is closed to the public when hearing child protection matters, and there is also a prohibition on publishing identifying material.

Publication of identifying information

The only circumstances when a court can order the publication of the child's identifying information in a youth justice matter is if the child is found to have committed an offence and been sentenced under section 176(3)(b) (s 234 Youth Justice Act). This means:

- the offence the child committed was one for which there is a life sentence for an adult (murder, manslaughter, drug trafficking) and
- the court has imposed a sentence of more than 10 years up to the maximum of life because

  there was violence against a person and

  the court considers the offence to be a particularly heinous offence having regard to all the circumstances.

The judge must consider that it would be in the interests of justice to allow the publication considering issues such as:

- the need to protect the community
- the safety or wellbeing of a person other than the offender
- the impact that this could have on the offender's rehabilitation.

The details cannot be published before the end of the one-month appeal period. If there is an appeal, the publication is dependent on the outcome of the appeal.

The chief executive of the DCSYW may give written authority to publish identifying information if the chief executive is satisfied publication is necessary to ensure a person's safety (s 301(3) Youth Justice Act).

The maximum penalty for publication without authority is 100 penalty units or two years imprisonment for an individual and 1000 penalty units for a corporation (s 301 Youth Justice Act). A penalty unit was $126.15 as of 31 July 2017 but is subject to increase (you can check the current value at https://www.qld.gov.au/law/crime-and-police/types-of-crime/sentencing-fines-and-penalties-for-offences).

Role of youth justice services

The chief executive of the DCSYW is not generally a party to the proceedings but is entitled to be heard in relation to adjournments, remand/bail, sentencing orders, publication prohibition orders, the closure of the court to the public and any other matters the court considers to be relevant (s 74 Youth Justice Act).

In practice this means that a youth justice officer from the Youth Justice Services (YJ Services) in the DCSYW attends court. Before a child defendant appears in court, this officer will usually interview them and attempt to establish factors contributing to the child's offending behaviour. It is the policy of YJ Services not to interview a child regarding the details of an offence prior to the child discussing it with a legal representative.

A youth justice officer can apply for, or support, a remand (dealing with the case on another day) to allow:

- a parent to be in court
- a child to be legally represented
- an interpreter to be in court
- a child's identity or age to be determined
- a presentence report to be written.

The role of a youth justice officer with respect to submissions about bail will usually be limited to welfare issues such as accommodation. It does not address a child's general suitability for bail.

Issues concerning the likelihood of re-offending or failing to appear are matters for the prosecution and defence. The court therefore does usually not take submissions from youth justice officers in relation to possible bail conditions such as curfews, reporting to police, or forbidding contact with a complainant or co-accused.

Conditional bail programs are often prepared by YJ Services in circumstances where a child is highly unlikely to comply with bail conditions without substantial intervention.

In general, youth justice officers are not required to argue that a child receives a particular sentence order. It is required, however, that that officer provide the court with a range of alternative orders, together with information about the nature and suitability of each.

Breach of supervised orders

A youth justice officer has to act in a prosecuting role in relation to the following as they are responsible for the administration of community-based sentence orders (probation order, graffiti removal order, community service order, intensive supervision order, conditional release order or restorative justice order) and deal with:

- breaches of orders
- complaints regarding non-compliance with conditional release and supervised release orders
- variation, discharge, revocation or resentence of orders.

These applications are made formally in writing with accompanying affidavits and may be defended by the child.

Parental involvement

The Youth Justice Act supports the involvement of parents in any proceedings where their child is a defendant, irrespective of the child's wishes, and anticipates that a parent will be present in court.

Generally, courts will not deal with a child's matter unless a parent is present. A court can adjourn a proceeding to enable a parent to be present, and can recommend the department meet a parent's travel expenses (s 69 Youth Justice Act). The court has some discretion and may proceed without the parent where, for example, the child is close to turning 18 and it is not a serious matter, or the child has not had contact with their family for a long time. The court can, however, order a parent to attend, and it is then an offence for the parent not to (the maximum penalty is currently over $6300) (s 70 Youth Justice Act).

