

# Legal Studies

## Young Offenders – Lesson 1

Presented by Natasha Isbel

### Syllabus Dot Points:

- Age of criminal responsibility
- The rights of children when questioned or arrested
- Children's Court – procedures and operation

# Learn about/learn to

## Learn about:

- Age of criminal responsibility
- The rights of children when questioned or arrested
- Children's Court - procedures and operation

## Learn to:

- **Discuss** the issues surrounding the age of criminal responsibility
- **Explain** why young offenders are treated differently in the criminal justice system
- **Assess** the effectiveness of the criminal justice system when dealing with young offenders

## Relevant themes and challenges

- discretion, compliance, moral and ethics, law reform, balancing rights and effectiveness

# State of Australia's Young People – Report 2009

- A Commonwealth funded Report on the **social, economic, health and family lives** of young people
- A comprehensive picture of how young Australians are faring
- A **positive** picture
  - young people are important socially and economically
  - makes sense for governments to invest in lifting outcomes for all young people.
- Areas of concern
  - important role of families, education and employment in young people's development



Source: <https://pixabay.com/en/photos/young%20people/>

# Complexity of Youth Issues

Issues are **complex** and often, there are **multiple influences** on young persons' lives:

- education
- substance abuse
- broken families
- homelessness
- working families
- technology
- changing social and
- economic factors



Source: <http://www.pdpics.com/photo/2643-man-depressed-hoodie/>

# Who is a child in NSW?



Source: [https://commons.wikimedia.org/wiki/File:Little\\_Boy\\_Drawing.jpg](https://commons.wikimedia.org/wiki/File:Little_Boy_Drawing.jpg)

- A person under 18 years old
- **Historically** = limited say in key decisions affecting their lives, usually made by parent/carer.
- **Changing community values** about the **rights** of children and young persons = increased awareness and legal recognition e.g. education and financial independence
- Because children are a **vulnerable** group = increased responsibility on society/law to protect them and safeguard their rights
- Many children in the child protection system are also in the juvenile justice system

# Status of Children

- Australia = United Nations' Convention on the Rights of the Child (CROC) 1991 signatory.
- CROC:
  - defines a child = a human being under the age of 18 years
  - sets out a number of obligations in respect of those rights which signatory nations must follow e.g. right to protection from all forms of physical abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care or parents, legal guardians or any other person who has the care of the child.

BECAUSE  
EVERY CHILD  
IN THE WORLD  
HAS ONE THING  
IN COMMON.  
THEIR RIGHTS.

Source: [http://www.carnegiecouncil.org/publications/ethics\\_online/0095](http://www.carnegiecouncil.org/publications/ethics_online/0095)

# Young Offenders and the Law

Because of the **inexperience, immaturity and vulnerability** of children, the criminal law:

- recognises a **different level of responsibility** for them than it does for adult offenders
- provides a **separate system of criminal justice** (juvenile justice) from the adult system, which:
  - applies a higher level of **protection** and **assistance** for young offenders but still allows for serious punishments where necessary
  - combines a **welfare and justice model** = minimising formal intervention but increasing restorative justice opportunities and community reintegration

This area of the criminal justice process is **constantly evolving** in response to **changing community standards** about the welfare of young offenders e.g. late 1980's = introduction of legislation **diverting young offenders** from court and custody

# Youth Offenders



Source: [http://news.bbc.co.uk/2/hi/uk\\_news/110762.stm](http://news.bbc.co.uk/2/hi/uk_news/110762.stm)

- Often have complex **multi-faceted problems** requiring long term solutions = challenges for governments
- High risk of long-term disadvantage and social marginalisation = cycle of recidivism
- *R v Abrahams* (2013) and SMH 'Abuse and neglect putting children on path to crime' key quotes:
  - having been repeatedly assaulted by her alcoholic father and then shunted from one inappropriate home to another, Abrahams was, in the words of the sentencing judge, "the inevitable product of entrenched intergenerational failures".
  - recent survey of young people in juvenile detention in NSW that showed 81 per cent of women and 57 per cent of men had been abused or neglected.



