

Young offenders

Young offenders are those offenders under the age of 18-years when they commit offences. The criminal law needs to recognise that children and young people are in a special category in regards to the law on account of their inexperience, impressionability and immaturity. The *UN Convention of the Rights of the Child*, Article 40 specifically addresses the rights of children if arrested and charged. Article 37(b) says that imprisonment should only be used as a punishment of last resort.

Around Australia all jurisdictions treat children and young people as those under the age of 18-years (except Queensland, where the age is 17-years) and has laws specific to offenders who are not yet adults. In NSW the laws include:

- *Young Offenders Act 1997 (NSW)*
- *Children (Criminal Proceedings) Act 1997*
- *Children (Detention Centres) Act 1987*
- *Law Enforcement (Powers and Responsibilities) Act 2002*

Clearly, the first three laws listed above are specific to minors involved in the criminal justice system. The *Law Enforcement (Powers and Responsibilities) Act* is not specific to minors, but does have aspects that directly affect the treatment of young persons who are arrested, questioned and charged.

There are several different aspects to young offenders and the criminal justice system that are relevant:

- The age of criminal responsibility
- The rights of children when questioned or arrested
- The role, procedures and operations of the Children's Court
- The various sanctions or penalties that apply to children
- Alternative sentencing options that apply for children

Age of criminal responsibility

International law prescribes that each state must decide an age under which criminal liability cannot be found. In Australia (every jurisdiction) that age is 10 years.

Children (Criminal Proceedings) Act 1987 - s5 - Age of criminal responsibility

It shall be conclusively presumed that no child who is under the age of 10 years can be guilty of an offence.

Source: http://www.austlii.edu.au/au/legis/nsw/consol_act/cpa1987261/s5.html

The principle of *doli incapax*

The statutory threshold for criminality is to be age 10-years. Below this age it is understood that a child cannot form the requisite mens rea for an offence to be proven.

However, between the age of 10 and 14-years the common law allows the presumption of criminal responsibility to be challenged. This has been affirmed in recent cases in NSW including in two unreported cases: *R v LNW* (1999) SC and *R v CRH* (1996) CCA. That is, the presumption is rebuttable. Generally this means that a child under the age of 14-years may not be found guilty of an offence. There are specific legal rules that will be applied to determine whether a child between 10 and 14 years should be deemed criminally liable. These rules, per Newman J include:

- The prosecution must rebut the presumption of *doli incapax* as an element of the prosecution case.
- The child knew the act was seriously wrong as opposed to naughty.
- The evidence relied upon by the prosecution must be strong and clear beyond all doubt or contradiction.
- The evidence to prove the accused's guilty knowledge, as defined above, must not be the mere proof of doing the act charged, however, horrifying or obviously wrong the act may be.
- The older the child is the easier it will be for the prosecution to prove guilty knowledge.

Criminal records

A common question that arises is whether a child's criminal record can carry forward to their adult life. The answer lies in the *Criminal Records Act 1991* (NSW). After 3 years the record can be cleared ('expunged') however there are particular requirements that must be fulfilled as shown in the extract below.

Criminal Records Act 1991 - s10 - What is the crime-free period for orders of the Children's Court?

(1) The crime-free period in the case of an order of the Children's Court under section 33 of the *Children (Criminal Proceedings) Act 1987* (other than a finding or order referred to in section 8 (2) or (3) of this Act) in respect of a person is any period of not less than 3 consecutive years after the date of the order during which:

- a. the person has not been subject to a control order, and
- b. the person has not been convicted of an offence punishable by imprisonment, and
- c. the person has not been in prison because of a conviction for any offence and has not been unlawfully at large.

Source: http://www.austlii.edu.au/au/legis/nsw/consol_act/cra1991167/s10.html

The rights of children when questioned or arrested

The main law that details the rights of those when questioned or arrested in the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) or LEPRA. The relevant aspects of the Act in respect of minors are listed below:

■ LEPRA

- Arrest – use of 'reasonable force' only (ss230 and 231)
- Caution (s122)
- Must disclose name and address (Part 3 – Identity must be disclosed)
- 4 hours questioning - s115(4)
- Right to communicate with a relative, friend, guardian, independent person and legal practitioner (s123)
- Right to an interpreter (s128), to medical attention (s129), reasonable refreshment (s130)
- Power to search and seize (s87)
- Right to access a legal practitioner - legal aid (s123)

These rights under LEPRA are very significant in protecting children and young people from the power of law enforcement officials. The *Children (Criminal Proceedings) Act 1987* also provides protections for children. One such protection is detailed in s13 (extract shown below). Section 13 is very important as it will not allow the admissions of evidence in any proceedings where the evidence given was made without a responsible adult or legal practitioner present.

