

# The Shopfront

## YOUTH LEGAL CENTRE

---

### Criminal Procedure - an overview

---

#### 1 Police investigation or arrest

Most criminal prosecutions are initiated by the police (although some proceedings are commenced by the Director of Public Prosecutions or other government agencies such as local councils, Workcover, RailCorp, or the Roads and Traffic Authority).

Police often arrest the suspect and/or conduct some sort of investigation before commencing proceedings.

##### 1.1 Arrest

**Arrest** means taking a person into police custody, usually to a police station.

Police may arrest someone if they catch them in the act of committing an offence or suspect on reasonable grounds that the person has committed an offence. Police may also arrest a person for breaching their bail conditions, or if there is a warrant for the person's arrest (usually for failing to appear at court, breaching parole, etc).

There is a limit on how long police may detain a person under arrest before taking action (e.g. issuing a court attendance notice, issuing a penalty notice, taking action under the *Young Offenders Act*, or releasing the person without charge).

It is possible to commence criminal proceedings against a person *without* arresting them. **Arrest must be used as a last resort**, where police believe it is necessary in order to get the person to court, to prevent them committing further offences, to stop them interfering with witnesses, etc.

##### 1.2 Police questioning

The police will often want to interview a suspect before deciding what action to take against them. Police often interview a person after arrest, but there is no need to arrest a person in order to interview them.

**Whether you are under arrest or not, answering police questions is voluntary** (except in relation to certain traffic offences, drug importation, terrorism, etc).

If a **person aged under 18** is being interviewed by police, there must be an independent adult present. If not, any answers the young person gives usually cannot be used against them in court.

For more information about arrest, police powers and questioning, see the separate documents on *Police powers and your rights* and *Attending police interviews with an under 18 year old*.

---

## 2 Alternatives to court proceedings

### 2.1 Penalty notices

For some types of offences, usually less serious ones that do not carry a sentence of imprisonment, the police or other authority may issue a penalty notice (on-the-spot fine) instead of commencing court proceedings.

A person who receives a penalty notice may elect to challenge it in court.

For more information, see the separate document on *Fines*.

### 2.2 Diversionary options for juveniles

Some kinds of offences committed by people under 18 can be dealt with under the *Young Offenders Act*. This means that a young person can be warned, cautioned or sent to a youth justice conference instead of going to court.

For more information, see the separate document on the *Young Offenders Act*.

---

## 3 Court Attendance Notice

If police decide to commence criminal proceedings (often referred to as “laying charges”) they will give the person a **Court Attendance Notice (CAN)**. A CAN may be issued with or without the person being arrested first.

A person who has been issued with a CAN is called the **accused** or **defendant**.

A CAN sets out the court date, place, and a brief description of the alleged offence. Unless the defendant is refused bail, the **first court date** will usually be about 3-4 weeks after the CAN is issued.

There are basically two types of CAN:

- a “**bail CAN**”, which means the defendant may be **granted or refused bail**. If granted bail, the defendant must sign a bail undertaking which may have conditions attached. The defendant has to appear personally at court and can be charged with “fail to appear” if he or she does not turn up.
- a “**no bail CAN**”, “**field CAN**”, or “**future CAN**” where **bail is dispensed with**, meaning that the defendant is free until their court date with no conditions attached. The defendant can send a lawyer to court in their place (at least on the first occasion) and cannot be guilty of the offence of failing to appear. These types of CANs are normally used for less serious offences, where there are no concerns about the defendant failing to appear or re-offending.

---

## 4 Bail

If the police decide to commence court proceedings, they must decide whether to **dispense with bail**, **grant bail** or **refuse bail**.

Bail may be unconditional or subject to **conditions**, e.g. to put up money, to live at a certain address, to report to the police station on certain days.

A person may be granted bail by the **police** straight away. If the police refuse bail, the person must be taken to **court** as soon as possible (the same day or the next morning) and has another chance to apply for bail.

If bail is **refused** by the court, the defendant may re-apply for bail in the same court again if they can show that there are new facts or circumstances. Alternatively the defendant may apply for bail to the **Supreme Court**.

A defendant can also apply to the court to vary bail **conditions** (e.g. to change the police station they report to).

For further information, see separate document on *Bail*.

---

## 5 Which court?

### 5.1 Summary offences – Local or Children’s Court

A summary offence is a relatively minor offence which is always dealt with by a **magistrate** (as opposed to a judge and jury).