# Who is responsible for juvenile justice in NSW



Source: <https://pixabay.com/en/policeman-officer-stop-cop-uniform-23796/>

- Primarily the **responsibility of state government**, with state legislation and state departments and facilities
- **3 key NSW Government Agencies:**
  - NSW Police
  - Juvenile Justice in the Dept of Human Services (Dept of Corrective Services only relevant when a incarcerated young offender turns 18)
  - AG in the Dept of Justice and AG =
    - operates specialist **Children's Legal Services** providing lawyers to represent and advise children appearing in criminal matters in specialist Children's Courts at Parramatta, Glebe, Campbelltown and Wollongong
    - free legal advice to young people in police custody via the **Youth Hotline** and to those in **Juvenile Justice Centres**

# Major Juvenile Justice NSW Legislation

No single piece of legislation regulating juvenile justice

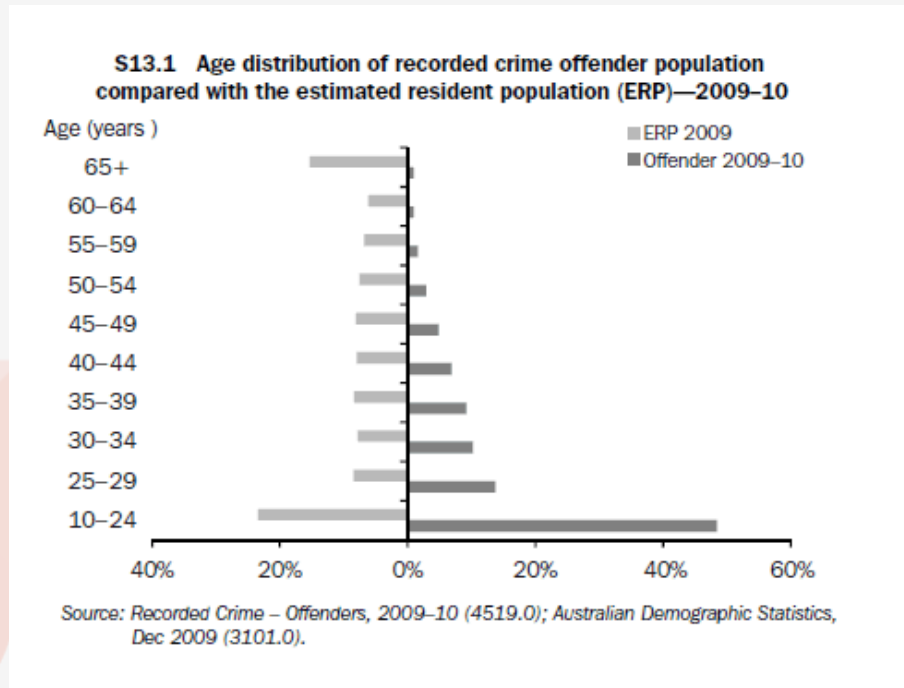
- Bail Act 2013 (NSW)
- Children (Criminal Proceedings) Act 1987 (NSW)
- Children's Court Act 1987 (NSW)
- UN Convention on the Rights of the Child Crimes (Sentencing Procedure) Act 1999 (NSW)
- Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)
- Young Offenders Act 1997 (NSW)

# Australian Institute of Criminology 2011 Report

Identifies **key trends in juvenile detention** in Australia:

- Substantial reduction in juvenile detention since 1981 but upward trend since 2004
- **Proportion remanded juveniles increased substantially** since 1981 but *Bail Act 2013 (NSW)* aims to reduce juvenile remand rate
- **Remand rate far higher for juveniles** than adults, possibly because more likely to come to attention of police as congregate in public/visible areas, inexperienced at instigating and committing crime
- Significant **over-representation of indigenous** juveniles = 23 times more likely than non-indigenous young offenders

# Young Offenders and Crime Statistics



Source: <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/1301.0Main+Features742012>

ABS Statistics = youth offenders demonstrate different types of offending to adults e.g. most common principal offence for youth offenders aged 10–24 was theft (21% of young offenders)

# Snapshot of NSW Young Offenders

- About 40% of young offender offences may be dealt with by **fine or infringement notice** - about 40% of offences are dealt with this way
- **Non-payment of fines** a huge issue = is this an effective approach?
- But law has been responsive to challenges here = new system of **Work and Development Orders** where debt can be 'worked off' e.g. voluntary work or approved courses/treatment
- Mental health and substance abuse issues often compound the **opportunistic** and **impulsive nature** of young offender crimes