If a parent cannot attend, it may be useful for the parent to write a letter to the court explaining the difficulties and providing a phone number they can be contacted on.

Parents have the right to be in court, and they are to be given full opportunity to be heard and participate in the proceedings (s 72 Youth Justice Act).

The court must ensure that the parent understands:

- the nature of the offence alleged to have been committed by the child
- the court's procedures
- the consequences of any order that may be made (s 72(2) Youth Justice Act).

Where a parent is absent and a finding or an order is made against a child, the parent can apply to have the order set aside, and the court can order this if it considers it is in the interests of justice to do so (e.g. where the child's capacity to make decision relating to the proceeding was adversely affected by the parent's absence (s 71 Youth Justice Act)). The application must be made within 28 days of the original decision and, if successful, the matter must be heard afresh. There may, therefore, be significant consequences for a child.

If a parent is absent, a court will usually ask a child if their parents know about the proceedings and if they want the matter remanded so that the parents may be present. If the child elects to proceed, the answers to these questions are recorded and could be referred to by a parent in requesting an order be set aside.

Children and Court Bail

The general principle that detention should be a last resort is relevant to bail as well as sentence.

The Bail Act also applies in relation to bail decisions for children in court. A court must take into account the sentence order the court would likely make if the child was to be found guilty (s 48(3A) Youth Justice Act) when deciding bail.

Where a child's legal representative has instructions to make a bail application, they should liaise with the youth justice officer who may:

- ascertain the child's present circumstances so far as they are relevant to bail

- if necessary, investigate suitable placement options including a parental home
- organise a placement acceptable to the court.

If the child is released without bail they must be given a release notice stating the time and place of their next court appearance with a warning that the court may issue a warrant for their immediate arrest if the child does not turn up.

If the child is released on bail and promises to come back to court as directed but does not come to court, the court may issue a warrant for their arrest, but no offence is committed (unlike the adult court).

If the child is released on bail with conditions and breaches a bail condition, their bail may be revoked but breaching the condition is not in itself a further offence.

If a magistrate refuses bail, the child may apply for bail to a Childrens Court judge. A child can also apply for bail directly to the judge if an application was not made to the magistrate.

Review and variation of bail

A child who is subject to bail with conditions is able to ask for a variation of those conditions if there are grounds to change the conditions (e.g. variation of a curfew to accommodate work commitments). A request for variation of conditions would usually require the young person's legal representative to provide advance notice to the police before the court date when it is to happen, so the police may consider their position to the proposed change.

Show cause situation

The 'show cause' provisions of the Bail Act do not apply to a child (s 16(5) Bail Act). The court is, however, able to consider any previous grants of bail in determining if bail should be granted.

Sentencing Regime and other Orders for Child Offenders

The sentencing regime for child offenders is not significantly different to that for adult offenders. However, the sentences that can be imposed are shorter in recognition of their youth (see pt 7 div 4 Youth Justice Act). Cautions or restorative justice referrals generally do not form part of a child's criminal history and are not provided to a court when a child is sentenced by a court for matters which are prosecuted (s 15 Youth Justice Act).

Where a caution should have been administered

The Childrens Court can dismiss a charge brought before it, on application of a child defendant, if the court considers the child should have been cautioned or no action should have been taken (s 21Youth Justice Act). The court may administer a caution or refer back to the police for cautioning.

If the child is cautioned, that ends the matter. A caution does not form part of the child's criminal history and is not generally admissible in subsequent court proceedings against that person either as a child or an adult (s 15 Youth Justice Act). The prosecution can seek to rely on prior cautions in the Childrens Court:

- for a child under 14 to rebut the presumption that the child did not know what they did was wrong (s 147 Youth Justice Act)
- in relation to decisions about bail
- where there is a submission by a child defendant that they should have been cautioned for the matter for which they are in court.

