

The Shopfront

YOUTH LEGAL CENTRE

The Young Offenders Act 1997

1 Introduction

The *Young Offenders Act* aims to **divert juvenile offenders away from the court system**. It allows some children to be dealt with by way of **warnings, cautions or youth justice conferences**. The Act is modelled on a New Zealand scheme, and came into force in April 1998 after several years of planning, consultation and piloting.

The Act generally applies to less serious offences committed by juveniles who do not already have a substantial criminal record. The Act **does not apply to the following types of offences:**

- (a) **serious** offences such as robbery;
- (b) **traffic** offences, if the young person was old enough to hold a licence (including Ls) at the time;
- (c) offences resulting in the **death** of any person;
- (d) **sexual** offences;
- (e) **apprehended violence** offences (such as stalking, breach AVO);
- (f) **drug** offences (except for possession, cultivation or use of small amounts).

2 Warnings, Cautions and Conferences

2.1 Police Warnings

Children who commit minor offences that do not involve violence will often get a police warning whether or not they have a record of prior offences. No conditions are attached to police warnings and it does not form part of the child's criminal record. However, the police must make a record that a warning was given.

2.2 Formal Police Cautions

The next step up is a formal caution. To receive a caution, the child must **admit the offence and consent to the caution in the presence of an adult**. The "investigating official" (that is, a police officer or person appointed by the Act whose function includes preventing or investigating offences) must decide whether the offence requires a formal caution rather than a warning.

The official must take into account the **seriousness** of the offence, the degree of **violence** and **harm caused**, and the **number of prior offences committed by the**

child. The fact that a child already has a record does not preclude them from being cautioned. If the official doesn't want to deal with the child in this way, they can refer the matter to a **specialist youth officer** (a police youth liaison officer) who will decide whether the matter should be dealt with as an official caution, or whether it should go to a Youth Justice Conference, or to the Children's Court.

When deciding to issue a caution, police must **explain the nature of the offence** to the child, tell them they are entitled to **legal advice**, and where they can go to get it (most police officers should now be aware of the Legal Aid Hotline for Under 18s). They must also explain the **purpose, nature and effect of a caution** and the fact that **the child can choose to go to court instead.** This explanation should be given in front of a responsible adult if practicable. The official must also give the child **written notice** that a caution will be issued.

There is then a **"cooling-off period"** (between 10 and 21 days) during which the young person can get legal advice and/or change their mind about whether they wish to be cautioned.

The caution will be **issued by a police officer** or, where appropriate, a respected member of the child's community (for example, an Aboriginal elder). The caution is recorded, but **does not count as a criminal conviction.** It can be taken into account by the Children's Court if the child gets into trouble again, but cannot be taken into account by any adult court.

A child may also be **referred for a caution by the Director of Public Prosecutions.** The **Children's Court may issue a caution** under the Act if appropriate (as distinct from a normal court caution under section 33 of the *Children (Criminal Proceedings) Act*).

2.3 Youth Justice Conferences

The scheme is administered by the Department of Juvenile Justice and overseen by an Advisory Committee appointed by the Minister for Juvenile Justice.

Conferencing can take place when the child **admits to the offence in the presence of an adult, and agrees to being dealt with by means of a conference.**

The ultimate decision about whether a child can be dealt with under the Act rests with a **specialist youth officer** who refers the matter to a **conference administrator** (an employee of the Department of Juvenile Justice). This officer must consider the **seriousness** of the offence, the degree of **violence, harm caused** to a victim, the **number and nature of prior offences** of the child and any other relevant circumstances.

As with cautioning, the specialist youth officer must explain certain things to the child. These include the **nature of the offence**, the **right to legal advice**, the **nature and effect of a conference** and the **right to choose to go to court instead.** Again, the officer should try to ensure that this explanation takes place in front of a responsible adult. As with cautions, there is a **cooling-off period** of at least 10 days.

A child may also be **referred for a conference** by the **Director of Public Prosecutions** or by the **Children's Court.**

The conference must, if possible, **take place within 21 days** of the referral. The conference must not be held at a police station, court house or any office of the Department of Juvenile Justice.

The following people are entitled to attend at a conference:

- (a) the **child**;
- (b) the conference **convenor** (who will be appointed by the Department of Juvenile Justice);
- (c) a **person responsible** for the child;
- (d) members of the child's **family**;
- (e) an **adult chosen by the child**;
- (f) a **lawyer** advising the child (although the child can get legal advice, the lawyer can only be present under conditions set by the convenor and is not supposed to speak on behalf of the child);
- (g) the **investigating official**;
- (h) a **specialist youth officer**;
- (i) any **victim** or person chosen by the victim to be their **representative**;
- (j) the **victim's support people**.