## Major issues are:

- Often had a parent in/been in prison
- Unsettled accommodation
- Are parents themselves
- Subjected to physical and/or sex abuse and/or neglect
- Ear infections
- Left school early
- Low average IQ
- Mental health issues
- Suicidal thoughts/anxiety

# Age of Criminal Responsibility

Age at which person allegedly commits an offence is critical

- < 18 years when commit offence = dealt with in **juvenile justice system** up until they turn 21
- > 18 years when they commit an offence = **adult criminal system**

**Exceptions:**

- Traffic offences (Local Court)
- Commit serious offence e.g. rape, murder (District & Supreme)

Law provides for a **transition** from no criminal responsibility at a young age to full responsibility on maturity

- < 10 years = minimum age criminal responsibility as per *Children (Criminal Proceedings) Act 1987 NSW*; can't be charged with a criminal offence
- 10 and 13 years (inclusive) = *doli incapax* applies
  - presumed to be incapable of forming the relevant criminal intent//*mens rea*
  - rebuttable presumption is the starting point = onus on prosecution to prove that they knew what there were doing was seriously wrong and not merely naughty.
- 14 years and older = capable of forming criminal intent

# R v LMW (1999) NSW – Corey Davis Case

- A 10 year-old boy, LMW, charged with the manslaughter of 6 year-old Davis, who drowned after accused dropped him into Georges River knowing that he was unable to swim.
- Accused found not guilty of manslaughter as jury accepted defence that the drowning had been a childish prank gone wrong, done by a boy with a very low IQ who did not comprehend the consequences of his actions.
- This case raised the issue of *doli incapax*, which presumes any child aged 10-14 is incapable of criminal intent unless proven otherwise.

Source: LIAC Crime Library NSW State Library

# Retention of Doli Incapax



Source: [https://en.wikipedia.org/wiki/Murder\\_of\\_James\\_Bulger](https://en.wikipedia.org/wiki/Murder_of_James_Bulger)

- UK Case – in 1993 in the middle of a busy shopping centre, two 10 year old boys abducted, assaulted and killed a 2 year old James Bulger; Both found guilty of murder as prosecution successfully rebutted the presumption of *doli incapax*
- Intense **media coverage** and **community debate** about whether the concept of *doli incapax* should be retained
- Law subsequently reformed and rebuttal presumption of *doli incapax* now removed from UK law.



# Fact Check

An 8-year-old cannot be charged with a criminal offence because there is an absence of...

A. mens rea

B. causation

C. actus reus

D. strict liability

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(BOSTES 2011 Specimen Paper Q9  
Multiple choice)

# The rights of children and young people when questioned or arrested

- Most police powers = *Law Enforcement (Powers and Responsibilities) Act 2002* – still applies to young offenders
- Due to the **vulnerabilities** of children and young people, **additional/special protections** (that adults don't get) are provided when police:
  - a. Question young people
  - b. Arrest and interrogation them



Source: [https://en.wikipedia.org/wiki/Childhood#/media/File:Children\\_at\\_the\\_Bannu\\_Jail.jpg](https://en.wikipedia.org/wiki/Childhood#/media/File:Children_at_the_Bannu_Jail.jpg)

# a. Questioning of Young People

Summary Offences Act 1988 (NSW) = enables police to stop and require provision of details of a person if suspected of being <18 and carrying/consuming alcohol in a public place without adult supervision or reasonable excuse

When a young person is:

- arrested, police must:
  - advise them that they are being arrested and why; and
  - obtain details of young person's parent/guardian and contact them as soon as possible
- questioned/interrogated by police:
  - they can refuse to answer questions (right to silence); and
  - a responsible adult/appropriate support person must be present during police interview = to ensure investigation conducted appropriately and assist children with communication/knowing their rights