Where a restorative justice process should have been ordered

Similarly, under s24A of the Youth Justice Act, the Childrens Court can dismiss a charge, on an application by the child defendant, if it considers that the offence should have been referred by police to a restorative justice process. It may refer the matter to a restorative justice process, in which case, if the child participates and completes the agreement, that is the end of the matter. If the child does not participate in the process or do what is required under the terms of the agreement, police can restart proceedings or the court can sentence the child.

Reprimand

The legislation does not provide any guidance on the delivery of a reprimand or what it should cover. In general, the magistrate will address the child in relation to their behaviour and provide some form of warning and/or advice about their future behaviour.

Good Behaviour Order

The court can order the child to be of good behaviour and not break the law for a period up to one year (ss 175, 188 Youth Justice Act). If the child re-offends during that time, the fact that they were on a good behaviour order will be taken into account on sentencing for the subsequent offence (s 189 Youth Justice Act).

Fines

There is provision for a court to fine a child (s 175 Youth Justice Act), but it can only order this if it is satisfied that the child has the capacity to pay the amount (s 190 Youth Justice Act). Realistically, this is not an option for most children, particularly those under 16 years. A fine is the only order a court can impose in the child's absence for a simple offence, but the child must have provided information in writing of their ability to pay.

If, in sentencing a child, the court considers it is appropriate that the child pay a fine and an amount by way of compensation or restitution, but the child does not have capacity to pay both, preference must be given to paying compensation or restitution (s 156 Youth Justice Act).

If a fine is ordered and the child does not pay it within the time allowed, an application can be made to cancel the fine and make a community service order instead (s 192 Youth Justice Act).

Community-based orders

Community-based orders cover restorative justice, graffiti removal, probation, community service and intensive supervision orders (pt 7 div 6A–9 Youth Justice Act). The length of order depends on whether the matter is dealt with by a magistrate or a judge and the age of the child.

Children have to agree before the court can place them on a community-based order except for a graffiti removal order (s 194A Youth Justice Act). The orders are supervised by YJ Services, and the child must comply with reasonable directions given by YJ Services, report as required, advise of any change in address, employment or school and not leave the state without permission. For a restorative justice order, the child must also participate in the restorative justice process and perform their obligations under the agreement (s 192B Youth Justice Act).

Conditional release orders are detention orders that are immediately suspended for the child to go on a prearranged program. These are also supervised through YJ Services, and the child must agree to the order (pt 7 div 10 sub-div 2 Youth Justice Act).

If a child does not comply with the conditions of any of these orders, they can be breached (i.e. YJ Services bring the matter back to the court). The court generally can extend the order, vary any of the conditions or discharge it and resentence the child.

For conditional release orders (detention orders which are immediately suspended for the child to go on a prearranged program), the court can revoke the order and the child has to serve the time in detention. The court can vary or extend the order if the child can satisfy the court that they should have another opportunity.

Restorative justice processes

If a child pleads 'guilty' at court, the court must consider referring the offence for a restorative justice process instead of sentencing the child (s 162(1) Youth Justice Act).

If the court finds a child guilty of an offence after the child has pleaded 'not guilty', the court must consider referring the offence for a restorative justice process to help the court decide the appropriate sentence (s162(2) Youth Justice Act).

The court can also order that a child attend a restorative justice process as the sentence it imposes for the offence (s 175(1)(db) Youth Justice Act). This is considered to be a supervised community-based order in the same way as a probation order or community service order.

In all of these scenarios, the court must be satisfied:

- the child has been told about, and understands, the process and agrees to participate
- the child is a suitable person to participate in a restorative justice process.

The court must take into account:

- the nature of the offence
- the harm suffered by anyone because of the offence
- whether the interests of the community and the child would be served by having the offence considered or dealt with at a restorative justice process (ss163, 192A Youth Justice Act).

It must also consider that:

- the offence can be appropriately dealt with without making a sentence order (a court diversion referral)

- the referral will help the court make an appropriate community-based order or detention order (a presentence referral) (s 163 Youth Justice Act).

