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Children and Young People

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This chapter considers legislation and legal issues applying specifically to children. It discusses:

- the criminal law as it applies to people under 18, from dealing with police to the operation of the Children’s Court
- the legislation dealing with the care and protection of children
- the law dealing with adoption
- other legal issues specifically affecting children.

Our society recognises that children’s needs are, in many important ways, different from those of adults. It also recognises that children, like adults, have rights. Australia is a signatory to the UN Convention on the Rights of the Child, an agreement between signatory countries to observe common standards for protecting the rights of children.

The four basic principles of the UN Convention on the Rights of the Child are:

- non-discrimination
- the best interests of the child
- the right to life, survival and development
- the right to respect for views expressed.

The convention has 40 articles, some of which are summarised below.

- Article 2: Children should be protected from discrimination on the basis of their family background.
- Article 3: A primary consideration when courts or welfare institutions make decisions about children should be the best interests of the child.
- Article 5: Governments are to respect the responsibilities, rights and duties of parents (or extended family and community members) to give the child guidance and direction in the exercise of their rights under the convention.
- Article 12: Children capable of forming their own views have the right to express those views when decisions are made about them.
- Articles 19, 34 and 39: Governments have a responsibility to protect children from neglect, abuse and sexual exploitation. Child victims of abuse should be assisted to recover in a supportive environment.
- Article 25: Children placed in care have the right to periodic review of their treatment and placement.
- Articles 26 and 27: Children have the right to a standard of living adequate for their physical, mental, spiritual, moral and social development, and to social security benefits when families and children need them.
- Article 28: Children have the right to education on the basis of equal opportunity. School discipline should be consistent with the child’s human dignity and in conformity with the convention.
- Article 30: Children of minority or indigenous communities have the right to enjoy their own culture, language and religion.
- Article 40: Children have rights in the criminal justice system: for example, the right to be presumed innocent, or to have legal or other assistance, and to be dealt with without resort to judicial proceedings where appropriate.

These rights have not become part of Australian domestic law, so they cannot be enforced through our courts or tribunals. However, they can be used to assess whether our laws and practices meet international standards.

Some of the rights expressed in the Convention are summarised in the box below.

**Who is a child?**

Legally, a child in NSW is a person under the age of 18. In some cases, for example in the Children and Young Persons (Care and Protection) Act 1998 (NSW), a distinction is made between a “child”, defined as a person under 16, and a “young person”, defined as someone aged 16 or 17.

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*The United Nations Convention on the Rights of the Child*

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Children and criminal law

Children in the criminal justice system

[7.20] Some general considerations

Generally, children can be charged with the same offences as adults, and the evidence required to prove a criminal charge in the Children’s Court is the same as for adults.

The general criminal law, and police and court processes, are discussed in detail in Chapter 14, Criminal Law.

However, there are a number of things that should be kept in mind in relation to children in the criminal justice system.

The age of criminal responsibility

Children under 10

No child under 10 can be charged with a criminal offence in NSW (Children (Criminal Proceedings) Act 1987, s 5).

Children between 10 and 14

Where the child is between 10 and 14, the prosecution must prove, in addition to the usual matters, that the child knew that what they were doing was seriously wrong and not just naughty (the principle of doli incapax).

Alternatives to court

Formal court proceedings are not the only option for dealing with certain types of offences committed by children. Police may give a child a warning or caution, or refer them to a youth justice conference, under the Young Offenders Act 1997 (NSW) (see The Young Offenders Act at [7.130]).

Court procedure

The Children (Criminal Proceedings) Act governs the way courts deal with children who are charged with criminal offences.

Section 6 sets out some important principles that courts and other decision-makers must have regard to when dealing with children.

Most children charged with criminal offences are dealt with by the Children’s Court.

In general, court proceedings for children are less formal than for adults. Children involved in criminal proceedings also have a right to privacy.

Penalties for children

Penalties in the Children’s Court are different from those imposed on adults, usually emphasising rehabilitation over punishment (see Options in the Children’s Court at [7.290]).

Particular offences

Generally, children can be charged with the same offences as adults. However, children are particularly vulnerable to being charged with particular types of offences including:

• offences unique to children (eg offences concerning access to licensed premises and alcohol)
• offences involving consensual under-age sex
• child pornography offences associated with “sexting”
• public order and “street” offences (eg disobeying police directions, offensive conduct, trespassing, resisting and assaulting police) due to young people’s frequent use of public space and vulnerability when dealing with police
• offences committed by groups (eg affray, robbery in company)
• traffic offences, particularly relating to driving while unlicensed, suspended or as an unaccompanied learner.
Even if a court imposes a lenient penalty, the consequences of some of the above offences can be severe, for example, lengthy automatic disqualification periods for traffic offences, or entry on the child protection register for child pornography or sex offences.

Police powers
Most police powers (such as the power to arrest, search or issue directions) are the same in relation to children as they are for adults. However, there are some special protective measures for children when dealing with police.

Children and police

[7.30] There are some special protections for children in any dealings they have with the police.

Largely due to their vulnerability and the way in which they use public space, there are also special problems that children encounter with police (and with other authority figures such as security guards).

Protections for children when dealing with police

There are special laws to protect children who are arrested or being investigated by police. For example, children have the right to a support person at the police station if they are under arrest, and police need a court order to take a DNA sample from a child or to take fingerprints from a child under 14.

An important protection for children is the right to have an adult (a parent, carer, lawyer, or other adult independent of the police) present during police questioning. In most cases, unless such a person is present, any evidence obtained is not admissible in court.

The right to an adult support person during police questioning does not affect the child’s right to silence.

Nobody, adult or child, has to answer any questions asked by police except in the specific circumstances mentioned in When police questions must be answered at [7.90].

The right to legal advice
Children should not answer questions, or write or sign a statement for police, unless they have had legal advice.

Police must tell children that they have a right to legal advice, and where to get it (for example, the Legal Aid Youth Hotline – see The Legal Aid Youth Hotline at [7.160]).

[7.40] Searches

When police can search a person
Police can stop and search a person in a variety of situations, including:
- with the person’s consent
- with a search warrant
- if the person is under arrest or in police custody (Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), ss 27, 28)
- if police suspect on reasonable grounds that the person is carrying prohibited drugs, stolen goods, or something (such as a weapon) used or intended to be used to commit an offence (s 21)
- if police suspect on reasonable grounds that a person in a school or public place has a knife or a “dangerous implement” (s 24). In this situation police may request the person to undergo a frisk search, or a search of their bag or school locker. There is no power to forcibly search, but it is an offence to refuse (s 25)
- if police have been authorised to use special powers (such as to set up roadblocks or lockdowns of suburbs) to control large-scale public disorder, they may...
search anyone in the area that is the target of the authorisation. No warrant or reasonable suspicion is required (ss 87J–87K). Strip searches are not permitted in this situation.

Police obligations
Police must provide evidence that they are a police officer (unless they are in uniform), and their name and place of duty. They must tell the person the reason for the search and (in some cases) warn them that failure to submit to the search may be an offence.

Police must provide this information as soon as reasonably practicable (Law Enforcement (Powers and Responsibilities) Act, Pt 15).

Forcible and intrusive searches should be a last resort. There are procedures that police must observe so that the search is conducted with a minimum of interference to the person’s privacy and dignity (ss 32, 33).

Strip searches of children
Strip searches should not be done unless the seriousness and urgency of the circumstances justify it. Where practicable, a child being strip-searched should have a support person present.

Under no circumstances may a child under 10 be strip-searched (ss 31, 33, 34).

Searches by consent
Young people should be wary of police officers asking them questions such as “Have you got anything on you that you shouldn’t have?” and “Would you mind if I look in your bag?” This is often a way of trying to gain the person’s consent to a search, which means that the police may search the person without the need for any reasonable suspicion.

Recent amendments to the Law Enforcement (Powers and Responsibilities) Act 2002 (which came into force on 1 September 2016) clarify that police may search by consent. However, police are required to provide their name and place of duty and evidence that they are police officers, and to obtain consent before conducting the search (s 34A).

[7.50] Move-on directions
When police can give a direction
Police may give a direction when they believe on reasonable grounds that a person’s behaviour or presence in a public place:

- is obstructing another person or persons or traffic, or
- constitutes harassment or intimidation of another person or persons, or
- is causing or likely to cause fear to another person or persons (so long as the relevant conduct would be such as to cause fear to a person of reasonable firmness), or
- is for the purpose of unlawfully supplying, or obtaining any prohibited drug (s 197).