Adults accused of summary offences will appear in the **Local Court**.

Children (aged under 18 at the time of the alleged offence and under 21 when charged) will appear in the **Children’s Court**.

### 5.2 Indictable offences – District or Supreme Court

An indictable offence is a more serious offence, traditionally tried by a judge and jury in a **superior court** (ie. the District or Supreme Court).

Many types of indictable offences can actually be **dealt with summarily** – ie finalised by a magistrate in the Local or Children’s Court.

Some offences are **strictly indictable**, which means they cannot be finalised by a magistrate. These matters usually go to the **District Court**, except for extremely serious offences such as murder, which go to the **Supreme Court**.

Proceedings for strictly indictable offences commence in the Local or Children’s Court, where they go through **committal** proceedings before being sent to the District or Supreme Court.

---

## 6 Court procedure – Local and Children’s Court

### 6.1 Plea

The defendant must enter a **plea** of **guilty** or **not guilty**. The plea may be entered on the first court date, or the court may allow the defendant a 3-4 week **adjournment** to obtain legal advice.

There are some situations where the defendant does not have to enter a plea, for example, if making an application to be dealt with under section 32 of the *Mental Health (Forensic Provisions) Act*), or if seeking a referral to a program such as MERIT.

### 6.2 Guilty plea

A defendant who pleads guilty may be **sentenced** on the same day, or the matter may be **adjourned** to allow the defendant more time to prepare or to obtain reports. See the section on *Sentencing* below.

### 6.3 Not guilty plea

If the defendant pleads **not guilty**, in all but the most trivial cases the court will **adjourn** the matter for about 4-6 weeks and order the police to provide a **brief of evidence**. The brief contains witness statements and other evidence the police intend to rely on (e.g. photographs, fingerprint evidence, video footage).

After receiving the brief, if the defendant maintains their plea of not guilty, the matter will be set down for **hearing** on another date. This may be several months away, especially if there are a lot of witnesses involved.

A hearing in the Local or Children's Court is before a **magistrate** without a jury.

If the prosecution is unable to prove its case **beyond reasonable doubt**, the defendant is found **not guilty**.

If found **guilty**, the defendant is said to be **convicted**. **Sentencing** will follow, either immediately or at a later date.

### 6.4 Diversionary and treatment programs

At Local (and, to a lesser extent, Children's) Courts there are a range of programs available for eligible offenders.

These include Traffic Offender Programs, MERIT (Magistrates' Early Referral Into Treatment), Rural Alcohol Diversion, the Adult Drug Court, the Youth Drug and Alcohol Court, and Community Conferencing for Young Adults.

In most cases, court proceedings are adjourned while the defendant participates in the program. Successful completion usually results in a more lenient sentence.

## 7 Court procedure – District and Supreme Court

### 7.1 Committal proceedings in Local or Children's Court

A defendant charged with a strictly indictable offence will first appear in the Local or Children's Court. A **brief of evidence** will be provided without the defendant having to enter a plea.

The magistrate will then conduct **committal proceedings** to determine whether there is enough evidence for the matter to proceed to the District or Supreme Court.

The most common procedure is a **paper committal**, in which the magistrate simply reads the brief of evidence. In some cases, the defendant may be entitled to have a contested **committal hearing**, where prosecution witnesses are questioned in order to test the strength of the prosecution case. If the case is very weak, the defendant may be **discharged** at committal and the matter will not proceed any further.

If the magistrate believes there is sufficient evidence, the defendant will be **committed for trial** (or, if the defendant decides to plead guilty, **committed for sentence**).

### 7.2 Trial

A defendant who pleads not guilty will appear at a **trial** before a **judge and jury** in the District Court or Supreme Court.

As with a defended hearing in the Local Court, the prosecution must prove its case beyond reasonable doubt. Failure to do so will result in the defendant being found **not guilty (acquitted)**.

If found **guilty**, the defendant is **convicted** and **sentencing** will follow, either immediately or at a later date. Sentencing is performed by a **judge** without a jury.

### 7.3 Guilty plea

Instead of going to trial, a defendant may plead guilty at any time and will be **sentenced** by a **judge** without a jury.

## 8 Sentencing

Sentencing means imposing a penalty on a person who pleads (or is found) **guilty**. For relatively minor matters, this often happens straight away.