The elements of a court-referred or ordered restorative justice process are the same as that described earlier in relation to police referral to a restorative justice process. Generally, it will take the form of a conference but can be an agreement for certain activities if holding a conference is problematic.

Court diversion referral

- If the child participates and completes any agreement which results from the process, that is the end of the matter and the offence does not form part of the child's criminal history for other Children's Court matters.
- If the child does not complete the agreement, the matter must be brought back to the court which may take no further action, allow more time for the child to comply or sentence the child.
- If the child does not participate, or during the process denies committing the offence, or an agreement cannot be reached, the matter must be brought back to the court for sentence (s 164 Youth Justice Act).

Presentence referral

- If the child does not participate, or during the process denies committing the offence, or an agreement cannot be reached, the matter must be brought back to the court for sentence.
- If an agreement is made, a copy of the agreement is given to the court and also information about what the child has done to comply with it, and the court will sentence the child taking into account their participation and compliance with the agreement (s 165 Youth Justice Act). The court can make an order that the child comply with the remainder of the agreement as part of the sentence (s 175(1)(da) Youth Justice Act).

Failure to participate or comply with the restorative justice process or agreement is treated the same as a breach of any other supervised community based order (see pt 7 div 12 Youth Justice Act).

Detention

The principle of detention being a response of last resort (a fundamental principle in the common law system) was reinstated into the Youth Justice Act in June 2016.

Magistrates can only sentence to a maximum of one year (s 175 Youth Justice Act) in detention and, in general, a judge up to two years. However, the length of a detention order can be significant, certainly in the context of a child's life. The maximum sentence of detention for a child for a serious offence (an offence if committed by an adult would have a maximum term of 14 years or more) is seven years (s 176(2) Youth Justice Act). A sentence of years at age 15 or 16 will have a significant impact on the child's life as this is at a critical developmental stage physically, mentally and socially and in terms of preparing for life in general (e.g. employment prospects).

If the offence is one for which an adult could be sentenced to life imprisonment, the child offender's sentence is up to 10 years. However, if the offence involved violence against a person and the court considers it particularly heinous, imprisonment can be for a period up to and including life

(s 176(3)(b) Youth Justice Act). Life in Queensland means for the term of the person's natural life, although the person may be released from custody to parole at some point.

Disqualification from holding or obtaining a driver licence

The *Traffic Act 1949* (Qld) and the *Transport Operations (Road Use Management) Act 1995 (*Qld) apply to children. A child who commits an offence for which an adult could be disqualified by a court from holding or obtaining a driver licence can be similarly disqualified by a court (s 254 Youth Justice Act).

A court can disqualify a child from driving at a time when they would not be able to obtain a licence because of their age. In this situation, the court will usually calculate the length of the disqualification by adding the period of time remaining until the child may obtain a provisional driver licence to the period of time which the court decides should represent the disqualification proper.

Infringement notices

A child who is at least ten years of age can be issued with an infringement notice and choose to pay the monetary penalty where it relates to a simple offence, including under an instalment arrangement. However, the provisions of the *State Penalties Enforcement Act 1999* (Qld) (Penalties Enforcement Act) relating to enforcement of payment, including an instalment arrangement, do not apply to young people under the age of 18 (s 6 Penalties Enforcement Act).

Young people are less likely to pay an infringement notice or to make arrangements to pay the fine by instalments (generally because they do not have capacity to pay). As a result, such matters will be referred to the police who can issue a complaint and summons or a notice to appear (noting that the police should consider the requirements of s 11 of the Youth Justice Act as mentioned above).

As such, young people are at greater risk than adults of being prosecuted in court for minor offences. Also those offences, once dealt with in court, may appear on a child's criminal history (at least for court purposes until they turn 18.

Compensation or restitution by the child offender

Where a child is found guilty of a criminal offence and sentenced by a court, the court may also order the child to make restitution or pay compensation for loss relating to a victim's property or injury to the victim or someone else (s 235 Youth Justice Act).