Police may also give a direction to a person if police believe on reasonable grounds that the person’s behaviour in a public place as a result of intoxication:

- is likely to cause injury to any other person or persons or damage to property, or
- otherwise gives rise to a risk to public safety, or
- is disorderly (s 198).

What sort of direction police may give
If a direction is given under s 197, there is no restriction on the type of direction the police may give, except that it must be reasonable in the circumstances for the purpose of reducing or eliminating the "relevant conduct" which is of concern.

If police are giving a direction to an intoxicated person under s 198, they may direct the person to leave the public place and not return for a specified period of up to six hours.

Police obligations
When giving a direction, police must provide evidence that they are a police officer (unless they are in uniform), their name and place of duty, and the reason for the direction.

The police must also warn the person that they are required by law to comply, unless they have already complied or are complying.
If the person is being given a direction under s 198, police must also warn them that it is an offence to be intoxicated and disorderly in any public place within six hours after the direction is given.

Failure to comply with a direction
It is an offence to fail to comply with a police direction without reasonable excuse (s 199), but only if the direction is reasonable in the circumstances, the police have followed the correct procedures, and the person persists with "relevant conduct" (ie, doing something that would give the police a reason to give them a direction) after the direction has been given.

[7.60] Demanding name and address
Police may demand a person’s name and address in a variety of situations, including:
• if police suspect on reasonable grounds that the person may be able to assist in the investigation of an indictable offence because they were at or near the scene (Law Enforcement (Powers and Responsibilities) Act, s 11)
• if police propose to give the person a direction to leave a place under s 197 or s 198 (s 11)
• if police suspect on reasonable grounds that an apprehended violence order has been made against the person (s 13A)
• if police suspect on reasonable grounds that a person is under 18 and is carrying or consuming alcohol in public without the supervision of a responsible adult (Summary Offences Act 1988 (NSW), s 11)
• if police suspect on reasonable grounds that the person has committed a public transport-related offence (Passenger Transport Act 2014 (NSW), s 162)
• if police suspect on reasonable grounds that the person has committed an offence in certain precincts which are covered by their own laws (eg Sydney Harbour Foreshore Authority Regulation, Sydney Olympic Park Authority Regulation)
• if police are trying to serve a fine default warrant (Fines Act 1996 (NSW), s 104)
• if police have been authorised to use special powers (such as to set up roadblocks or lockdowns of suburbs) to control large-scale public disorder, and:
  – the person is in an area or in a vehicle on a road that is the target of the authorisation, and
  – police suspect on reasonable grounds that the person has been involved or is likely to be involved in a public disorder (Law Enforcement (Powers and Responsibilities) Act, s 87L)
• if the person is driving a motor vehicle (Road Transport Act 2013 (NSW), s 175) and in a number of other situations relating to vehicles and traffic (eg, Road Transport Act, ss 176, 177).

In most of these cases it is an offence to refuse to provide the information, or to provide false information. The police can ask for documentary identification but there is no obligation to provide it (except in traffic situations where a driver may be required to produce their licence; or where a young person is suspected of consuming or possessing alcohol in public, in which case they can be required to provide proof of age).

[7.70] Arrest
If a person is arrested, they are deprived of their liberty and are no longer free to go as they please. A person’s rights during and after arrest depend on why they are being arrested.

Arrest for an offence
Police may arrest a person without a warrant if:
• they catch the person committing an offence or suspect on reasonable grounds that the person has committed an offence, and
• certain other conditions are met (see “Arrest is a last resort” below) (Law Enforcement (Powers and Responsibilities) Act, s 99).

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Arrest is a last resort
Police can commence criminal proceedings against someone without arresting them first, eg by giving or
situating them a court attendance notice. The law makes it clear that arresting someone for an offence is a last resort, especially where children are concerned. Police may arrest a person for an offence if they are “satisfied that arrest is reasonably necessary” for a purpose listed in s 9(1)(b). These include:

- to ensure that the person attends court
- to protect witnesses or evidence
- to stop the person from continuing the offence or committing another offence, or
- to preserve the safety or welfare of any person, including the person being arrested, or
- because of the nature and seriousness of the offence.

Section 8 of the Children (Criminal Proceedings) Act (referred to elsewhere in this chapter) also suggests that arrest should be a last resort when commencing proceedings against children.

**Must a child go to the police station if asked?**

No one, regardless of their age, has to go to a police station when asked by police, unless they are arrested. However, in some situations it may be advisable for a child to go to the police station if asked - it may save them from being arrested. A young person in this situation should seek legal advice.

**Police obligations**

The arresting police officer must tell the person their name and place of duty and the reason for the arrest (Pt 15). They must also caution the person about their right to silence, which means telling the person that they do not have to say anything but that anything they say may be used in evidence.

**Security guards and citizen’s arrest**

A person who is not a police officer may conduct a “citizen’s arrest” if they catch someone committing an offence (s 100). This is the power used by security guards, transit officers, loss prevention officers and so on.

It is important to be aware that these people are not police and do not have the power to arrest on mere suspicion. Nor do they have the power to search a person or their belongings without consent.

**Arrest for breach of bail**

Police may arrest a person if they believe on reasonable grounds that a person has breached (or is about to breach) their bail.

There is a range of options for police to deal with a suspected breach of bail (eg giving the person a warning, or issuing a notice to appear at court), and police must consider certain factors before deciding to arrest the person (Bail Act 2013 (NSW), s 77). See Bail at [7.230].

**Arrest with warrant**

If there is a warrant for a person’s arrest, police may arrest the person without having to consider other options. Warrants are commonly issued by courts when a person fails to appear, or when action is being taken for breach of a court order (eg a bond, community service order, parole).

**[7.80] Detention after arrest**

Part 9 of the Law Enforcement (Powers and Responsibilities) Act sets out procedures for police to deal with people who are detained at the police station after being arrested for an offence. It also sets out the rights of people who are under arrest.

**The investigation period**

A person under arrest may be detained for a “reasonable” period to allow police to investigate the alleged offence. This is called the investigation period, and it must not exceed six hours (amended from four hours, with effect from 1 September 2016) (ss 114–116).

If the police want to extend the investigation period, they must obtain a detention warrant from a court to extend the period by up to six hours, to a total of 12 hours (ss 118–120).

**Time that is not included**

Many periods (including time spent talking to a lawyer or support person, waiting for a support person to arrive, eating, sobering up, waiting for police to complete paperwork) count as time out from the investigation period, so a person could end up in police custody for much longer than four hours even without an extension (s 117).

**Rights during detention**

Everybody who is detained under Part 9 has some basic rights which must be explained to them by the custody manager at the
police station. These are set out in ss 123–130 of the Law Enforcement (Powers and Responsibilities) Act, and include the right to:

- obtain legal advice
- consult a friend or relative
- have an interpreter or consular official present if appropriate
- be provided with reasonable refreshments and facilities.

Children's rights in detention
Children are defined as “vulnerable people”, and have a number of additional rights under the Law Enforcement (Powers and Responsibilities) Regulation 2016 (NSW).

**Parent or guardian must be notified**
If a child is in police custody, a parent or person responsible for the child’s welfare must be notified (cl 36).

**Right to a support person**
Children have the right to have a support person present during any investigative procedure, such as a search or interview (cll 30–32). A child cannot waive this right (cl 33).

**Right to information and assistance**
The police custody manager must tell the child about their rights and help them to exercise their rights (for example, by giving them the telephone number for the Legal Aid Hotline) (cl 29).

**Right to separate accommodation from adults**
Children in police custody must not be kept in the same cells as adults (Children (Detention Centres) Act 1987 (NSW), s 9).

After the investigation period
At the end of the investigation period the police must take some action. Usually this will be one of the following:

- releasing the child without charge
- referring the child for a caution or youth justice conference under the Young Offenders Act
- commencing criminal proceedings in the Children’s Court.

### [7.90] Police questioning

**Must a child answer police questions?**
Every suspect, regardless of their age, has the right (with a few exceptions) not to answer police questions or make a statement.