Children (Criminal Proceedings) Act 1987 - s13 - Admissibility of certain statements

1. Any statement, confession, admission or information made or given to a member of the police force by a child who is a party to criminal proceedings shall not be admitted in evidence in those proceedings unless:
 - a. there was present at the place where, and throughout the period of time during which, it was made or given:
 - i. a person responsible for the child,
 - ii. an adult (other than a member of the police force) who was present with the consent of the person responsible for the child,
 - iii. in the case of a child who is of or above the age of 14-years an adult (other than a member of the police force) who was present with the consent of the child, or
 - iv. an Australian legal practitioner of the child's own choosing

Source: http://www.austlii.edu.au/au/legis/nsw/consol_act/cpa1987261/s13.html

Other protections

LEPRA - s34 – states that children under the age of 10-years cannot be strip searched.

LEPRA - s136 – states that children under the age of 14-years cannot be photographed, have fingerprints or palm prints taken unless authorised by a court.

Law Enforcement (Powers and Responsibilities) Act 2002 - s136 - Identification particulars of children under 14 years

1. This section applies to a child under the age of 14 years who is in lawful custody for an offence.
2. A person must not take a photograph or the finger-prints or palm-prints of a child except in accordance with this section. Nothing in this section, however, prevents the taking of any child's photograph, finger-prints or palm-prints in accordance with the order of a court under section 134.
3. A police officer of the rank of sergeant or above may, in respect of a child, apply:
 - a. to the Children's Court, or
 - b. if it is not possible to apply to the Children's Court within 72 hours after the taking of the child into custody, to a authorised officer, for an order authorising, for the purpose only of identifying the child, the taking of the child's photograph, finger-prints and palm-prints.

Source: http://www.austlii.edu.au/au/legis/nsw/consol_act/leara2002451/s136.html

Children's Court – procedures and operation

In NSW there is a specialist court that hears matters where children are the alleged offenders. Section 28 of the *Children (Criminal Proceedings) Act 1987* details the jurisdiction of the Children's Court. It states that the Court is authorised to hear offences involving children under the age of 18-years with respect to summary matters, committals and indictable offences that can be tried summarily. It further allows that a person committing an offence under the age of 18-years, who is still under the age of 21-years can have matters heard in the Children's Court.

About the Court

The NSW Children's Court was established in 1905. It is an informal court presided over by a magistrate. The magistrate who hears matters in this court will have undertaken special training in adolescent psychology. The court is a 'closed' court in the sense that the names of children are repressed and cannot be reported in the media. The restriction on publishing and broadcasting the names of those subject to proceedings in the Children's Court is detailed in s15A of the *Children (Criminal Proceedings) Act 1987*.

Further protections for children are detailed in s12 (below). This section tells the court that a child subject to proceedings must have those proceedings explained and understood by the child.

Children (Criminal Proceedings) Act 1987 - s12 - Proceedings to be explained to children

1. If criminal proceedings are brought against a child, the court that hears those proceedings must take such measures as are reasonably practicable to ensure that the child understands the proceedings.
2. The Children's Court shall, if requested by the child or by some other person on behalf of the child, explain to the child:
 - a. any aspect of the procedure of the Children's Court, and
 - b. any decision or ruling made by the Children's Court, in or in relation to the proceedings.
3. A court shall give the child the fullest opportunity practicable to be heard, and to participate, in the proceedings.

Source: http://www.austlii.edu.au/au/legis/nsw/consol_act/cpa1987261/s12.html

Penalties for children

The range of penalties that can be imposed on a child by the Children's Court are detailed in s33 of the *Children (Criminal Proceedings) Act*. If a child has committed an indictable offence that is heard in the intermediate or superior court then the penalties are in the *Crimes (Sentencing Procedure) Act*.