A court may make an order for compensation or restitution only if satisfied the child has the capacity to pay the amount (s 235(5) Youth Justice Act), and the amount of compensation ordered must not be more than $2374 (s 235(2)(b) Youth Justice Act).

Chapter 65A of the Criminal Code relating to civil compensation orders and the Criminal Offence Victims Act also apply to offences committed by children (s 256 Youth Justice Act).

Orders against a child's parents

Where a child is found guilty of an offence relating to the injury of a person or the property of another person, the parent of that child may be called on by a court to explain why ('show cause') the parent should not pay compensation to the victim (s 258 Youth Justice Act), but only if:

- the parent of the child may have contributed to the fact the offence happened by not adequately supervising the child and
- it is reasonable that the parent should be ordered to pay compensation for the offence.

If a parent is in court when the child is found guilty, the court may call on the parent there and then to explain (s 258(4) Youth Justice Act). Alternatively, the court may give the parent a written notice to attend a show cause hearing at a later date (s 258(6) Youth Justice Act).

The parent may be represented at the show cause hearing, provide evidence and make submissions to the court (s 259 Youth Justice Act). If the parent does not attend after a notice has been served on them, the court may deal with the matter in their absence (s 259(10) Youth Justice Act).

The amount of any compensation ordered depends on the parent's capacity to pay including an assessment of the affect any order would have on the parents' capacity to provide for dependants (s 259(9) Youth Justice Act).

An order for compensation against a parent is a civil debt and can be enforced by execution of judgment in the Magistrates Court (s 260 Youth Justice Act).

Convictions of child offenders

A court cannot record a conviction where the child is found guilty and sentenced to a reprimand or a good behaviour bond (s 183(2) Youth Justice Act).

It may consider whether or not to record a conviction in relation to all other sentences (s 183(3) Youth Justice Act).

In considering whether or not to record a conviction, a court must have regard to all the circumstances of the case, including:

- the nature of the offence
- the child's age and any previous conviction
- the impact the recording of a conviction will have on the child's chances of rehabilitation and finding or retaining employment (s 184 Youth Justice Act).

Recording of a conviction is not mandatory with a period of driver licence disqualification (ss 183, 254 Youth Justice Act).

If a child later goes to court as an adult for offences committed as an adult, the court cannot be told about childhood offences where a conviction was not recorded. That is, the child has the opportunity to leave their Childrens Court criminal history behind them.

Recorded and unrecorded convictions can be referred to by:

- the police or a Childrens Court when considering bail for a child where the child is alleged to have committed further offences
- a Childrens Court sentencing the child for any further offences committed as a child.

Appeals

Decisions of the Childrens Court magistrates are subject to the appeal provisions set out in pt 9 div 1 of the *Justices Act 1886 (Qld)* and can be appealed only to a Childrens Court judge (s 117(3) Youth Justice Act).

Decisions of a Childrens Court judge can be appealed to the Court of Appeal in accordance with ch 67 of the Criminal Code (s 116 Youth Justice Act).

The Youth Justice Act also provides the process for a child to have a sentence order by a magistrate reviewed by a judge of the Childrens Court of Queensland (s 117 Youth Justice Act).

Child Offenders in Detention

There are two youth detention centres in Queensland, the Brisbane Youth Detention Centre at Wacol in Brisbane and the Cleveland Youth Detention Centre in Townsville.

Some young people can be a long way from their homes and communities. This may make it difficult, if not impossible, for them to have personal contact with family and friends, which may affect their behaviour and how well they deal with situations and circumstances.

Transfer to prison

Currently a child ordered to serve a sentence of detention and who, as at their 18th birthday will have at least six months remaining on their sentence, will be subject to automatic transfer to an adult prison following their birthday (pt 8 div 2A Youth Justice Act). It is possible in some circumstances to apply for a temporary delay. It would be important for the young person to talk to their lawyer if they have particularly concerns about their transfer.