Except in the situations discussed below, children should politely tell police officers that they are under 18 and do not wish to answer any questions until they have spoken to a lawyer and/or have an adult support person present. After speaking to a lawyer or support person, the child may still decline to answer questions if they wish.

Police will often tell the suspect that, if they do not wish to answer questions, they must go into an interview room and have their refusal recorded on audio and video (commonly known as ERISP – Electronically Recorded Interview with Suspected Person). However, this is incorrect - the police cannot lawfully compel a person to be recorded on ERISP.

**When police questions must be answered**
Police have the power to require a person to provide their name and address in variety of situations (see [7.60]). In most cases, the person has no obligation to answer any other questions. However, a person may be required to answer other questions in some situations including motor accidents and certain vehicle-related offences (for example, a person can be required to provide details about an accident, and/or details about a vehicle’s driver or passengers).

**Police questioning of children**
Special rules apply when people under 18 face police questioning. Confessions or statements made to police by a child are admissible in evidence only if:

- there is an independent adult (who is not a police officer) present when the statements are made, or
- the court considers that there is a very good reason for the absence of such an adult and that the statement should be admitted into evidence (Children (Criminal Proceedings) Act, s 13).

**The independent adult**
Section 13 of the Children (Criminal Proceedings) Act sets out who the independent adult
can be. The independent adult cannot be a police officer (except a police officer who is the child’s parent or carer).

For children under 14, the adult must be:
• a person responsible for the child (usually a parent or carer), or
• another adult present with the consent of the person responsible, or
• a solicitor or barrister chosen by the child.

For young people aged 14 or over, the adult can be any of the people listed above, or an adult present with the young person’s consent.

What the independent adult should do

It is important that the adult protects the child: for example, by making sure the child knows that they do not have to answer questions, and by ensuring that the child receives legal advice before deciding whether to answer questions.

If possible, the adult should also take notes of proceedings in the police station, in case a dispute arises later on about what was said.

Evidence from someone other than the police can be useful. Most police interviews are recorded on audio and video (ERISP), but police may try to rely on conversations occurring outside the formal interview.

If the child decides to participate in an interview, the independent adult is not restricted to being a mere observer. As long as they do not dominate the interview or answer questions on the child’s behalf, the independent adult is entitled to speak and to help the child to assert their rights.

If the child does not wish to be interviewed, an adult support person may need to advocate on their behalf, for example, to ensure that the child is not taken to an interview room and recorded on ERISP. Even where the child has made it clear they do not wish to answer questions, the police sometimes use an ERISP as an opportunity to ask further questions.

Children under 14

Police may not photograph or take fingerprints from a child under 14 without a court order (Law Enforcement (Powers and Responsibilities) Act, s 136).

Destruction of photographs and fingerprints

The fingerprints and photographs of children must be destroyed if:
• the child is found not guilty
• the charge against the child is dismissed (with or without a caution) under Children (Criminal Proceedings) Act, s 33(1)(a)(i)
• the court orders it (s 38), or
• 12 months have elapsed and no criminal proceedings have been commenced against the child (Law Enforcement (Powers and Responsibilities) Act, s 137A).

[7.100] Forensic procedures

The Crimes (Forensic Procedures) Act 2000 (NSW) sets out the conditions under which police may conduct forensic procedures (see Chapter 14, Criminal Law).

Forensic procedures include, for example, taking a blood sample, or collecting a DNA sample by taking a strand of hair or a buccal swab (a swab from inside the mouth).

Who may be subject to a forensic procedure

A forensic procedure may be carried out on:
• a suspect – ie, a person who police suspect on reasonable grounds has committed an offence
• a convicted indelible offender or an untested former offender – that is, a person who has been imprisoned for an offence carrying a maximum penalty of five years or more. This may include a child sentenced to imprisonment by a superior court (see Sentencing in the District Court and the Supreme Court at [7.320]), but not a child sentenced to a control order by the Children’s Court (unless he or she has turned 21 by the time the control order is imposed)
• a victim
• a volunteer (for example, a person who is not a suspect but wants to clear their

[7.100] Photographs and fingerprints

People arrested for offences, including children, usually have a photograph and fingerprints taken by police for identification purposes.
name or help police).

When a forensic procedure may be carried out on a child who is a suspect Police may carry out a forensic procedure on an adult suspect with the person’s informed consent.

Children are deemed unable to give informed consent (Crimes (Forensic Procedures) Act, s 7). To carry out a forensic procedure on a child, there must be a court order (ss 22–38, 74).

Who must be with the child
Some parts of the Act require a child to have an interview friend (support person) or legal representative present during any application for a court order, and during the procedure itself (ss 30, 54).

[7.120] Improper or unlawful police behaviour
If police behave improperly or illegally (for example, by using threats or violence, or unlawfully arresting a child), this could have consequences if the child is charged with a criminal offence. The child may also be able to pursue a formal complaint or civil action against the police (see [9.450] Complaints against police). It is important to get legal advice in such cases. This is dealt with in more detail in Chapter 14, Criminal Law.

The Young Offenders Act

[7.130] The Young Offenders Act 1997 (NSW) provides an alternative to court proceedings in the form of:

• informal warnings
• formal cautions
• youth justice conferences.

[7.140] Purpose of the Act
The aim of the legislation is to divert young people away from formal court processing, to encourage them to take responsibility for their offending, and to meet the needs of victims as well as offenders. In 2008, a further object was added to the Act: to address the over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system (s 3).

[7.150] People covered by the Act
Like the Children (Criminal Proceedings) Act, the Young Offenders Act applies to young people aged at least ten but under 18 at the time of the alleged offence, and under 21 when dealt with under the Act (s 7A).

[7.160] Offences covered by the Act
Offences covered by the Act include most offences that can be dealt with by the Children’s Court (see [7.210]), subject to a few exceptions (s 8).

Offences not covered by the Act
Offences not covered by the Act include:

• offences resulting in the death of any person
• serious children’s indictable offences
• sexual offences
• offences of stalking/intimidation or breaching an apprehended violence order
• most drug offences, except for possession or use of small amounts
• traffic offences, if the child was old enough to hold a licence at the time of the offence
• offences where the person investigating the offence is not an “investigating official” within the meaning of the Act (in practice, this means offences dealt with by bodies other than the police, such as local government or public transport authorities).
• graffiti offences are covered by the Act, but with some restrictions. The police...
may not caution a child or refer them to a youth justice conference for an offence covered by the Graffiti Control Act 2008 (ss 18, 37) but these options are still available to the court (ss 31, 40). It is also worth noting that there are no restrictions on cautioning or conferencing for an offence under the Crimes Act 1900 of “destroy/damage property” (which may include graffiti).

**What police must do**

For offences covered by the Act, police **must** consider a warning, caution or conference. Court proceedings should be commenced only if these three options are clearly inappropriate.

If police decide not to warn or caution a child, they must refer the matter to a specialist youth officer to decide how the child should be dealt with (ss 14, 20, 21). A specialist youth officer is a police officer with special training in dealing with young people and the Young Offenders Act.

**The Legal Aid Youth Hotline**

The Young Offenders Act promotes the principle that children are entitled to be informed about their right to legal advice and to have an opportunity to obtain it (s 7). The Legal Aid Youth Hotline provides children with telephone advice from 9am to midnight on Monday to Thursday and for 24 hours on weekends and public holidays. The phone number is 1800 101 810.

To be referred for a caution or youth justice conference instead of going to court, the child must admit the offence (in the presence of a responsible adult) and consent to a caution or conference.

A warning may be given without the child admitting the offence.

**[7.170] Warnings**

**What offences are covered?**

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 non-violent summary offence – for example, trespassing or offensive language (s 14).

The investigating officer may consider it appropriate not to give the child a warning but to deal with them by other means. However, a child is not precluded from being given a warning merely because they have a prior record (s 14(3)) or have not admitted to the offence.

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**No conditions**

Conditions, or additional sanctions, may not be imposed on a warning (s 15).

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**Effect on the child’s record**

The child’s name is recorded, but the incident does not form part of the child’s criminal history or court alternatives history. Records of warnings must be destroyed or expunged once the young person turns 21 (s 17).

**[7.180] Formal cautions**

**When can a caution be given?**

A formal caution may be given if the child:

- has admitted the offence in the presence of a responsible adult (the categories of adults who may fulfil this role, and who has a say over who the adult should be, are similar to those set out in s 13 of the Children (Criminal Proceedings) Act) (ss 10, 19)
- consents to being given a caution (s 19).

