
The Young Offenders Act: a guide for children's lawyers

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1 Introduction

The *Young Offenders Act* 1997 (NSW) has been operational since 6 April 1998.

The Act provides a system of diversionary measures as alternatives to court proceedings for children who commit certain offences. These diversionary measures follow a hierarchy of informal police warnings, formal police cautions, and youth justice conferences.

The objects of the Act include:

- establishing a scheme that sets out an alternative process to court proceedings;
- providing an efficient and direct response to the commission by children of certain offences; and
- dealing with young offenders in a way that enables a community-based negotiated response, emphasises restitution and acceptance of responsibility by the offender, and meets the needs of victims and offenders.¹

The Act's guiding principles include the application of the least restrictive sanction, the child's right to legal advice, reintegration of the offender into the community, victim involvement, and the use of criminal proceedings only where there is no appropriate alternative.²

It is vital that criminal lawyers have a good grasp of the *Young Offenders Act*. Lawyers should be able to explain to juvenile clients the potential benefits and disadvantages of being dealt with under the Act. In some areas, such as criminal records and liability for victims compensation restitution, the benefits of being dealt with under the Act, instead of being sentenced by the Children's Court, may extend well into the future.

Before discussing the scope of the Act, it may be helpful to provide an overview of the jurisdiction of the Children's Court, and the applicable sentencing options.

¹ *Young Offenders Act* 1997 s3

² *Young Offenders Act* 1997 s7

2 Jurisdiction of the Children's Court

2.1 Age

The Children's Court deals with criminal proceedings against people who were aged under 18 at the time of the alleged offence, and under 21 when charged.³

The age of criminal responsibility is set by legislation, so that no child aged below 10 years can be dealt with for a criminal offence.⁴

Further, the common law presumption of *doli incapax* ("incapable of wrong") applies to children aged under 14. The prosecution must establish beyond reasonable doubt that the child understood that their act was "seriously wrong" - ie that it was criminal as opposed to merely naughty.⁵

2.2 Offences covered

The Children's Court has jurisdiction to hear and determine any offence other than a "serious children's indictable offence" or certain traffic offences.⁶

The Children's Court may hear committal proceedings in respect of indictable offences, including serious children's indictable offences⁷

2.3 Serious children's indictable offences

"Serious children's indictable offence" is defined in section 3 of the *Children (Criminal Proceedings) Act 1987*. In general, these include certain sex offences and any offence punishable by imprisonment for life or 25 years or more.

For example, robbery with wounding (*Crimes Act* s98) or armed with a dangerous weapon (*Crimes Act* s97(2)) carry maximum penalties of 25 years and are "serious children's indictable offences".

However, a simple s94 robbery or a s97(1) robbery (armed or in company) are within the jurisdiction of the Children's Court (as they carry maximum penalties of 14 and 20 years respectively).

2.4 Traffic offences

Juveniles charged with traffic offences are dealt with in the Local Court unless:

- they are too young to obtain a licence (ie under 16 years of age); or

³ *Children (Criminal Proceedings) Act 1987* s28(1)

⁴ *Children (Criminal Proceedings) Act 1987* s5

⁵ Leading cases on *doli incapax* include *R (a child) v Whitty* (1993) 66 A Crim R 462; *C v DPP* [1996] 1 AC 1; *R v CRH* unreported, CCA NSW 18 December 1996; *IPH v Chief Constable of NSW* [1987] Crim LR 42; *Ivers v Griffiths* unreported SC NSW, Newman J, 22 May 1998

⁶ *Children (Criminal Proceedings) Act 1987* s28

⁷ *Children (Criminal Proceedings) Act 1987* s28(1)(b)

- the traffic offence arises from the same circumstances as a criminal offence (eg steal motor vehicle), in which case all charges will be dealt with in the Children's Court.⁸

2.5 Sentencing options

Children's Court sentencing options are set out in section 33(1) of the *Children (Criminal Proceedings) Act 1987*. In summary, these are:

- s33(1)(a) dismissal of charge, with or without caution
- s33(1)(b) good behaviour bond (maximum period 2 years)
- s33(1)(c) fine (not exceeding 10 penalty units)
- s33(1)(c1) order releasing the person on condition that the person complies with an outcome plan determined at a youth justice conference
- s33(1)(c2) "Griffith remand" (maximum period 12 months from the date of the finding of guilt)
- s33(1)(d) bond and fine
- s33(1)(e) probation (maximum period two years)
- s33(1)(f) community service order (maximum hours may not exceed 100 for an offence committed by a child under 16, or 250 hours for an offence committed by an older child⁹)
- s33(1)(g) control order (maximum period 2 years). A control order is a custodial sentence served in a juvenile detention centre. Like an adult sentence of imprisonment, it may be suspended.¹⁰

The Children's Court may also make ancillary orders, such as licence disqualification for traffic offences and orders for the defendant to pay compensation to the victim. The amount of a compensation order is limited to \$1,000¹¹ and the court must take into account the child's ability to pay¹².

3 Eligibility to be dealt with under the Young Offenders Act

3.1 Age

The Act applies to offences committed by children, and defines a child as "a person who is of or above the age of 10 years and under the age of 18 years".¹³ The Act is

⁸ *Children (Criminal Proceedings) Act 1987* s28(2)

⁹ *Children (Community Service Orders) Act 1987* s13

¹⁰ *Children (Criminal Proceedings) Act 1987* s33(1B)

¹¹ *Children (Criminal Proceedings) Act 1987* s 36(3)

¹² *Children (Criminal Proceedings) Act 1987* s24

¹³ *Young Offenders Act 1997* s 4

silent as to the position of young people who commit offences as children but are not dealt with by police until after they turn 18.

3.2 Offences covered

Subject to a few exceptions, offences covered by the Act are summary offences and "indictable offences that may be dealt with summarily under Part 9A of the *Criminal Procedure Act 1986* or another prescribed law"¹⁴.

Curiously, the *Children (Criminal Proceedings) Act 1987* is not a law prescribed by the regulations. I am not certain whether this was deliberate or an oversight, but the effect is that the indictable offences which can be dealt with under the Act are limited to those in Table 1 and 2.

Offences such as robbery in company (over which the Children's Court has jurisdiction but the Local Court does not) are therefore ineligible to be dealt with under the Act. Initially, such matters were being referred to Youth Justice Conferences, until police and conference administrators were advised that they were outside the ambit of the Act.

3.3 Specific exclusions

The offences specifically excluded from the Act are¹⁵:

- offences where the principal person who investigates the offence is not an investigating official within the meaning of the Act (this would presumably include prosecutions by local government and other statutory bodies)
- traffic offences committed by children old enough to obtain a learner licence (ie. 16 or over)
- offences resulting in the death of any person
- sex offences
- offences under Part 15A (Apprehended Violence) of the *Crimes Act 1900*
- most offences under the *Drug Misuse and Trafficking Act 1985* (other than minor offences involving small quantities of prohibited drugs).

The exclusion of most drug offences has been the subject of much controversy. Initially, the Act applied only to offences involving possession and cultivation of prohibited plants. This was almost certainly a drafting error, and the Act was eventually amended to cover summary offences involving small quantities of prohibited drugs.

Offences under Div 2 of Part 2 of the *Drug Misuse and Trafficking Act 1985* (eg possession, self-administration, possession of equipment) are eligible to be dealt with under the Act as long as they involve no more than the "small quantity" prescribed by the *Drug Misuse and Trafficking Act 1985*.

Offences involving possession or cultivation of prohibited plants are eligible, as long as:

¹⁴ *Young Offenders Act 1997* s8(1)

¹⁵ *Young Offenders Act 1997* s8

- the quantity is not more than *half* the small quantity (as the small quantity for cannabis is 5 plants, this would mean 2 1/2 plants!); or
- there are exceptional circumstances, in that the amount is no more than the small quantity and dealing with the matter under the Act is in the interests of the child's rehabilitation.