For more serious matters or repeat offences, the court will often order a **pre-sentence report** from the Probation and Parole Service (for adults) or a **background report** from the Department of Juvenile Justice (for children). This will usually require the matter to be adjourned for 6 weeks (or a shorter time if the defendant is in custody). Some Local Courts have duty probation officers who can prepare a report on the same day if the matter is not complex. A pre-sentence or background report is essential if the defendant wishes to be assessed for certain options such as community service or an intensive correction order.

The defendant may also hand up **references** or **reports** from other people such as employers, youth workers, counsellors or psychiatrists. These reports, along with the submissions put to the court by the defendant or their solicitor, will try to convince the court to impose a more lenient or appropriate sentence.

Matters taken into account in **sentencing** a defendant fall into two general categories:

- the **objective** seriousness of the offence: eg whether premeditated; whether the defendant was the ringleader or just a follower; reasons for doing it; involvement of weapons; extent of injury to victim or damage to property.
- **subjective** circumstances relating to the offender: eg youth; homelessness; mental illness; alcohol and other drug issues; criminal record; remorse shown for having committed the offence (the courts regard pleading guilty at the first opportunity as a sign of remorse); and progress towards rehabilitation.

## 9 Sentencing options – adults

The following options are available under the *Crimes (Sentencing Procedure) Act*.

### 9.1 Dismissal/Conditional discharge (section 10)

The court has a discretion to record a finding of guilt but to dismiss the charge without recording a conviction. This can be done unconditionally or on the condition that the offender complies with a good behaviour bond.

This procedure is used mainly for minor offences, and it would be rare for a defendant to receive it more than once.

### 9.2 Conviction but no penalty (section 10A)

This option may be used when the court decides it is appropriate to record a conviction (meaning the defendant will have an entry on their criminal record) but inappropriate to impose any penalty.

### 9.3 Fine (sections 4, 14-15)

A fine may be imposed on its own or as an additional penalty to a good behaviour bond or imprisonment. The court must consider the defendant's **capacity to pay**. The magistrate can only allow 28 days to pay, but court registry staff can allow more time to pay if needed.

Failure to pay fines may lead to all sorts of consequences including licence disqualification, property seizure or (as a last resort) imprisonment. For more information, see the separate document on *Fines*.

### 9.4 Bond (section 9)

A bond is an agreement to be of good behaviour (ie not commit offences) for a specified period (maximum of 5 years). It may be subject to **conditions**, eg. to accept supervision from a probation officer or to do a drug rehabilitation program.

If a defendant re-offends or breaks the conditions, he or she will be brought back to court for **breach** of the bond, and may be sentenced again for the original offence as the court sees fit.

### 9.5 Deferred sentence (“Griffiths Remand”) (section 11)

Instead of sentencing the offender straight away, the court may **adjourn the matter for up to 12 months** to assess the offender’s rehabilitation progress or prospects.

During the adjournment the offender will usually be placed under strict conditions (for example, to complete a residential drug rehabilitation program).

An offender who has complied with the conditions and not re-offended will often be given a non-custodial sentence (eg. CSO, suspended sentence) when the matter comes back to court.

### 9.6 Community service order (section 8)

When sentenced to a community service order (CSO), the defendant is ordered to perform up to 500 hours of **unpaid community work**.

A CSO is a direct alternative to imprisonment. To be sentenced to a CSO, the defendant must be assessed as suitable (ie reliable/stable enough) by the Probation and Parole Service.

### 9.7 Suspended sentence (section 12)

The Court may **impose a sentence of imprisonment**, and then **suspend** its operation for up to two years. This means the offender doesn’t go to prison but is released on a bond.

If the conditions are **breached** or the defendant re-offends during the period of suspension, the offender has to serve the term of imprisonment.

### 9.8 Periodic detention (section 6) (no longer available from 1 October 2010)

Periodic detention was an available sentencing option until 1 October 2010, when it was abolished and replaced with Intensive Correction Orders. However, people on existing sentences of periodic detention will continue to serve the rest of their sentence by way of periodic detention.

Periodic detention is a direct alternative to full-time imprisonment. The defendant goes to jail for short periods (usually two nights) either on weekends or midweek.

### 9.9 Intensive Correction Order (section 7)

An **Intensive Correction Order** (ICO) is a new sentencing option which has replaced periodic detention as of 1 October 2010. An ICO involves intensive supervision, participation in community work and programs, drug testing, and (in some cases) electronic monitoring.