**What must be considered by the police**

Issues that must be taken into account by police in deciding whether to give a caution include:

- the seriousness of the offence
- the degree of violence involved
- the harm caused to any victim
- the number and nature of any previous offences committed by the child
- the number of times the child has been dealt with under the Young Offenders Act (s 20(3)).

If the child has a record

A history of prior matters does not preclude a child from being given a caution, but the Act imposes a limit of three cautions (s 20).

**What must be explained to the child**

The police must explain:
• the nature of the allegations against a child
• the child’s right to legal advice and where that may be obtained
• the purpose, nature and effect of the caution
• the child’s right to choose to deal with the matter in court (s 22).

Notice of caution
Police do not give the caution on the spot. They must give the child a notice of caution which includes information such as the offence, the date and time the caution will be delivered, the consequences of failing to attend, the child’s right to obtain legal advice, and the child’s right to choose to go to court instead of proceeding with the caution (s 24).

The cooling-off period
There is a cooling-off period during which the child can seek legal advice and, if they wish, change their mind. The child is entitled, at any time before a caution is given, to elect to have the matter dealt with by a court (s 25).

Timing of the caution
A caution must be given not less than ten days and not more than 21 days after the notice of caution is given (s 26).

Who gives the caution
The caution is given by:
• a senior police officer or specialist youth officer, or
• sometimes, a respected member of the community such as an Aboriginal elder (s 27).

Who may accompany the child
It is the responsibility of the officer giving the caution to ensure, as far as practicable, that the child is accompanied by a person responsible for the child or an adult chosen by the child (s 29). Other people such as an interpreter, social worker, community elder, disability worker or juvenile justice officer may also attend if appropriate (s 28).

Conditions imposed on a caution
No conditions may be imposed on a caution, other than reading out a statement from the victim and requesting the young person to provide a written apology to the victim if asked (ss 24A, 29).

If the child does not attend for the caution
If the child does not attend, the police may arrange for the caution to be given at a different time, or may commence court proceedings (s 64).

Effect on the child’s record
A record of the caution is kept (s 33). This will appear on the child’s “court alternatives history”, and may be seen by the Children’s Court if it deals with the child for further offences. However, there is no criminal conviction, and the caution may not be taken into account by an adult court (s 68).

Any photographs or fingerprints taken by the police must be destroyed if the child is cautioned (s 33A).

Cautions given by the Children’s Court
The Children’s Court may also give a caution under the Young Offenders Act in appropriate circumstances. For example, the child may have chosen not to answer police questions, but has now admitted to the offence at court. The court must notify the police and give reasons why the caution was given (s 31).

[7.190] Youth justice conferences
Youth justice conferences are the next step up from cautions. If a caution is not considered appropriate, the investigating police officer must refer the matter to a specialist youth officer to consider a conference.

The scheme establishing youth justice conferences is based on principles of:
• responsibility for criminal behaviour
• strengthening of family support
• identification of appropriate services
• victim participation and reparation
• cultural appropriateness (s 34).

Referral to a conference
Ideally, a child will be referred to a conference by the police, without having to go to court first. However, a
Eligibility for a conference
A conference can be arranged only if the child:
• has admitted the offence in the presence of a responsible adult (s 10, 36), and
• consents to the holding of a conference (s 36).
As with cautioning, police must consider a number of issues in deciding whether or not to refer the child to a conference (s 37).

The cooling-off period
There is a cooling-off period during which the child can seek legal advice and, if they wish, change their mind. The child may at any time before the conference elect to have the matter dealt with by a court (s 44).

When must the conference be held?
According to the Act, a conference must be held not less than ten days and not more than 28 days after the referral is received (s 43). However, in practice, conferences often take much longer to arrange.

Who runs the conference?
Youth justice conferences are not run by the police. They are run by independent convenors appointed by Juvenile Justice (s 42).

Before the conference
The convenor speaks to the child, and everyone else involved, before the conference. The convenor also gives the child a notice outlining the details of the conference and the right to legal advice (s 45).

Who attends the conference?
The following people are entitled to attend (s 47):
• 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 lawyer advising the child

• the investigating official
• a specialist youth officer
• an additional police officer, for training purposes, with the consent of the child, person responsible, victim and convenor
• the victim or a representative of the victim
• a support person for the victim.
Other people (such as interpreters and disability support workers) may attend where appropriate.

Legal representation
A lawyer is entitled to attend and advise the child, but not to represent the child unless permission is obtained from the conference convenor (s 50).

How should the conference be conducted?
The purpose of the conference is to determine an outcome plan for the child (s 34), and it should be conducted in a way which best enables the reaching of an agreement or outcome plan (s 48).

Outcome plans
The outcome plan must reflect the consensus of the participants, and must be agreed to by both the child and the victim.

Decisions and recommendations may include an apology, reparation, voluntary community work, participation in a program, or anything else that is considered appropriate. The only limitation is that the outcomes must not be more severe than those a court may have ordered, and must be realistic and appropriate (s 52).

Supervision of the outcome plan
The outcome plan is supervised by a conference administrator from Juvenile Justice (s 56).

If the plan is satisfactorily completed
When the outcome plan has been satisfactorily completed, notice is given to the child, the victim, and the police (or the Director of Public Prosecutions or the court, if they referred the child to the conference) (s 56).

No further criminal proceedings may be taken against a child who has satisfactorily completed an outcome plan (s 58). If the
matter was referred by a court without making a formal finding of guilt, the court must dismiss the charge (s 57).

If the plan is not completed
If the outcome plan is not completed, court proceedings may be commenced or continued against the child (s 64).

Effect on the child’s record
As with a caution, the fact that the child has attended a conference will be recorded. It will appear on the child’s “court alternatives history”, and may be seen by the Children’s Court if it is dealing with the child for further offences.

However, there is no criminal conviction and the conference may not be taken into account by an adult court (s 68).

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**Can police use information obtained in cautions and conferences?**

Any statement or information given by a child during a caution or conference is not admissible in subsequent criminal or civil proceedings (s 67).

However, any information obtained by police during a conference may be used to investigate other criminal matters (s 69).

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**Criminal proceedings in the Children’s Court**

[7.200] If it is not considered appropriate to refer a child for a warning, formal caution or youth justice conference under the Young Offenders Act, the child may be required to appear in court.

[7.210] The Children’s Court

The NSW Children’s Court consists of several specialist children’s magistrates and is headed by a President, who is a District Court judge.

In metropolitan Sydney, Wollongong, Newcastle and the Central Coast there are specialist Children’s Courts. In other areas, the Local Court sits as a Children’s Court on certain days of the week.

The Children’s Court has a criminal jurisdiction (discussed in this section of the chapter) and a care and protection jurisdiction (see Care and protection of children and young people at [7.400]).

**Jurisdiction of the Children’s Court**

The Children’s Court deals with most criminal matters not dealt with under the Young Offenders Act where the child was between ten and 18 when the offence was committed, and is under 21 when charged.

The criminal jurisdiction and procedure of the Children’s Court is governed by the Children (Criminal Proceedings) Act.

**Summary offences**

The Children’s Court has jurisdiction over summary offences (such as offensive conduct, drug possession and trespassing) (Children (Criminal Proceedings) Act, s 28).

**Indictable offences**

The Children’s Court has jurisdiction over all indictable offences except “serious children’s indictable offences” (see definition below). The Children’s Court can deal with some types of serious offences (for example, robbery and sexual assault) that would have to go to the District Court if the defendant was an adult.

**Traffic offences**

The Children’s Court has jurisdiction over traffic offences only if:

- the person was not old enough at the time of the alleged offence to hold a licence or permit to drive the vehicle to
which the offence relates (this generally means 16 years of age for a car, 16 years
and 9 months for a motorcycle), or
• the traffic offence arose out of the same
circumstances as another charge that in-
volves appearing in the Children’s Court
(Children (Criminal Proceedings) Act, s 28).
Apart from these two situations, Local
Courts have sole jurisdiction over traffic
matters.
The Local Court magistrate may, however,
choose between adult sentencing options
and children’s sentencing options when
dealing with a child convicted of a traffic
offence (Criminal Procedure Act 1986 (NSW),
s 210).