4 The role of the police

The initial decision to deal with a child the Act rests with the police. For offences covered by the Act, police *must* first consider a warning, then a caution, and finally a conference. Court proceedings should be commenced only if these three options are clearly inappropriate.

If a child is *prima facie* eligible for a warning or caution, but the investigating officer believes it is inappropriate, they must refer the matter to a Specialist Youth Officer (SYO) to decide how the child should be dealt with.¹⁶ Most Local Area Commands have SYOs.

There is a range of summary offences for which police may issue infringement notices. For certain offences under the *Summary Offences Act* (carrying knives and disobeying police directions) the police must first consider applying the *Young Offenders Act* before issuing an infringement notice.¹⁷

5 Admissions and legal advice

To be eligible for a caution or conference, the child must admit the offence in the presence of an appropriate adult¹⁸. If the child is 16 or over, the child may choose an adult to be present. If the child is under 16, the adult must be a "person responsible" (generally a parent or guardian), a person chosen by the person responsible, or a legal practitioner chosen by the child.¹⁹

The Act promotes the principle that children are entitled to be informed about their right to obtain legal advice and to have an opportunity to obtain such advice.²⁰

Police must inform a child of their right to legal advice, and where to obtain it, before arranging for a caution or conference²¹. The Act does not specifically require the police to give the child an opportunity to get legal advice before making an admission. However, if the child is under arrest (or deemed arrest) the Detention After Arrest

¹⁶ *Young Offenders Act 1997* ss. 14, 20, 21.

¹⁷ *Young Offenders Act 1997* s9(2A), *Young Offenders Regulation 1997* cl. 21

¹⁸ *Young Offenders Act 1997* ss. 19, 36

¹⁹ *Young Offenders Act 1997* s10

²⁰ *Young Offenders Act 1997* s7

²¹ *Young Offenders Act 1997* ss.22, 24, 39, 45

provisions in Part 10A of the *Crimes Act* would apply. Police would therefore have to inform them of their right to legal advice and to give them an opportunity to obtain it.

In practice, police are required to give children the opportunity to get legal advice before making any admission. Police should provide the phone number of the Legal Aid Hotline for Under 18s, and allow the child to call the Hotline or a lawyer of their choice.

The Legal Aid Hotline provides free telephone advice for young people who are facing police questioning or procedures under the *Young Offenders Act*. It is open from 9am to midnight Monday to Friday, and 24 hours during the weekend (this means it is open continuously from 9am Friday to midnight Sunday) The number is 1800 10 18 10.

Your role as a legal adviser or representative will be further discussed at the end of this paper.

6 Warnings

A child is entitled to be dealt with by way of an on-the-spot warning if they have committed (or it is alleged that they have committed) a *summary* offence. The child does not need to admit the offence. A child is not entitled to a warning if the circumstances of the offence involve violence or if the police believe a warning is not in the interests of justice. However, a prior record does not preclude a child from being given a warning.²²

A warning may be given at any place, including on the spot where the child is found. Conditions, or additional sanctions, may not be imposed on a warning.²³ The police must take steps to ensure that the child understands the purpose, nature and effect of the warning.²⁴

The police must record certain details including the child's name, but the incident does not form part of the child's criminal history.²⁵

7 Cautions

7.1 Eligibility

A formal caution may be given if the child has admitted the offence and consents to being given a caution.²⁶ An admission must be made in the presence of an appropriate adult (as to which see section 5 above).

²² *Young Offenders Act 1997* s14

²³ *Young Offenders Act 1997* s15

²⁴ *Young Offenders Act 1997* s16

²⁵ *Young Offenders Act 1997* ss. 14, 68; *Young Offenders Regulation 1997* cl. 15

²⁶ *Young Offenders Act 1997* s19

7.2 Appropriateness of caution

Police may decide not to administer a caution if they believe a caution is not in the interests of justice. Issues taken into account by police in deciding whether a caution is appropriate include the seriousness of the offence, the degree of violence involved, the harm caused to any victim, the number and nature of any prior offences committed by the child and the number of times the offences have been dealt with under the Act.²⁷ However, a child is not precluded from being given a caution merely because they have a history of prior matters.²⁸