Visitors

The DCSYW is in charge of the detention centres. Departmental policy allows a child in a Queensland detention centre up to four visits a week. This is important as it means, for example, a child does not have to choose between contact with their family or meeting their lawyer.

Ordinary visitors

Detention centre staff have the power to:

- approve the entry of visitors
- refuse entry to a person who, in their opinion, would prejudice the security or good order of the centre and does not when requested:

    provide name, address, or proof of identity

    agree to an external search of their person or a search of anything in their possession

    comply with a direction considered necessary for the security or good order of the centre

- require a visit to be in the presence or under the supervision of a detention centre employee
- ask the visitor to leave for failure to comply with a search or direction (s 272 Youth Justice Act).

Legal practitioners

A legal practitioner representing a child held in a detention centre is entitled to access at all reasonable times. In practice, visiting can only take place on weekdays and booking a time is required.

Any interview with the child at the detention centre must be out of the hearing of other people, and correspondence between the child and the child's legal representative must not be opened, copied, removed or read (s 276 Youth Justice Act).

Community visitors

A youth detention centre is a 'visitable site' under the *Public Guardian Act 2014* (Qld). Through its community visitor scheme, the community visitor has a responsibility to regularly:

- inspect the centre and report on its appropriateness for the accommodation of the child or the delivery of services to the child
- ensure the child's needs are being met by staff members at the centre.

A child or a child living in a visitable site can contact a community visitor by phone, SMS message or email whenever they need to. They can also request a visit from the community visitor in addition to any regular visits.

Any request for a visit must be passed on and the community visitor must then make contact or visit as soon as can reasonably be arranged.

Complaints

A child in detention or their parent can complain about something that affects the child. The detention centre has a process for dealing with complaints, but the child can contact their lawyer, the community visitor of the centre or a child advocacy officer at the Office of the Public Guardian for help in making a complaint.

Lawyers Working with Young Offenders as Clients

Legal Aid Queensland has developed best practice guidelines for working with young people.

It must be understood, however, that taking instructions from, and working with, children and young people is not the same as for adults. It is important to understand individual young people's circumstances and situations as well as the more general context of brain, physical and emotional development.

Presence of adults at interviews

As the child is the client, wherever possible the child should be given the opportunity to be interviewed alone, in the absence of the parents or anyone else. There may be some things the child is

unwilling or reluctant to talk about in the presence of a parent or other person, which may therefore hinder the lawyer's ability to obtain full instructions.

Further, the parent or other person may tend to take over the interview, to speak on the child's behalf, or to put words into the child's mouth.

Nevertheless, some children, particularly younger ones, feel they need a parent or other person present during an interview as a support person. In such a situation it is suggested that the interview start in the presence of the other person with an explanation of the court process and of the lawyer's role. If sufficient understanding and rapport can be built up with the child in that time, it might then be suggested to the child that the parent or other person(s) leave the room prior to the taking of specific instructions.

There are situations where the child will continue to prefer the presence of a parent or other person, and times when this may be of assistance to the practitioner in building rapport and gaining understanding of the case. The practitioner must use their own judgment in deciding on the occasions when the presence of another person may be appropriate. In many cases they can provide valuable information and insights.

Where parents or others are kept waiting outside the interview room, it is often a good idea to bring them into the interview room at the conclusion of the interview so that the process, and any decisions arrived at, may be explained to them. This should be with the concurrence of the child.

Children's understanding of the legal process

Young people need to know that the lawyer takes instructions from the child, not from parents, police, youth justice services or any other adult. The lawyer is there to advocate on behalf of the child, to enable the child to have their say and their side of the story told. The lawyer has a duty of confidentiality, which means that nothing said by the child will be revealed or passed on to anyone else, including the court, police and parents, without the permission of the child.