Children’s matters heard in the District or Supreme Courts
Serious children’s indictable offences
Serious children’s indictable offences cannot be finalised
by the Children’s Court and must be dealt with by the
District or Supreme Courts (s 17). These are:
• homicide offences
• offences punishable by imprisonment for life
• offences punishable by imprisonment for 25 years or
more
• some sexual assault matters
• certain firearms offences.
The Children’s Court can only conduct committal pro-
ceedings in these cases (see Chapter 14, Criminal Law).

Other indictable offences
For other indictable offences, the Children’s Court mag-
istrate decide that the charge may not be properly dealt
with by the Children’s Court. In this case the magistrate
may commit the matter to the District Court for trial or,
if the child pleads guilty, for sentence (s 31(3), (5)).
In some cases a child charged with an indictable offence
may choose to be dealt with “according to law”. This
means that the child will be committed for trial or
sentence in the District Court (s 31(2)).

[7.215] Principles for courts
dealing with children
The following principles, set out in s 6 of the
Children (Criminal Proceedings) Act, must be
considered by all courts dealing with chil-
dren:
• children’s rights and freedoms before the
law are equal to those of adults
• children who commit offences are respon-
sible for their actions but, because of their
dependence and immaturity, need guid-
ance and assistance
• it is desirable, if possible, for a child’s
education to proceed without interruption
• it is desirable, if possible, for a child to
live at home
• it is desirable that children who commit
offences be assisted with reintegration
into the community
• the penalty imposed on a child for an
offence should be no greater than that
imposed on an adult who commits an
offence of the same kind
• it is desirable that children who commit
offences accept responsibility for their
actions
• (subject to the other principles set out
above) consideration should be given to
the effect of any crime upon the victim.

[7.220] The court attendance
notice
All criminal proceedings commence with
the issue of a court attendance notice (CAN).
The notice gives such details as the nature of
the charge and the court date and venue.
A field, future or no bail court attendance
notice means that the person is at liberty
and has no obligations except to appear at
court on the stated date.
A bail court attendance notice involves the person signing a bail agreement or, in some cases, being refused bail and held in custody until court.

Court attendance notices for children

Section 8 of the Children (Criminal Proceedings) Act requires criminal proceedings against children to be commenced by way of a court attendance notice unless:
- the offence is a serious children’s indictable offence
- the offence is one of certain drug offences
- the police believe the child is unlikely to comply with a court attendance notice
- the police believe the child is likely to commit further offences, or
- the police believe that due to the violent behaviour of the child or the violent nature of the offence the child ought to be in custody.

In fact, all court proceedings commence with a court attendance notice, so the language of the section is outdated. The intention of the section is that children should be issued with a field, future or no bail court attendance notice wherever possible.

In practice, however, children are often given bail court attendance notices, usually with conditions attached. Often this is because police believe that conditions need to be imposed to ensure the young person attends court or does not re-offend.

[7.230] Bail

If the police decide not to issue a field, future or no bail court attendance notice, the custody manager at the police station must make a decision about bail.

Bail is essentially a promise to attend court on a criminal charge, and it may be granted unconditionally or subject to conditions. It may be granted by the police (or, if refused by the police, by a court.

The general provisions of the Bail Act also apply to children (see Chapter 14, Criminal Law).

If bail is not granted by the police

A child who is not granted bail by the police must be brought before a Children’s Court as soon as practicable. This is normally the next day. On Saturdays and Sundays, there are bail courts at Parramatta in metropolitan Sydney. Children usually appear at these weekend bail courts by audio-visual link from a detention centre.

If the child is held overnight awaiting court after being refused bail by the police, the child is held in a detention centre run by Juvenile Justice. The child should be removed from a police station to the nearest regional detention centre as soon as practicable (Children (Detention Centres) Act, s 9).

This also applies if bail is not granted by the court. In some cases (but very rarely) a child may be remanded in an adult prison (see Juvenile offenders and prison at [7.330]).

Applying for bail at court

Bail applications (also known as release applications) in the Children’s Court are conducted in much the same way as bail applications in the Local Court (see Chapter 14, Criminal Law).

Assistance with bail applications

Duty solicitors provided by Legal Aid NSW are available at the court to assist children with bail applications.

At most specialist Children’s Courts, a duty juvenile justice officer also attends to assist children in custody with accommodation and other matters relevant to bail. The officer gives the court informal information about options for accommodation, and family and other support.

Restrictions on bail applications

Section 74 of the Bail Act restricts the number of bail applications a person may make.

If a person over 18 has been refused bail by a court, the court cannot deal with another bail application unless:
- the person was not legally represented when the first bail application was made, or
- the first bail application was dealt with by a Justice of the Peace (these people sometimes sit at weekend bail courts) and not a magistrate or judge, or
• there are “new facts or circumstances” that justify another bail application being made (for example, a person who was previously homeless has found accommodation), or
• there is new information presented to the court (for example, a report that was not available when the first bail application was made).

The situation for children is the same, except that children may make two unsuccessful bail applications before the restrictions start to apply.

A child who is refused bail by the Children’s Court may still apply for bail to the Supreme Court without having to present new information or show a change in circumstances.

Factors to be considered in deciding whether to grant bail
The police, or the court, must consider whether there are any “unacceptable risks” that the person will, if released on bail:
• fail to appear at court
• interfere with witnesses or evidence
• commit a serious offence while on bail, or
• endanger the safety of victims, individuals or the community (s 19).

The police or court must consider a range of factors including the person’s age, health, housing, family and employment situation, criminal history (especially anything that would suggest they are likely to commit a serious offence while on bail or fail to appear at court), the nature and seriousness of the alleged offence, the likely penalty if found guilty, the length of time before the matter is likely to be finalised, and any bail conditions that can be imposed (s 18).

If there is an unacceptable risk, bail must be refused; if there are no unacceptable risks, the person must be released (ss 19, 20).

A high risk of failing to appear or reoffending on bail is not necessarily an unacceptable risk, particularly if the accused is a child charged with a minor offence which is unlikely to result in a custodial sentence.

In some cases, an adult applying for bail is first required to “show cause why his or her detention is not justified”. This does not apply if the person was under 18 at the time of the alleged offence (s 16A).

Bail conditions
Bail conditions may be imposed for the purpose of “mitigating a bail concern” (Bail Act, s 17). This means a concern that the person on bail may fail to appear at court, interfere with witnesses or evidence, commit a serious offence while on bail, or endanger the safety of victims, individuals or the community (s 17).

Bail conditions must be reasonable, proportionate to the offence for which bail is granted, and no more onerous than necessary to deal with the bail concern (s 20A). Despite this, bail conditions imposed on children, especially by police, are often quite onerous.

Types of bail conditions commonly imposed on children include:
• to report to a police station on certain days of the week
• to reside at a particular address, or at an address approved by Community Services or Juvenile Justice
• to keep a curfew (ie, not to be away from their home address between certain hours)
• restrictions on entering certain areas or associating with certain people.

It is common practice for police to conduct “curfew checks” on young people who are subject to curfew conditions. This involves attending their home (usually late at night) to check that the young person is home. It is important to understand that police do not have the power to enter premises to check whether a person is complying with their bail, nor does the child have to answer the door or otherwise prove that they are at home, unless the child has an “enforcement condition” as part of their bail.

The police may apply to a court for an “enforcement condition”, which is a condition imposed for the purpose of monitoring or enforcing compliance with another bail condition (s 30). For example, if a young person is subject to a curfew condition, the court may also impose a condition requiring the young person to answer the front door if
directed to by police. When making an enforcement condition, the court must impose some limits to ensure that the condition is not too onerous (for example, by specifying that the police may only attend the young person’s home once per night, or once per week, or between certain hours).

Variation of bail
Because children’s circumstances often change (eg they may change address or become homeless), and because bail conditions can often be quite onerous, a child may need to apply to vary their bail conditions.

A bail variation application can be made by lodging a form with the court; the application will usually be listed within a few days.

Alternatively, a bail variation application can be made on any day when the child is appearing in court, without the need to lodge a formal application. In practice, the court is unlikely to grant a variation unless it is uncontroversial or the prosecution has been notified at least a couple of days in advance. A child wishing to vary their bail conditions should get legal advice as soon as possible.