If the investigating police officer believes a caution is not in the interests of justice, they must refer the matter to a specialist youth officer to determine whether the matter should be dealt with by way of youth justice conference.²⁹

If police do not refer the child for a caution and court proceedings are commenced, the child may be referred for a caution by the Director of Public Prosecutions.³⁰

7.3 The cautioning process

If the investigating officer decides a caution should be given, he or she must arrange for the caution to be given.³¹ Before doing so, they must first explain to the child the nature of the allegations, the child's entitlement to legal advice and where the advice may be obtained, the child's entitlement to choose to go to court, and the purpose, nature and effect of the caution. If possible this explanation must take place in the presence of an appropriate adult.³² The child must also be given a written notice of caution.³³

A caution must be given not less than 10 days, and not more than 21 days, after notice of the caution is given.³⁴ This time serves as a "cooling off" period, during which time a child can access legal advice and/or change his or her mind. A child is entitled at any time, before a caution is given, to elect to have his or her matter dealt with by a court.³⁵

The caution is given by a senior police officer or sometimes by a respected member of the community such as an Aboriginal elder.³⁶ A child receiving a caution must be accompanied by a parent, guardian or other responsible adult.³⁷ The police must explain the caution to the child,³⁸ and must give them a written notice (which the child must sign)

²⁷ *Young Offenders Act 1997* s20(3)

²⁸ *Young Offenders Act 1997* s20(6)

²⁹ *Young Offenders Act 1997* s21(2)

³⁰ *Young Offenders Act 1997* s23

³¹ *Young Offenders Act 1997* s21(1)

³² *Young Offenders Act 1997* s22

³³ *Young Offenders Act 1997* s24

³⁴ *Young Offenders Act 1997* s26

³⁵ *Young Offenders Act 1997* s25

³⁶ *Young Offenders Act 1997* s27

³⁷ *Young Offenders Act 1997* s28

³⁸ *Young Offenders Act 1997* s29

after the caution has taken place.³⁹ No conditions may be attached to a caution, except the provision of a written apology to any victim.⁴⁰

A record is kept of a child receiving a caution.⁴¹ It does not form part of the child's criminal history but may be taken into account in certain circumstances (this is further discussed in section 10 below).

7.4 Decision not to proceed with caution or failure to attend

If a child decides not to proceed with a caution, or fails to turn up to receive the caution, criminal proceedings may be commenced, even if the limitation period for proceedings has expired. Proceedings must be commenced before the expiry of the applicable limitation period, or within three months of the matter being referred back to the referring person or body, whichever is the later.⁴² In practice this will only affect summary offences, where the limitation period is six months.

7.5 Caution administered by court

A court may also administer a caution under the Act (as long as it is an eligible offence and the child admits the offence). The court must notify the police (the Local Area Commander of the area where the offence occurred) and give reasons why the caution was given.⁴³

This is separate from the Children's Court's power to caution a child under s33(1)(a) of the *Children (Criminal Proceedings) Act*.

8 Youth justice conferences

8.1 Principles of conferencing scheme

The youth justice conferencing scheme is based on principles of restorative justice and allows for victim participation. The principles and purposes of the scheme are set out in the Act and include promoting the child's acceptance of responsibility for criminal behaviour, strengthening of family support, the provision of appropriate services to enable the child to overcome the offending behaviour, the enhancement of victims' rights, and cultural appropriateness.⁴⁴

³⁹ *Young Offenders Act 1997* s30

⁴⁰ *Young Offenders Act 1997* s29

⁴¹ *Young Offenders Act 1997* s33

⁴² *Young Offenders Act 1997* s64

⁴³ *Young Offenders Act 1997* s31

⁴⁴ *Young Offenders Act 1997* s34

8.2 Eligibility

Like a caution, a conference can be arranged only if the child has admitted the offence in the presence of an appropriate adult, and consents to the holding of a conference.⁴⁵