Interviews should not be rushed. The lawyer should avoid legal jargon and language should be kept simple, but not patronising. Some young people are inarticulate and have difficulty in talking about and explaining even simple events. Furthermore, they may not understand the type of information required of them. It is useful to check from time to time that the client has an understanding of what is being explained or asked of them. One way to do this is to get them to explain in their own words what has just been said.

It is important when taking instructions that lawyers do not impose or imply moral judgments on what the child may have done. Reactions of shock or disgust may dissuade a child from giving full and accurate instructions. It is not the role of the lawyer to judge. However, the range of penalties available to the court should be thoroughly explained.

No interview should be concluded without giving the client proper opportunity to ask questions.

It frequently happens that children come out of court without any idea, or with the wrong idea, of what has happened. It is important that the lawyer ensures the child understands what has taken place

in court on that occasion, if and when the child must come back to court, any bail conditions and, where appropriate, the penalty and its implication.

The Youth Advocacy Centre has child-friendly information sheets that explain court process and sentences, which may be accessed by lawyers.

Taking instructions

Details of the events in question should be obtained to the same extent as if the client were an adult. Particular care should be given to exploring the circumstances surrounding any admissions or statements made by the client to police, whether at a police station or elsewhere.

Prior criminal history

The child should carefully check this record for accuracy. It is often useful to get particulars from a child about the nature of any prior matters on the record. Prior cautions and police-referred community conference agreements should not be referenced.

Bail

One of the most common problems in obtaining bail for children is the lack of stable accommodation. While homelessness is not a reason for refusing bail, the courts are often reluctant to grant bail if the child has nowhere to live. In such circumstances, the lawyer should explore the possibilities of the child returning home or residing with a relative. If this is not possible, the option of obtaining independent or refuge accommodation should be explored. This may be done through the youth justice services of the DCSYW or directly by the lawyer. In the greater Brisbane area, lawyers can contact the Youth Advocacy Centre's Youth Bail Accommodation Support Service.

With respect to bail conditions, while for some children this may be the only way to convince the court to grant bail, courts should not be allowed to impose conditions as a matter of course and should not make them so stringent that it will be virtually impossible for the child to comply.

Children and the Criminal Law—Tips for Parents

Having a child involved in the criminal legal process can be confronting. It is important that parents remember:

- if the police wish to question or even arrest your child, it does not mean that they have committed any offence or that they have committed the offence which the police are alleging. The facts may show that the child may have broken the law but not in the way or to the extent that is being alleged
- if the police come to your home, stay calm. If you are angry or upset with your child, now is not the time to deal with this
- you should ask the police what it is that they believe your child has done.

If the police want to search any part of your home or a car, they can only do so if they have a warrant or can give you some other reason as to why legally you must let them search (e.g. they think

evidence of an offence will be removed). Otherwise, it is your choice as to whether they can come in and search.

If they enter your home with or without a warrant, you should accompany the officers on their search. They may not like you doing this but you are entitled to do so.

If police take away any property belonging to you or your child, police must provide a receipt.

Police officers should give you their name and number, and the police station they are from if you ask them for that information so that you know whom you have been dealing with.

It is your child's choice if they want to answer questions other than giving their name, address and age, however, it would be useful for them to have some legal advice as to what is best to do in their situation.

The police can charge your child whether or not they interview them if the police believe they have the evidence to support the charge.

If your child is prepared to go to an interview but the time the police propose is not suitable, or your child would like some legal advice before being interviewed, you can negotiate a time to allow for this.

Think about whether you are the best person to be the support person for your child at a police interview at this time. Your role is to ensure that the interview is carried out appropriately by the police and you should be prepared to advocate for your child in this situation.

Parents also do not have to answer questions and care should be taken in case parents put themselves at risk of being charged with an offence. Parents may also need to seek legal advice.

Sometimes parents complain to, or call, the police about their child and the police then charge the child with an offence. There can be significant legal and non-legal consequences for the child in doing this. It may be better for parents to contact an agency to talk about the issues they are experiencing and attempt to resolve them without recourse to the law.

Legal Notices

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