Breach of bail
It is an offence to fail to appear at court when bailed to do so (s 79). It is not an offence to breach other bail conditions, but an alleged breach of bail can have consequences. Police have a range of options available, including:

• issuing a warning
• requiring the child to attend court, or
• as a last resort, arresting the child and taking them to court (s 77).

If the court is satisfied that a child has breached their bail, the court may decide to revoke the child’s bail, or to continue bail with the same or amended conditions (s 78). If the alleged breach is minor, and the child has not committed any new offences, the court will usually re-release the child on bail. However, in practice, many young people spend time in custody on remand following a breach of bail. See Arrest for breach of bail at [7.70].

[7.240] Legal representation
A child should be represented by a lawyer whether they are pleading guilty or not guilty.

In particular, a child who is pleading not guilty will find it difficult to succeed if they are not represented.

Legal Aid
Legal aid from Legal Aid NSW is available to children appearing on all matters in the Children’s Court. There is generally no means test applied to the child or the child’s parents, except in committal hearings. For appeals (see Appeals at [7.340]), legal aid is subject to a merits and means test.

Legal aid is available through the duty solicitor at the Children’s Court, who may be a Legal Aid NSW solicitor or a private lawyer on a roster.

The child should arrive at court by 9am on their first court date to see the duty solicitor.

Representation in defended matters
For matters where the child is pleading not guilty, they may be represented by an in-house legal aid solicitor, or by a private solicitor or barrister chosen from the Legal Aid Children’s Court panel.

The solicitor who enters the plea of not guilty and has the matter set down for hearing often continues with the case and represents the child at the hearing.

Keeping in touch with the lawyer
It is important that children who have pleaded not guilty know who their solicitor is and keep in touch with them. This is because the solicitor will probably need to see the child to prepare for the hearing. A child cannot just turn up on the hearing date and expect a duty solicitor to be able to act for them.

Alternatives to Legal Aid representation
Some children may be represented by a lawyer from an Aboriginal Legal Service or a community legal centre rather than Legal Aid NSW.

A child may also choose to be represented in court by a private lawyer, if the child or their parents are willing and able to pay for one.
Taking instructions from the child
The lawyer’s job is to represent the child, not the child’s parents or guardians. Unless the child really lacks the capacity to give instructions (which is rare) the lawyer must act according to the child’s wishes rather than on some notion of what may be in the child’s best interests.

[7.250] Procedure in the Children’s Court

Attendance at court
The child should try to attend with at least one parent or other adult support person. In practice, many young people are not accompanied by a parent. In such cases a youth worker or other adult support person can be a great asset.

The Children’s Court has the power to adjourn court proceedings and to direct parents to attend (Children (Protection and Parental Responsibility) Act 1997 (NSW), s 7), but this power is not often used.

Court procedure
The Children’s Court is similar to that in the Local Court, but proceedings are generally conducted with less formality.

Explanation of proceedings
The court must ensure that the child understands the proceedings (s 12).

The court may be asked to explain to the child any aspect of procedure or any ruling made, and must make sure that the child has the fullest opportunity to be heard and to participate.

In practice, the court usually relies on the child’s solicitor to explain these matters to the child.

When will the case be heard?
Most cases are listed to start at 10am, but they cannot all be heard at the same time. Usually short matters (like requests for adjournments and simple guilty pleas) and matters involving children in custody are dealt with first. Sometimes people may have to wait until late afternoon before their case is heard.

If there is any special reason for a case to be dealt with quickly (for example, the child may need to go to school, or the family may have young children or aged grandparents present), the child or their parents should tell their solicitor or the court officer, who will usually arrange to have the matter dealt with early.

Adjournments
Cases are often adjourned. Reasons include:

• giving the child a chance to get legal advice
• allowing police to prepare a brief of evidence, if the child pleads not guilty or if the matter is likely to go to the District or Supreme Court (see Jurisdiction of the Children’s Court at [7.210])
• setting the matter down for a defended hearing (on a date when all relevant witnesses are able to attend)
• allowing time for a background report to be prepared for sentencing, if the child has pleaded or been found guilty.

During the adjournment the child may be:
• remanded in custody (usually in a juvenile detention centre)
• out on bail (with or without conditions)
• at liberty without requiring bail.

Who can attend the Children’s Court?
The general public are excluded from Children’s Courts, and from any other courts hearing criminal proceedings involving a child. Section 10 of the Children (Criminal Proceedings) Act sets out who may be present in court.

Family, friends and support people
Parents and other support people may sit in the courtroom if the child wishes them to be present. If a young person does not wish their parent(s) or other adult present, their wishes should be respected.

The child does not have an absolute say over who enters the courtroom – for example, a magistrate may allow a parent to be present despite the young person’s objection, or a magistrate may exclude people such as younger siblings and friends from the courtroom.

Victims and their families
Victims and their immediate family members or support people may be present in court while their matter is being dealt with.
Lawyers and officials
Lawyers, police prosecutors and juvenile justice officers are usually allowed to remain in court, even when not directly involved in the case being heard. The policy on this varies between courts.

The media
Media reporters are entitled to be in the courtroom unless the court says otherwise (s 10).
Children’s matters can be reported in the media, but the name of any child involved (or any other material that would identify them) may not be published or broadcast (s 15A) without the consent of:
- the child, if the child is 16 or over, or
- the court, if the child is under 16. The court must also obtain the child’s consent if possible (s 15D).

However, the name of a child convicted of a “serious children’s indictable offence” in the District or Supreme Courts may be published without the child’s consent if the court orders it (s 15C).

The prohibition on publication of names and identifying details applies to witnesses and any other children involved in criminal proceedings, not just to a child defendant.

Going into court
When the court is ready to deal with the child’s case, a court officer will usually call the child’s name outside the court. The child, preferably with a parent and/or other support people, goes into court. The court officer or the child’s lawyer tells the magistrate who is present.

[7.260] Pleas and hearings
Entering a plea
In most cases, the child will be required to enter a plea of either guilty or not guilty.

There are some situations in which a plea does not need to be entered (see Diversionary options at [7.270]).

Pleading not guilty
If a child pleads not guilty, the prosecution will have to prove the case against the child beyond reasonable doubt.

The hearing
Where a plea of not guilty is entered, the matter will usually be adjourned for several weeks to allow the police to prepare and serve a brief of evidence. After the brief is served, the matter will be adjourned again for a hearing.

The hearing date is when all relevant witnesses give their evidence and the magistrate reaches a finding of guilty or not guilty. The procedure is similar to the procedure for adults in a Local Court (see Chapter 14, Criminal Law). However, some special considerations may arise from the fact that the accused persons (and often many of the witnesses) are children.

Doli incapax
If the child is under 14, the principle of doli incapax (a Latin phrase meaning “incapable of wrong”) applies.

As well as proving that the child did the alleged act, the prosecution must also satisfy the court that the child understood that their actions were “seriously wrong” as opposed to merely naughty.

To demonstrate that the child was capable of understanding the criminality of their actions, the police will often call evidence from people such as school teachers who know the child and can comment on their level of maturity. Police may also rely on admissions made by the child, evidence of flight, and so on.

Children giving evidence
A child who is very young or has a developmental disability may not be competent to give sworn evidence. In this case, they may be able to give unsworn evidence if they are capable of understanding the difference between the truth and a lie, and that it is important to tell the truth (Evidence Act 1995 (NSW), s 13).

Certain children may be entitled to give evidence by CCTV or to give part of their evidence by means of a recorded statement (see Giving evidence at [7.1060]).

Parents giving evidence against children
It is not uncommon in the Children’s Court for parents to be called as prosecution witnesses, to give evidence against their
children. A parent may object to giving evidence against the child, and they may be excused from giving evidence if the magistrate is of the view that giving evidence may harm the relationship between the parent and the child (s 18).

**If the child is found guilty**
If the child is found guilty, the matter will proceed to sentencing in a similar way to dealing with a guilty plea (except the police do not hand up a fact sheet, because the magistrate has already heard the evidence and made findings about the facts).

**Pleading guilty**
If the child pleads guilty and admits the facts alleged by the police, the charge can sometimes be finalised on the first court date. The usual order of events is described below.

**Entering the plea**
The magistrate asks whether the child will plead guilty or not guilty. This question is usually answered by the solicitor on the child’s behalf.