If appropriate, the **conference convenor can also invite others** such as respected members of the community, an interpreter, a person who can assist a child with a communication or cognitive disability, social workers, Juvenile Justice Officers, or other people requested by the child's family.

The purpose of the conference is integral to the scheme. The words "punishment" or "penalty" are not used in the Act. Instead, it refers to "**outcome plans**". These plans are said to develop **realistic sanctions** and **not impose anything more serious than what a court might have imposed** (although it is doubtful that the conference convenor would have known what this was.)

The Act does not limit the types of plans the conference can recommend. Plans include getting the child offender to:

- (a) make oral and written **apologies**;
- (b) make amends to a victim or the community by performing **voluntary work**;
- (c) **repair** damage or **repay** the cost of property taken;
- (d) participate in an appropriate **program**.

The plans must give **specific times for implementation** and where appropriate, provide for ongoing **monitoring**.

If agreement cannot be reached at the conference, the matter is **referred back** to the person or body that referred the matter. The **victim does not have to participate** in a conference for a final outcome to occur.

If the court has referred the matter, the conference convenor must **refer the outcome plan back to the court** for approval. If approval is not given, the court can continue with the proceedings.

Conferences can be re convened when necessary to reconsider outcome plans.

If a child doesn't complete an outcome plan, the matter will be referred to the conference convenor and **further proceedings may be brought** against the child.

If an outcome plan is satisfactorily completed, this will be the end of the matter. If the matter has been referred by the court, a satisfactory outcome means that the **charges are dismissed**. The conference administrator has to inform the parties when the outcome plan is complete. The fact that the child has been dealt with at a conference will be recorded, but it **won't count as a conviction**. Like a caution, it can be taken into account by the Children's Court, but not by an adult court, in subsequent proceedings.

3 Court Proceedings

There are still a variety of situations when a child may have to go to court:

- (a) if the Act doesn't apply to the offence;
- (b) if the police consider that a warning, caution or conference is inappropriate (eg because of the seriousness or violence of the offence, or the child's record);
- (c) if the child does not admit guilt in the presence of an adult;
- (d) if the child chooses to go to court instead of taking up the offer of a caution or conference;
- (e) if the child fails to attend a caution or conference;
- (f) if a conference can't agree on an outcome plan;
- (g) if the child fails to complete the outcome plan.

4 Records and Privacy Issues

The Act tries to protect children by prohibiting the use of any **statements, confessions, or admissions** against a child in subsequent criminal or civil proceedings. However, any information gained by the police during the conference that relates to other offences can be acted on by the police.

Conference administrators must keep **records of conferences**, but these must not be disclosed, except to the child (or the person responsible or their legal representative), the referring body (police, court or DPP) and the Children's Court (for the purpose of making a decision concerning sentencing on a subsequent matter).

As with the Children's Court, **it is an offence to publish or broadcast the name of a child** (or anything that tends to identify a child) dealt with under the Act. A child aged 16 or over can consent to being identified or having their name published.

Conferences and cautions do not give a child a criminal record, but the Children's Court may take them into account when dealing with the child for a subsequent offence.

5 Legal Advice

Although **children have a right to get legal advice** at any stage, many children admit to offences (and go to a caution or conference) without getting legal advice.

Fortunately, it is now possible to get legal advice via the Legal Aid Hotline for Under 18s, which operates from 9am to midnight on weekdays, and midday to midnight on weekends. The number is 1800 10 18 10.

Some Aboriginal Legal Services, and centres like the Shopfront Youth Legal Centre, also offer after-hours telephone advice.

In some cases, lack of legal advice could lead to a child admitting to an offence when there may be a valid defence available. If the matter is then dealt with by way of caution or conference, this fact may not be picked up, as it would be by a duty solicitor at the Children's Court. The child may then be dealt with as if they were guilty, when they could have beaten the charge at court.

Even more worrying is the problem of **inducements** - where police say something along the lines of "if you just admit you are guilty, we'll give you a caution, you won't get a criminal record and you won't have to go to court". In most cases the police are acting in good faith and merely trying to be reassuring. However, there is a danger that it may induce a child to admit to something they haven't done, just to avoid going to court.

It is therefore important that a child gets legal advice if possible, preferably before making admissions.

Shopfront Youth Legal Centre Updated June 2000

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

This document was last updated in June 2000 and to the best of our knowledge is an accurate summary of the law in New South Wales at that time.

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