Children (Criminal Proceedings) Act 1987 - s33 - Penalties

1. If the Children's Court finds a person guilty of an offence it shall do one of the following things:
 - a. it may make an order:
 - i. directing that the charge be dismissed (with or without a caution) or
 - ii. discharging the person on condition they enter into a good behaviour bond of 2 years or less,
 - c. it may make an order imposing on the person a fine, not exceeding: 10 penalty units (\$1,100)
 - i. it may make an order releasing the person on condition that the person complies with an outcome plan determined at a conference held under the *Young Offenders Act 1997*,
 - ii. it may make an order adjourning proceedings against the person to a specified date (being an adjournment for a maximum period of 12 months from the date of the finding of guilt), and granting bail to the person in accordance with the *Bail Act 1978* :
 - d. it may make an order releasing the person on probation, on such conditions as it may determine, for a period of time, not exceeding 2 years, as it thinks fit,
 - e. it may, subject to the provisions of the *Children (Community Service Orders) Act 1987*, make an order under s5 of that Act requiring the person to perform community service work,
 - f. it may make an order committing the person for such period of time (not exceeding 2 years) as it thinks fit:
 - i. in the case of a person who is under the age of 21 years, to the control of the Minister administering the *Children (Detention Centres) Act 1987*, or
 - ii. in the case of a person who is of or above the age of 21 years, to the control of the Minister administering the *Crimes (Administration of Sentences) Act 1999*.
2. Before making an order imposing a fine on a child, the Children's Court is to consider the age of the child and the following matters, where information is available in relation to those matters:
 - a. the child's ability to pay the fine,
 - b. the potential impact of the fine on the rehabilitation of the child.
3. Nothing in this section limits or affects any power that the Children's Court may have apart from this section:
 - a. to impose any disqualification under the road transport legislation on a person whom it has found guilty of an offence,
 - b. to order the forfeiture of any property that relates to the commission of an offence of which it has found a person guilty, or
 - c. to make an order for restitution of property under s43 of the *Criminal Procedure Act 1986*, or
 - d. to make a community clean up order in respect of a fine imposed for an offence under the *Graffiti Control Act 2008*.

Source: See: http://www.austlii.edu.au/au/legis/nsw/consol_act/cpa1987261/s33.html

Note however, that the *Young Offenders Act 1997* gives direction in regards to the approach authorities should have with respect to crime and punishment for young offenders.

Alternatives to court

The international law through the *Convention on the Rights of the Child* and also the domestic law as exemplified in NSW through the *Young Offenders Act*, both articulate that the least restrictive form of sanction is to be applied against a child alleged to have committed an offence - *Young Offenders Act 1997 – s7(a)*.

Young Offenders Act 1997 - s3 - Objects of Act

The objects of this Act are:

- a. to establish a scheme that provides an alternative process to court proceedings for dealing with children who commit certain offences through the use of youth justice conferences, cautions and warnings, and
- b. to establish a scheme for the purpose of providing an efficient and direct response to the commission by children of certain offences, and
- c. to establish and use youth justice conferences to deal with alleged offenders in a way that:
 - i. enables a community based negotiated response to offences involving the affected parties, and
 - ii. emphasizes restitution by the offender and the acceptance of responsibility by the offender for his or her behaviour, and
 - iii. meets the needs of victims and offenders, and
- d. to address the over representation of Aboriginal and Torres Strait Islander children in the criminal justice system through the use of youth justice conferences, cautions and warnings.

Source: http://www.austlii.edu.au/au/legis/nsw/consol_act/yoa1997181/s3.html

Young Offenders Act 1997 - s7 - Principles of scheme

The principles that are to guide the operation of this Act are as follows:

- a. The principle that the least restrictive form of sanction is to be applied against a child who is alleged to have committed an offence.
- b. The principle that 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.
- c. The principle that criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter.
- d. The principle that 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. The principle that, 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 and to sustain family and community ties.
- f. The principle that parents are to be recognised and included in justice processes involving children and that parents are to be recognised as being primarily responsible for the development of children.
- g. The principle that victims are entitled to receive information about their potential involvement in, and the progress of, action taken under this Act.
- h. The principle that 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.

Source: http://www.austlii.edu.au/au/legis/nsw/consol_act/yoa1997181/s7.html

Rather than subject minors to court processes the YOA allows a system of warning, cautions and conferencing. These alternatives aim to integrate an understanding of the immaturity of young offenders and the need to emphasise and encourage rehabilitation rather than retribution. The system of warnings, cautions and conferencing is now detailed.