**The police fact sheet**
When a guilty plea is entered, the prosecutor hands up to the magistrate a document setting out the police version of the facts and surrounding circumstances of the offence.

The child should already have been given a copy of this by the police, or shown a copy by their solicitor. A child who disagrees with anything in the fact sheet should tell their solicitor immediately.

**The child’s record**
A Children’s Court magistrate may be told about police cautions and youth justice conferences (which will appear on the child’s court alternatives history) as well as offences that have been proved against the child in court.

The police prosecutor will hand up a copy of the child’s criminal record and court alternatives history (if any).

The child is entitled to look at the record to make sure it is correct. If the child disagrees with anything in it, they should say so immediately.

**Reports and references**
The child or their lawyer may hand up reports or references on the child’s behalf. In some cases reports may be provided to the court from other sources (see below).

**Deciding whether to adjourn**
The magistrate will usually then decide whether the matter can be finalised immediately, or if it should be adjourned for any reason.

If the child is a first offender, or the offence is not particularly serious, the matter is often finalised on this first occasion. Otherwise, the magistrate may adjourn the case to obtain a background report (see below), to enable the child to undertake some kind of program or just to prove that they can keep out of trouble for a time.

**Address by the child’s solicitor**
After all reports have been obtained and read by the magistrate, the solicitor is asked whether they have anything to say on the child’s behalf.

This is the opportunity to tell the magistrate if there are any mitigating factors; for example, that the child was led into the offence by older people, or is having difficulties at home or school, or has any relevant disabilities or health problems.

**Statement by the child or their parents**
The child or parents may be asked if they want to say anything directly to the magistrate. This can be an opportunity for the child to apologise and to demonstrate some remorse or insight into their behaviour.

**Sentence**
After considering all the material, the magistrate makes a decision about the sentence, and whether to record a conviction (see Options in the Children’s Court at [7.290]).

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**References and reports**
A child who pleads (or has been found) guilty should try to obtain references or reports from people they know such as youth workers, school teachers, religious leaders, or other members of their local community.
Children who intend to plead guilty and who are attending court for a first offence should try to obtain these references before the first court date, because their matter may be finalised on that date. It is usually not necessary for the referees to attend court to give evidence.

**Psychiatrists, psychologists and counsellors**

Sometimes, lawyers may decide to seek more detailed reports from psychiatrists, psychologists or counsellors.

**Juvenile justice officers**

For more serious or repeat offences, the court usually requests a background report from juvenile justice. Most of these are provided by juvenile justice officers. Juvenile Justice also employs psychologists who provide reports at the request of the courts. The child need not be in custody for a psychological report to be prepared.

Juvenile justice officers are located in all regions, and their services are available at most Children’s Courts. For a full list of juvenile justice centres, see under Government bodies in Contact points at [7.1080].

**Justice Health**

At some Children’s Courts, mental health court liaison officers employed by Justice Health are available to assess and write reports on children who are thought to have mental health problems.

[7.270] Diversionary options

Depending on the child’s circumstances, they may be eligible for a diversionary option, sometimes without having to enter a plea. The availability of diversionary options varies from place to place, and may also change over time (for example, the Youth Drug and Alcohol Court was discontinued in 2012, the Youth Conduct Order scheme no longer operates, and there are programs such as Youth on Track and the Youth Koori Court available in some areas).

**Young Offenders Act**

If the offence is covered by the Young Offenders Act (see [7.140]) and the child admits the offence, the Children’s Court may deliver a caution or refer the child to a youth justice conference under the Act. The child must admit the offence but does not have to formally enter a plea.

**Youth on Track**

Youth on Track is a pilot program aimed at young people who do not have an extensive criminal history but who are at high risk of becoming entrenched in the juvenile justice system. It is aimed at children who have had their first contact with police before the age of 14, and who are vulnerable due to factors such as disability, mental health issues, abuse or neglect, homelessness or Aboriginality.

Youth on Track aims to provide these children with services and support to reduce their risk of re-offending.

The program is being run on a pilot basis in Blacktown, Newcastle and the Mid-North Coast, and will soon be expanded to the Central West, Coffs/Clarence, and New England regions. Eligible young people in these areas may be referred to the scheme directly by the police.

**Youth Koori Court**

The Youth Koori Court operates mainly at Parramatta Children’s Court. Its aim include reducing the risk of re-offending among Aboriginal and Torres Strait Islander young people, and increasing the Aboriginal and Torres Strait Islander community’s confidence in the criminal justice system.

To be eligible, a young person must:

- be an Aboriginal person or Torres Strait Islander
- be charged with an offence that is capable of being finalised in the Children’s Court
- be aged 10-17 at the time of the offence
- have pleaded guilty to (or been found guilty of) the offence, and
- be willing to participate.

The Youth Koori Court has the same powers as the Children’s Court but is usually less formal and involves the Aboriginal community in the process.

The program runs for up to six months and involves the development of an “Action and Support Plan”. The young person will be sentenced at the end of the program, and their participation will be taken into account.

For more details see Youth Koori Court Fact Sheet at www.childrenscourt.justice.nsw.gov.au.
Diversion for young people with mental health problems or intellectual disabilities

Section 32 of the Mental Health (Forensic Provisions) Act provides a special procedure for a magistrate to deal with charges against a person with an intellectual disability, a mental illness or a mental condition for which treatment is available in a mental health facility.

If the magistrate thinks it is more appropriate to deal with the matter in this way than according to law, he or she may dismiss the charges, usually on the condition that the young person complies with a case plan or treatment plan for six months.

Section 33 of the Act is similar to s 32 but applies to people with a mental illness who are in need of care, treatment or control for their own or others’ protection. Section 33 allows a magistrate to send a mentally ill person to hospital.

A defendant does not have to enter a plea to be dealt with under s 32 or s 33. A s 32 or s 33 dismissal does not amount to a finding of guilty, nor is it equivalent to a finding of not guilty.

See also Chapter 26, Health Law.

Sentencing children

[7.280] Sentencing principles for young offenders

The principles in s 6 of the Children (Criminal Proceedings) Act (see [7.215]) are especially important in sentencing children.

Over the years, courts have emphasised that rehabilitation should generally be given greater weight than deterrence when dealing with young offenders. However, where young people engage in “grave adult behaviour” and commit very serious offences, the courts often see a need to impose heavy sentences to set an example.

[7.290] Options in the Children’s Court

The sentencing options open to a magistrate in the Children’s Court following a plea or finding of guilty are set out in s 33(1) of the Children (Criminal Proceedings) Act. They are discussed below in increasing order of severity.

Dismissal, or dismissal with caution
This is the best possible result. It means that no punishment is given, and there is no conviction. It is usually available only for relatively minor offences (s 33(1)(a)(i)).

Bond
A child may be released on a good behavior bond for up to two years under:
• s 33(1)(a)(ii), which means that no conviction is recorded, or
• s 33(1)(b), which means that the court may decide to record a conviction if the child is 16 or over.

A child released on a bond must sign a document in which they promise to be of good behaviour (that is, commit no further offences) for the period of the bond.

Bond conditions
The court may, and often does, impose other conditions on the bond, such as:
• that the child accept supervision by a Juvenile Justice Officer
• that the child undertake a certain program (such as drug and alcohol rehabilitation)
• that the child refrain from certain activities (such as drinking alcohol).

Supervision
Supervision as a bond condition is usually by a juvenile justice officer.
If the child is aged 17 and a half or more, the court may order supervision by the adult Community Corrections (formerly known as Probation and Parole) Service.

If the child breaches the bond
If the child commits further offences or does not keep the bond conditions, they may be brought to court and re-sentenced for the original offence.

Application to vary the bond
A bond or probation order may be terminated or varied on application to the court by the child, or by an authorised officer from Juvenile Justice (s 40). The period of an order may be reduced, but cannot be extended.

Fines
A fine up to the maximum for the prescribed offence, or 10 penalty units (a penalty unit is currently $110), whichever is the lesser, can be imposed (s 33(1)(c)). A fine may be imposed in combination with a bond or probation (s 33(1)(d), (e1)).

The court must take into account the child’s capacity to pay, and the potential impact of a fine on the child’s rehabilitation. A fine is not normally imposed unless the child has some source of income (such as wages or social security).

The court allows the child 28 days to pay the fine. A child who is unable to pay the fine within this time should ask the office of the court where the fine was imposed for an extension of time. Such requests are usually treated sympathetically.