An ICO is a **direct alternative to full-time imprisonment**. The court must first decide to impose a sentence of imprisonment for two years or less, and that it is not appropriate to suspend the sentence. The court then refers the offender to the Community Compliance Group (part of Corrective Services) for an assessment.

ICOs are initially available in Sydney, Newcastle, Wollongong and Bathurst, and will later be rolled out across NSW.

### 9.10 Home detention (section 7)

Home detention involves very **strict supervision** (including electronic monitoring) in one's own home. Home detention is not available for certain offences (mostly offences involving violence).

The defendant **must first be sentenced to a term of imprisonment**. If the court thinks a suspended sentence or an intensive correction order is not appropriate, it may then refer the offender to the Community Compliance Group for a home detention assessment. The assessment process is quite involved, including interviews with members of the defendant's household.

If not assessed as suitable for home detention, the offender must serve the sentence in prison.

Home detention is currently only available in the Sydney, Newcastle and Wollongong (and possibly Grafton, Bathurst and Dubbo) areas.

### 9.11 Full-time imprisonment (section 5)

The court may impose a **fixed term** of 6 months or less, or a longer comprised of a **non-parole period** and then a period served out on **parole**. The non-parole period is usually three quarters of the total sentence, but the court can vary this if there are "special circumstances" (eg the need for a longer period under supervision to assist with rehabilitation).

The maximum sentence of imprisonment a Local Court may impose is 2 years.

## 10 Sentencing options – Children

The following options are available to the Children's Court under the *Children (Criminal Proceedings) Act*. [For children who are sentenced by superior courts for serious indictable offences, adult sentencing options usually apply.]

### 10.1 Dismissal/Caution (section 33(1)(a)(i))

The court may dismiss minor charges with or without a caution. This means there is no punishment and no conviction.

### 10.2 Bond (section 33(1)(a)(ii) or 33(1)(b))

A bond is an agreement to be of good behaviour (ie not commit offences) for a specified period (maximum of 2 years). It may be subject to **conditions** and often involves supervision by a Juvenile Justice Officer. The bond may be combined with a fine.

If a defendant re-offends or breaks the conditions, he or she will be brought back to court for **breach**, and may be sentenced again for the original offence as the court sees fit.

A child who is finding it difficult to comply with the conditions of a bond can apply to the Children's Court to have the conditions varied (this option is not available to people on adult bonds).

### 10.3 Fine (section 33(1)(c))

The Children's Court may impose a fine of up to 10 penalty units (currently \$1,100). A fine may be combined with a bond. The court must take into account the offender's capacity to pay.

### 10.4 Release on conference outcome plan (section 33(1)(c1))

If the court has referred a child to a youth justice conference, it may release the child on a condition that the child complies with the conference outcome plan (see separate document on *Young Offenders Act*).

### 10.5 Deferred sentence ("Griffith Remand") (section 33(1)(c2))

The deferred sentence option is also available in the Children's Court. It is often used with the Youth Drug and Alcohol Court program.

### 10.6 Probation (section 33(1)(e))

A probation order is an extra sentencing option in the Children's Court. It is like a bond but usually carries more intensive supervision by Juvenile Justice.

### 10.7 Community service order (CSO) (section 33(1)(f))

A CSO is a direct alternative to a control order. A CSO will not be made unless the court is satisfied that the young person is suitable for community service, and there is work available in the person's local area. This assessment is usually done by a Juvenile Justice Officer.

The maximum number of hours that may be imposed on a child under 16 years of age is 100 hours; over 16 the court may impose up to 250 hours.

### 10.8 Suspended sentence (section 33(1B))

Like an adult sentence of imprisonment, a Children's Court **control order** may be **suspended** for up to 2 years. **Breach** will almost always lead to full-time detention.

### 10.9 Control order (section 33(1)(g))

A control order may be made to **detain an offender** in a Juvenile Justice Centre (detention centre) for up to **two years**.

Where the sentence exceeds six months the court must impose a non-parole period and an additional term. Unlike adult prisoners, juveniles may be released early (even before the end of their non-parole period) if there is appropriate supervision in the community.

A control order is a **last resort**, and the court must give reasons why it was wholly inappropriate to impose any other penalty.



---

## 11 Convictions

### 11.1 Adults

Being found guilty of a criminal offence automatically carries a **conviction** (i.e. an entry on your **criminal record**) unless the court decides to deal with you under **section 10**.