# Case Study - Appropriate Support Person

*R v Phung and Hunyh 2001*

- 17 yr old Phung = suspected armed robbery, fatal shooting. Arrested by police, 2 interviews conducted = Phung made admissions
- Interviews ruled inadmissible because police didn't act according to required procedure i.e. failed to provide an **appropriate** support person for Phung
  - 1<sup>st</sup> interview = 21 yr old cousin with poor English
  - 2<sup>nd</sup> interview = Salvation Army officer/stranger who didn't have the chance to talk privately
- Judge found the support people didn't understand significance of charges Phung faced nor gave any advice about his rights (e.g. to silence/get legal advice)

# Police Searches – Young Offenders



Source: <http://www.telegraph.co.uk/news/uknews/scotland/11393532/Police-Scotland-considers-ending-stop-and-search.html>

Police search powers same as for adults except for strip searches = never performed on a child <10; children = 10-18, responsible adult must be present during search; done only in exceptional circumstances.

Police can stop and search a person:

- If police suspect on reasonable grounds that that person is carrying drugs, stolen goods, something about to be used to commit an offence or a knife or other dangerous implement
- without reasonable suspicion, if the person consents = because police might “ask” a young person to submit to a search without telling them they have the right to refuse
- Types of searches: frisk search, empty pockets/look in bag, open mouth, strip search
- Must follow CRIME protocol and respect privacy

## b. Arrest and Interrogation

Police powers to lawfully arrest a young person are the same as for an adult = police: know or believe on reasonable grounds that the person has or is about to commit an offence; **or** have a warrant for the person's arrest.

Police must inform the suspect of their right to contact Legal Aid; is a free Youth Hotline run by Legal Aid

During police interview:

- child/young person must have support person present
- caution must be given by police in presence of support person
- Detention - same time limit as for adults = 4 hours; 8 hours extension with a warrant
- Fingerprints/photos:
- If <14, Children's Court order required
- 14 and over, only for identification purposes
- DNA Samples - for those <18, Children's Court order required

# Children's Court – procedures and operation

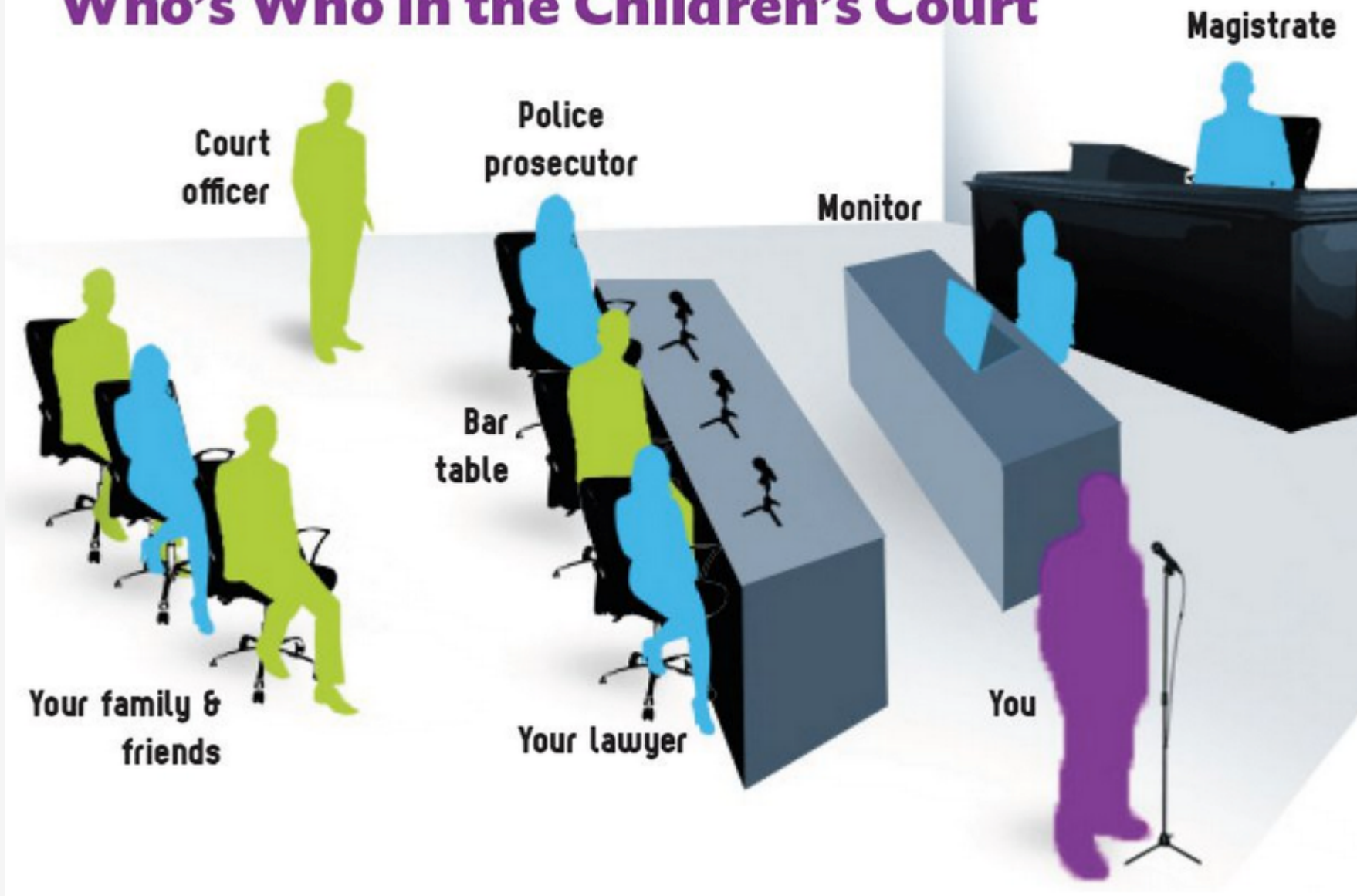
- **Specialised court** = *Children's Court Act 1987 (NSW)* outlines jurisdiction and procedures
- Various locations around NSW
- **Dual role:**
  - ✓ **criminal** = children/young people
    - ✓ <18 when charged or
    - ✓ <21 when charged for an offence committed when <18
    - ✓ Matter couldn't be dealt with under *Young Offenders Act 1997 (NSW)*
  - ✓ **care and protection** = children/young people referred to it by the Department of Family and Community Services.
- **Criminal jurisdiction:**
  - Any **offence other than a serious indictable offence** (murder, manslaughter, armed robbery, sexual assault are heard in a higher court) committed by a child
  - **Committal proceedings** for any indictable offence (including serious ones) where the accused is a child