8.3 Referral to conference

The decision to refer a child to a conference rests with a specialist youth officer (SYO). As with cautioning, there are a number of issues to be considered in deciding whether it is appropriate to refer the child to a conference. Prior offences or interventions under the Act do not preclude a child from being referred to a conference⁴⁶

If the SYO decides a conference is appropriate, the matter is referred to a conference administrator (administrators are employed by the Department of Juvenile Justice). If the SYO decides a conference is inappropriate, the matter will be referred back to the investigating officer for commencement of court proceedings.⁴⁷

If police do not refer a child to a conference, and instead commence court proceedings, a court or the Director of Public Prosecutions may refer the child to a conference.⁴⁸

As with cautioning, police must explain certain things to the child, including the child's right to legal advice and where to obtain it.⁴⁹ A conference must, if practicable, be held not later than 21 days after the referral is received, and not less than 10 days after a notice is given to a child.⁵⁰

A child may at any time before the conference elect to have the matter dealt with by a court instead. Additionally, the police, court or DPP (whoever referred the child to the conference) may change their mind during this period and decide that a conference is not appropriate. In this case they must provide written notice to the child.⁵¹

8.4 Role of conference administrator and convenor

An administrator who is of the opinion that a matter is not suitable for a conference (for example, because of the degree of violence involved or the harm caused to the victim) may discuss the matter with the SYO who referred the matter. If they cannot agree, the matter must be referred to the DPP to decide whether a conference should be held.⁵²

If the conference administrator is satisfied that a conference is appropriate, the matter will be referred to a convenor who will organise and run the conference.⁵³ Convenors

⁴⁵ *Young Offenders Act 1997* s36

⁴⁶ *Young Offenders Act 1997* s37

⁴⁷ *Young Offenders Act 1997* s38

⁴⁸ *Young Offenders Act 1997* s40

⁴⁹ *Young Offenders Act 1997* s39

⁵⁰ *Young Offenders Act 1997* s43

⁵¹ *Young Offenders Act 1997* s44

⁵² *Young Offenders Act 1997* s41

⁵³ *Young Offenders Act 1997* s42

are generally employed by the Department of Juvenile Justice on a contract basis. The convenor will speak to the child, and all other people involved, before the conference. Before the conference, the convenor must also give the child a notice outlining the details of the conference and the right to legal advice.⁵⁴

8.5 The conference process

A conference may be held at a location agreed upon by the participants (this will often be a youth or community centre). It may not take place at a police station, court house or Juvenile Justice office, but may be held at a detention centre if the child is in custody.⁵⁵

The following people are entitled to attend the conference: the child; the conference convenor; a person responsible for the child; members of the child's family or extended family; an adult chosen by the child; a legal practitioner advising the child; the investigating official; a specialist youth officer; the victim or a representative of the victim; and a support person for the victim. Other people (such as interpreters and disability support workers) may be invited to attend where appropriate.⁵⁶ Even though the involvement of victims is one of the stated aims of conferencing, a conference may still be held if the victim does not wish to attend.

8.6 Legal advice and representation at conferences

A legal practitioner is entitled to attend and advise a child, but not entitled to represent a child unless permission is sought from the conference convenor.⁵⁷

8.7 Outcome plan

The purpose of the conference is to determine an outcome plan.⁵⁸ The conference should be conducted in a way which best assists the reaching of an agreement or outcome plan.⁵⁹

The outcome plan must reflect the consensus of the participants, and must be agreed to by the child and the victim (if the victim participates in the conference). These outcomes must be realistic and appropriate, and must not be more severe than those a court might have imposed. Decisions and recommendations in the outcome plan are not limited, but may include an apology, reparation or participation in a program.⁶⁰ In the case of bushfire and arson offences, there are some recently-proclaimed stipulations on what the

⁵⁴ *Young Offenders Act 1997* s45

⁵⁵ *Young Offenders Act 1997* s46

⁵⁶ *Young Offenders Act 1997* s47

⁵⁷ *Young Offenders Act 1997* s50

⁵⁸ *Young Offenders Act 1997* s34

⁵⁹ *Young Offenders Act 1997* s48

⁶⁰ *Young Offenders Act 1997* s52

outcome plan must contain. This includes visiting a burns ward and making reparation such as assisting with clean-up operations.⁶¹

In practice, it is often difficult to assess whether the sanctions in an outcome plan are harsher than a court might have imposed. Conference convenors and participants often have limited experience of the Children's Court and may be unfamiliar with the appropriate range of penalties. Legal advice from an experienced Children's Court practitioner can be of great benefit, so the child has an idea of what is a reasonable outcome plan.