Most adult convictions will be **spent** (wiped off the record) after 10 crime-free years. Some convictions can never be spent (eg sex offences, offences where the defendant was sentenced to imprisonment for more than 6 months).

### 11.2 Children

A conviction cannot be recorded against a child **under 16**, unless it is for an indictable offence dealt with by the District or Supreme Court.

For children aged **16 and over**, the Children's Court can decide whether or not to record a conviction.

Contrary to popular myth, juvenile convictions don't automatically get wiped off your record once you turn 18. However, most juvenile convictions can be **spent** after 3 crime-free years.

---

## 12 Failure to appear

### 12.1 Consequences of failing to appear

For offences capable of being finalised by the Local or Children's Court, a defendant may be **convicted and fined in their absence** ("ex parte").

Sentencing options such as bonds, community service and imprisonment cannot be imposed without the defendant present. If the court convicts a person in their absence and is considering a sentence other than a fine, it will often issue a warrant (known as a **section 25(2) warrant**) to get the defendant to court for sentencing.

Strictly indictable offences cannot be dealt with in the defendant's absence. The court may issue a **bench warrant** (sometimes known as a "first instance warrant") to have the defendant arrested and brought to court.

A person on **bail** who has failed to appear may also be charged with the extra offence of "**fail to appear**". Also, anyone who has put up money for the defendant's bail may lose their money.

### 12.2 Options for defendants who have failed to appear

A defendant who has missed the court date but now wants to deal with the matter may be able to rectify the situation.

If a defendant has been **convicted and/or fined in their absence**, they may be able to have the conviction and/or penalty annulled (this is known as a **section 4 application** or simply an **annulment application**). The defendant will have to show a good reason why they didn't turn up to court, or convince the court of another good reason why the application should be granted. If this application is unsuccessful, the defendant may appeal to the District Court.

If the court has ordered a **warrant** to issue, the defendant may be able to get the matter **re-listed** before the court has had a chance to issue the warrant. If the defendant has lodged an annulment application, it may be possible to get the warrant **recalled**.

In most cases, if a **warrant** has already been issued, there is generally no alternative but to have the **police** involved. The defendant can either wait to be picked up (in which case they could have trouble getting out on bail) or hand herself/himself in to the police (this way there is a better chance of getting bail).

---

## 13 Appeals

### 13.1 Appeal from Local or Children's Court

A defendant may appeal to the **District Court** against a conviction or sentence imposed by the **Local Court** or **Children's Court**.

An appeal against conviction (i.e. a finding of guilt) is known as an **all-grounds** appeal; an appeal against **sentence** is known as a **severity** appeal.

The appeal must be lodged within **28 days** of conviction/sentence. If the appeal is not lodged within this period, the defendant can seek leave to appeal within three months; leave will be granted if there are good reasons why the appeal wasn't brought earlier.

There is a **fee** involved but this will usually be **waived** for children, people in custody or people in financial hardship.

When dealing with a **severity** appeal, the judge may actually **increase** the sentence should he or she consider the existing one too lenient! However, there is a general rule that requires the judge to warn the appellant of the intention to do this (this is known as a "Parker warning"). The appellant then has a chance to withdraw the appeal.

### 13.2 Appeal from District or Supreme Court

An appeal against a conviction or sentence imposed by the **District** or **Supreme** Court may be made to the **Court of Criminal Appeal**. However, it is a lot harder to appeal successfully because the defendant must show that the judge in the lower court has made an error of law.

#### Shopfront Youth Legal Centre Updated October 2010

Shopfront Youth Legal Centre  
356 Victoria Street  
Darlinghurst NSW 2010  
Tel: 02 9322 4808  
Fax: 02 9331 3287  
[www.theshopfront.org](http://www.theshopfront.org)  
[shopfront@freehills.com](mailto:shopfront@freehills.com)

*The Shopfront Youth Legal Centre is a service provided by Freehills, in association with Mission Australia and the Salvation Army.*

*This document was last updated in October 2010 and to the best of our knowledge is an accurate summary of the law in New South Wales at that time. This document provides a summary only of the subject matter covered, without the assumption of a duty of care. The summary should not be relied on as a substitute for legal or other professional advice.*

*This document may be photocopied and distributed, or forwarded by email, on the condition that the document is reproduced in its entirety and no fee is charged for its distribution.*