# Children's Court - Differences

- Processes are similar to adult court – plea, trial, verdict and sentencing
- Less formal proceedings – magistrate, no jury
- Emphasis on protection of identity and privacy of young person = focus on rehabilitation and community re-integration
- Achieved by closed to public/ media reporting restrictions = child's name/photo can't be published w/o the consent of the child (if over 16) or court (if under 16)
- Must have legal representation – legal aid available to all children
- Support person present or court may appoint a youth worker



# Who's Who in the Children's Court

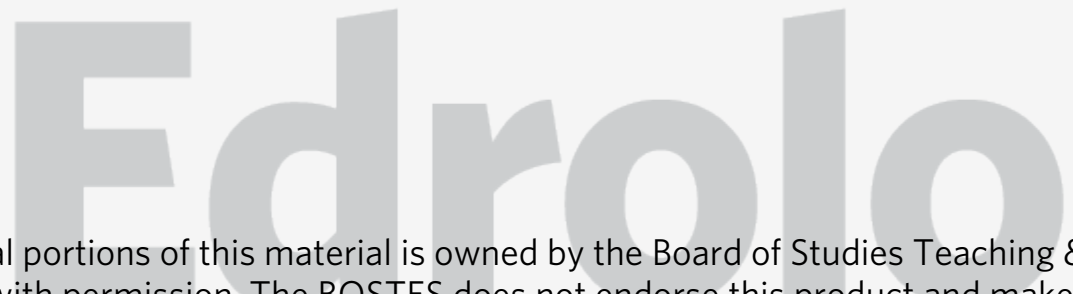


Source: <http://www.legalaid.nsw.gov.au/publications/factsheets-and-resources/get-court-smart/what-happens-at-the-childrens-court>

# Recap – what you need to be able to do

- Discuss the issues surrounding the age of criminal responsibility
- Explain why young offenders are treated differently in the criminal justice system
- Assess the effectiveness of the criminal justice system when dealing with young offenders

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