8.8 Monitoring and completion of outcome plan

The outcome plan is supervised by a conference administrator. The young person has six months to complete it (this time may be extended by the Department of Juvenile Justice).⁶²

Notice of whether the outcome plan has been satisfactorily completed is given to the child, the victim, and the person or body who referred the child to the conference.⁶³

No further criminal proceedings may be taken against a child who has satisfactorily completed the outcome plan.⁶⁴

If the matter was referred by a court without the court having made a finding of guilt, and the outcome plan has been completed, the court must dismiss the charge against the child.⁶⁵

A conference may be reconvened to reconsider any aspect of the outcome plan. This can be done if the conference administrator believes it is in the interests of justice to do so, or the outcome plan has become unsuitable or unworkable.⁶⁶

8.9 Failure to attend conference, agree on outcome plan, or complete outcome plan

If the child fails to attend the conference, if an outcome plan cannot be agreed upon, or if the child fails to complete the outcome plan, the matter will be sent back to the referring person or body.⁶⁷ Criminal proceedings may then be commenced (or, in the case of a court-referred conference, continued).

Criminal proceedings may be commenced even if the limitation period for proceedings has expired. Proceedings must be commenced before the expiry of the applicable

⁶¹ *Young Offenders Regulation 1997* cl. 19A

⁶² *Young Offenders Regulation 1997* cl. 18

⁶³ *Young Offenders Act 1997* s56

⁶⁴ *Young Offenders Act 1997* s58

⁶⁵ *Young Offenders Act 1997* s57

⁶⁶ *Young Offenders Act 1997* s55

⁶⁷ *Young Offenders Act 1997* ss. 51, 53, 57

limitation period, or within three months of the matter being referred back, whichever is the later.⁶⁸

8.10 Court referrals to conferences

The court can refer a child to a conference in two different ways:

1. under section 40 of the *Young Offenders Act*, after receiving an *admission* from the child; or
2. after a *finding of guilt*⁶⁹ (either a plea of guilty or a guilty finding at hearing) - in this case, the court may make an order under section 33(1)(c1) of the *Children (Criminal Proceedings) Act* releasing the child on condition that he or she complies with the outcome plan.

The difference between an admission and a plea of guilty may seem merely semantic, but there is a considerable difference in practice. If the court adopts the former course, this means there will be no finding of guilt and the charge must be dismissed upon completion of the outcome plan.⁷⁰ If the court adopts the latter course, the matter will form part of the child's criminal history and for some purposes (eg victims compensation restitution) will be regarded as a conviction.

The Senior Children's Magistrate has issued a practice direction for magistrates dealing with children under the *Young Offenders Act*.⁷¹

According to the practice direction, a magistrate referring a child to a conference should do so under the *Young Offenders Act*, recording an admission rather than a plea of guilty. However, the practice direction recognises that it will sometimes be appropriate to make an order under section 33(1)(c1) of the *Children (Criminal Proceedings) Act*. An obvious example of this would be where the child has been found guilty at a hearing.

If a child is referred to a conference, bail should generally be dispensed with and the child's further appearance should be excused. In some cases when the conference referral has been made after a finding of guilt, the court may require the child to appear for sentencing. Otherwise, the child should only be required to attend court again if the outcome plan is not approved by the court or is not satisfactorily completed.