Warnings and Cautions

Warnings

Warnings apply for trivial offences, (e.g. swearing in public) where there has been no violence or other related issues. A warning might be delivered in the following way:

"My name is Constable I am from Local Area Command. You have been heard to be swearing in an offensive manner. I am warning you under the provisions of the Young Offenders Act for this matter. I am required to record your details (name, address and date of birth). A record of this warning will also be kept on the police computer system. However, it cannot be used as a record of criminal history. Any further offending behaviour could result in formal action being taken.

Do you understand?

Do you have any questions?"

Cautions

Cautions apply to more serious offences such as damage to property and stealing. To receive a caution, the young offender must admit the offence and agree to be cautioned. Police will assist the young offender to access legal advice prior to being interviewed in the presence of an appropriate adult (parent/carer, adult nominated by parent/carer or young person if over 16 years, legal representative). With a caution, the young person meets a police officer or community member at the police station and considers what they have done. An adult responsible for the young person must be present during the caution.

Cautions can take up to an hour and may involve a written apology to the victim. A caution will generally involve the following steps:

- Introductions.
- Explanation of the reason for the caution.
- Exploration of the offence - what happened; why; impact of offence on young person, family or support people, victim and community; and consequences of future offending.
- Cautions for drug matters might include discussion of health, social and legal implications of illicit drug use and the provision of written information.
- Identify how to avoid future offending and acknowledge that a formal police record exists for the matter

Source: http://www.police.nsw.gov.au/_data/assets/pdf_file/0004/106789/brochure_young_offenders_act.pdf

Youth Justice Conferences

At a Youth Justice Conference a young offender, with his or her family, is brought face-to-face with the victim, and the victim's support group, to hear about the harm caused and to take responsibility for their actions. Together, the people at the conference agree on a suitable outcome for the crime that can include an apology, reasonable reparation to the victim and steps to link the young offender back into the community. Youth Justice Conferences are based on the idea that when a young person offends, they cause hurt, loss or damage to members of the community. The conference option, unlike warnings, cautions or court, helps young offenders take steps towards directly repairing the harm they have caused to victims.

A conference may be held if:

- the offence is covered by the *Young Offenders Act 1997* (NSW);
- the young offender has admitted to the offence and agreed to participate; and
- a warning or caution is not appropriate because of the seriousness of the offence, degree of violence, harm caused to the victim or the offender's criminal history.

Who decides to hold a conference?

- Specialist Youth Officers from NSW Police
- Office of the Director of Public Prosecutions (ODPP)
- The Court

Why hold a conference?

The Police, Office of the Director of Public Prosecutions or a Court may decide that a Youth Justice Conference is the most appropriate option to deal with a young offender.

A conference provides a forum where the young offender must acknowledge and accept responsibility for the results of their actions.

- A conference returns decision-making power to families of the young offender and identifies support mechanisms for the young person to prevent future offending.
- A conference recognises and gives importance to victims as well as involving them in decisions relating to offences against them.

Who may attend a conference?

- The young offender
- The victim or a representative
- The conference convenor
- An adult responsible for the young offender and someone of the young offender's choice
- Members of the offender's family or extended family
- Family/support group of the victim
- The investigating police officer and specialist police youth officer
- An Australian legal practitioner advising the young offender
- A trainee police officer
- A cultural adviser or developmental specialist if appropriate
- A supervising officer if the young offender is under probation or a court order
- If the young offender attends school, a representative from that school
- An approved observer

Source: http://www.djj.nsw.gov.au/pdf_htm/publications/yjc/YJCBrochure.pdf

Review Activities – Young offenders

1. Who is classified as a young offender?
2. Identify FOUR (4) laws that are either specific to young offenders or have aspects that are specific to young offenders.
3. What is the age of criminal responsibility in every jurisdiction in Australia?
4. Explain the principle of *doli incapax*.
5. List SIX (6) aspects of the *Law Enforcement (Powers and Responsibilities) Act 2002* relevant to young offenders.
6. Will a statement made by a child be admissible if when it was made without an adult or Australian legal practitioner present? Explain.
7. What are the rules in regards to children under age 10-years and strip searches?
8. Why must an authorised officer or court allow identification of children under the age of 14-years?
9. Identify the specialist court for young offenders.
10. Detail the role of the Children's Court.
11. Outline THREE (3) relevant procedures of the Children's Court.
12. List FOUR (4) penalties for children available under the *Children (Criminal Proceedings) Act 1987*.
13. Name the law that identifies alternatives to court for children.
14. Distinguish between warnings and cautions.
15. Summarise the role and purpose of Youth Justice Conferences.