If a child is required to attend court due to non-approval or non-completion of the outcome plan, the registrar will send the child a notice to this effect. If the child has breached an order under section 33(1)(c1), the court also has the option of issuing a summons or warrant.⁷²

⁶⁸ *Young Offenders Act 1997* s64

⁶⁹ *Young Offenders Act 1997* s40(3) provides that the court may refer a child to a conference at any stage in the proceedings, including after a finding of guilty

⁷⁰ *Young Offenders Act 1997* s57

⁷¹ *Children's Court Practice Direction No. 17*, 12 October 2000

⁷² *Children (Criminal Proceedings) Act 1987* s41

9 Confidentiality and record-keeping

As with Children's Court proceedings, it is an offence to publish or broadcast the name (or any identifying information) of a child involved in a procedure under the Act.⁷³

It is also an offence to disclose any information acquired or records kept in the exercise of functions under the Act, unless the disclosure is in accordance with the Act (eg providing records to the child, investigating police, the Children's Court, etc).⁷⁴

Any admission made or information given by a child during a caution or conference is not admissible in subsequent criminal or civil proceedings. However, any information obtained by police during a caution or conference may be used for the purpose of investigating other offences⁷⁵.

10 Convictions and criminal histories

Warnings, cautions and conferences under the Act do not give rise to convictions and do not form part of a child's criminal history (unless the person is applying for employment in specified occupations which include police officers, teachers, child-care workers, etc). However, cautions and conferences may be taken into account by the Children's Court in subsequent proceedings.⁷⁶

A conference will form part of a child's criminal history, and in some cases a conviction may be recorded, if the child has been referred by a court after a finding of guilt.⁷⁷

11 Victims Compensation restitution proceedings

Children who commit violent offences may be liable to pay restitution if the victim has been awarded statutory compensation under the *Victims Support and Rehabilitation Act 1996*.

Restitution proceedings can involve very large amounts of money - up to \$50,000. For assault-type offences, compensation awards in the vicinity of \$10,000 are not uncommon. The offender has an opportunity to be heard and the amount of restitution may be reduced, but restitution proceedings can nevertheless be a big setback for young people who are trying to put their juvenile criminal history behind them.

A person may be ordered to pay restitution if they have been "convicted of a relevant offence"⁷⁸. A "conviction" includes an order made under section 33(1)(b)-(g) of the

⁷³ *Young Offenders Act 1997* s65

⁷⁴ *Young Offenders Act 1997* s66

⁷⁵ *Young Offenders Act 1997* ss. 68, 69

⁷⁶ *Young Offenders Act 1997* s68

⁷⁷ i.e. under *Children (Criminal Proceedings) Act 1987* s33(1)(c1).

⁷⁸ *Victims Support and Rehabilitation Act 1996* s46

Children (Criminal Proceedings) Act 1987.⁷⁹ This means if there has been a finding of guilt and the Children's Court has used any of the sentencing options other than a section 33(1)(a) dismissal, the child may be liable for restitution even if no conviction has been recorded.

Children who are dealt with under the *Young Offenders Act* will usually not be liable to pay restitution because there is no finding of guilt by a court. If the Children's Court refers a child to a youth justice conference, it will usually do so under the provisions of the *Young Offenders Act*, having recorded an admission rather than a plea of guilty. However, the court may make a finding of guilt and make an order under section 33(1)(c), releasing the child on condition that they comply with the conference outcome plan. In this case, the restitution provisions of the *Victims Support and Rehabilitation Act 1996* apply.

12 Issues arising for children's lawyers

12.1 Advising a child before police questioning

When providing legal advice to a child who is facing police questioning, the traditional "don't say anything" approach is not always appropriate. If there is a realistic possibility of a caution or conference, it may be in your client's interests to admit the offence at the outset.

If the child remains silent at the police station, the police will almost always commence court proceedings. Of course, the child can admit the offence at court and be cautioned or referred to a conference. However, once they are at court, many children would rather "plead guilty and get it over and done with" (with the expectation that they will probably get a bond) than go to a conference. While this may seem like a good outcome in the short-term, it could be to the client's long-term detriment in terms of criminal record and liability for victims compensation restitution.

You should of course be careful not to rush in and advise the child to admit the offence - in many cases an admission and/or a *Young Offenders Act* disposition is inappropriate.

12.2 Where the child's guilt is in issue

Unfortunately, children often make admissions (and are cautioned or conferenced) in circumstances where they have a legitimate defence to the charge. If you have any doubt about the child's liability for the offence, you should advise them to elect to defend the matter in court.

When advising a child aged under 14, you should always advise your client about the possibility of defending the matter in court and raising the principle of *doli incapax*. Admittedly, many young children would probably prefer to receive a police caution for a minor charge than to endure a lengthy court process culminating in a hearing (and who could blame them for this?!). However, if the child later gets into trouble for a more

⁷⁹ *Victims Support and Rehabilitation Act 1996*, Dictionary

serious charge, which they do wish to defend, the police caution may be admitted into evidence to assist the prosecution to rebut the presumption of *doli incapax*.

A child with an intellectual disability or mental illness may be more appropriately dealt with by a court under section 32 or 33 of the *Mental Health (Criminal Procedure) Act* than by way of caution or conference.

12.3 Induced admissions

A child's admissions may often be induced by a police promise that the matter will be dealt with under the *Young Offenders Act*.

Induced admissions are often unreliable and the appropriateness of a caution or conference in this situation is questionable.

Induced admissions may be ruled inadmissible against the child in court because they have been obtained improperly or in circumstances in which their truth is likely to be affected.

12.4 Representing a child in court

When acting for a defendant in the Children's Court, you should carefully consider the applicability of the *Young Offenders Act*. If the offence is covered by the Act, and the child's guilt is not in issue, you must be able to advise your client about the pros and cons of being dealt with under the Act, and (where appropriate) to advocate for a disposition under the Act.

Do not assume that a child has already received legal advice at the police station. Despite the existence of the Legal Aid Hotline, many children do not receive legal advice. This occurs for a variety of reasons including being arrested outside Hotline hours, not being told by police of their right to legal advice or how to obtain it, or choosing not to seek legal advice.

If you believe a *Young Offenders Act* caution is appropriate, make sure you ask the magistrate for this rather than a section 33(1)(a) caution.

If you are asking the Children's Court to refer your client to a conference, you should try to ensure that that child makes an *admission* to the offence rather than entering a plea of guilty. As discussed above, this may make an important difference in terms of the child's criminal history and future liability for victims compensation restitution. Of course, if your client has been found guilty at a hearing, he or she is stuck with the finding of guilt, but a referral to a conference may still be a desirable sentencing option.

Despite the Children's Court practice direction, some magistrates may still impose or continue bail conditions after referring children to conferences. Make sure you are prepared to advocate for bail to be dispensed with and your client's further attendance excused.

13 Useful references

Children's Court Guidebook, Redfern Legal Centre Publishing

The Law Handbook, Redfern Legal Centre Publishing, Chapter 6, *Children and Young People*

Lawyers' Practice Manual (looseleaf service), Redfern Legal Centre Publishing, Chapter 6.1, *Children*

Joe's Conference video, Redfern Legal Centre Publishing

Youth Justice: your guide to cops and court, Macquarie Legal Centre/Redfern Legal Centre Publishing

Hot Topics: Juvenile Justice, Legal Information Access Centre, State Library of NSW, 1999

Convention on the Rights of the Child, www.unhchr.ch/html/menu3/b/k2crc.htm

United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (Beijing Rules); *United Nations Guidelines for the Prevention of Juvenile Delinquency 1990 (Riyadh Guidelines)*, www.unhchr.ch/html/intlinst.htm

14 List of attachments

- (a) *Young Offenders Act 1997*:
 - table of provisions
 - section 3 (objects of Act)
 - section 7 (principles of scheme)
 - section 8 (offences covered by Act)
- (b) *Young Offenders Regulation 1997*:
 - clause 19A (outcome plans for bush fire/arson offences)
- (c) *Children (Criminal Proceedings) Act 1987*
 - section 28 (jurisdiction of the Children's Court)
 - section 33 (penalties)
- (d) *Children's Court Practice Direction No. 17*