What happens if the child fails to pay the fine is discussed in Unpaid fines below.

Unpaid fines
If a person fails to pay a fine, it is referred to State Debt Recovery (SDR) for enforcement action under the Fines Act.

A person who cannot pay a fine by the due date may apply for more time to pay. For vulnerable people there are other options including Work and Development Orders or applying to have fines written off. A young person should seek legal advice about these options.

Referral to RMS
State Debt Recovery can refer the matter to Roads and Maritime Services (RMS), which can suspend a fine defaulter’s driver’s licence or car registration, or stop them applying for a licence or registration, until the fine is paid. Driving while unlicensed or suspended is a serious offence that can lead to more fines and long periods of licence disqualification.

The RMS cannot suspend or cancel a fine defaulter’s licence in relation to non-traffic fines incurred when the person was under 18 (Fines Act, s 65(3)). However, it can still cancel the fine defaulter’s vehicle registration, refuse to issue a licence, or refuse to engage in certain other dealings with the fine defaulter.

The Fines Act does not stop the RMS from issuing proof of age cards.

Civil enforcement action
State Debt Recovery can also try to recover the debt through civil enforcement such as repossession of property, garnishment of earnings, and so on (see Chapter 15, Debt). However, in practice, it is very difficult to pursue a child in this way.

Community service orders
State Debt Recovery can make a community service order if it is satisfied that:
- civil enforcement has not been successful, or is unlikely to be successful, and
- the child is capable of performing work under a community service order.

It is very rare for SDR to make community service orders.

Detention
Adult fine defaulters can be imprisoned as a last resort after all other options have been exhausted. A person cannot be imprisoned because of fines incurred as a juvenile – unless they have defaulted on adult fines as well, in which case they may serve time in an adult prison for the lot (s 92).

Work and Development Orders
A Work and Development Order (WDO) is an option available to people who are affected by homelessness, mental illness, cognitive impairment, drug or alcohol dependency, or extreme financial hardship.

A WDO allows a person to “work off” their fines by way of community work or participation in courses, counselling, rehabilitation and the like. Unlike a community service order, a WDO is not a last resort before imprisonment and can be applied for at any time.
Referral to a youth justice conference
A magistrate can refer a young person to a youth justice conference as a sentencing option after they have pleaded or been found guilty (s 33(1)(c1)) (see Youth justice conferences at [7.190]).

The young person must comply with the terms of the outcome plan developed at the conference, or return to court to be sentenced.

Children are usually referred to conferences according to the provisions of the Young Offenders Act, and not as a sentencing option under s 33 of the Children (Criminal Proceedings) Act.

Adjournment for rehabilitation purposes
The court may order an adjournment for up to 12 months (s 33(1)(c2)).

This is usually done in cases where the court is thinking of imposing a serious penalty but wants to give the child a chance to demonstrate rehabilitation. The adjournment will usually be subject to strict conditions such as participating in programs and not committing further offences. This option is sometimes referred to as a Griffiths remand.

At the end of the adjournment, if the child complies with the conditions, they are likely to receive a less serious penalty than they otherwise would have done.

Probation
Probation is like a bond, but it almost always carries a condition of supervision (s 33(1)(e)). It can now be imposed in combination with a community service order (s 33(1)(f1)).

If the child does not meet probation conditions
A child who does not keep the terms of the order may be taken back to court and dealt with for breach of probation, even if they have not committed any further criminal offence. Probation is a more serious punishment than a bond, so the consequences of a breach are usually more severe.

Variation
Like a bond, a probation order may be varied by the court on the application of the child or a juvenile justice officer.

Community service orders
Community service orders can be imposed on children (s 33(1)(f)). The child does unpaid work for the benefit of the community, usually with a charity or community organisation. A community service order can now be imposed in combination with a probation order (s 33(1)(f1)).

Procedures are set out in the Children (Community Service Orders) Act 1987.

When can community service orders be made?
A community service order is the last resort before a control order (committal to a detention centre), and the court can only make one where a control order would otherwise be made (s 5).

A Juvenile Justice background report is required, saying that the child is suitable and that work is available (s 9).

Duration of orders
The court can order:
- up to 250 community service hours for young people aged 16 or over
- up to 100 community service hours for children under 16 (s 13(2)).

Administration of orders
Orders are administered by juvenile justice officers.

Control orders
A control order means that the child is sent to a detention centre run by Juvenile Justice (Children (Criminal Proceedings) Act, s 33(1)(g)).

When a control order may be made
A control order may not be made unless the court is satisfied that it would be wholly inappropriate to give a less severe penalty (s 33(2)), and it must record its reasons for the decision (s 35).

A background report on the child is required before a control order can be made (s 25).

The term of the order
The term of the order must be specified. The Children’s Court can only sentence a child to such an order for a maximum of two years, and on consecutive orders up to a total of three years.
If the sentence is longer than six months, it must be divided into non-parole and parole terms.

**Where the child will be sent**

There are a number of detention centres in Sydney and in other parts of NSW. It is up to Juvenile Justice to decide where the child is sent. Generally, this will depend on the child’s age, gender, seriousness of the offence, any security risk factors, and where the child’s family lives.

In the detention centre, the child will either attend school or undertake other programs.

**Offenders aged 21 and over**

If the court imposes a control order on an offender who has already reached the age of 21, the sentence will be served in an adult prison.

**Transfer to adult prisons**

Juvenile offenders aged 16 or over may also be transferred to adult prisons in some circumstances (Children (Detention Centres) Act, ss 28, 28B, 28BA) (see Juvenile offenders and prison at [7.330]).

**Leave**

The child may be eligible for leave for such purposes as employment, education or family commitments (s 24(1)).

**Early release**

A child serving a control order may be eligible for early release even before the end of the fixed term or non-parole period (s 24(1)(c)). In practice early release is rarely, if ever, granted.

**Suspended sentences**

A control order may be suspended on condition that the child enters into a good behaviour bond (Children (Criminal Proceedings) Act, s 33(1B)). In this case the child does not go into detention immediately, but must serve the control order in custody if they breach any conditions or commit further offences during the term of the bond.

**Other sentencing options**

Instead of sentencing a child under the Children (Criminal Proceedings) Act, other options available to the Children’s Court include:

**The Children (Protection and Parental Responsibility) Act**

This Act gives the Children’s Court an alternative to the Children (Criminal Proceedings) Act, allowing it to release the child on an undertaking to (s 8(1)):

- submit to parental or other supervision
- reside with a parent or other person
- participate in a specified program or attend a specified activity centre, or
- do such other thing as may be specified by the court.

A child who fails to comply with the undertaking will be required to reappear before the court. The child may be released by the court, or an alternative penalty may be imposed.

This sentencing option is very rarely used.

**The Mental Health (Forensic Provisions) Act**

The court may make an order under s 32 or s 33 of the Mental Health (Forensic Provisions) Act 1990 (NSW) if the child has a mental illness or intellectual disability (see Diversionary options at [7.270] and Chapter 26, Health Law). This is not strictly a sentencing option, as the child is not required to enter a plea to be dealt with under one of these sections. However, these orders may still be made after a plea or finding of guilt.

**[7.300] Other orders in addition to sentence**

In addition to the sentencing options described above, a range of other orders may be made, including:

**Court costs and levies**

**Court costs levy**

The Children’s Court (or Local Court, if dealing with a traffic offence) may impose a court costs levy on a child found guilty of an offence (Criminal Procedure Act, s 211A). At the time of writing this levy is $85.
For adults, the levy is automatically imposed and cannot be waived, however, for children it can be waived. If the court imposes the levy at the time of sentencing, a child may later apply to the registrar of the court for the levy to be waived (s 211A(3)).

Unpaid levies will be referred to SDR and dealt with in the same way as unpaid fines.

**Victims support levy**

For people found guilty of most types of offences, there is also a victims support levy (*Victims Rights and Support Act 2013* (NSW), ss 105–108). As of 1 July 2016, the levy is $77 for matters dealt with by a Local or Children’s Court, or $172 for matters finalised in the District or Supreme Court.

As with the court costs levy, this is compulsory for adults but may be waived for children. If it is not waived at the time of sentencing, the child may later apply to the court for it to be waived.

Unpaid levies will be referred to SDR and dealt with in the same way as unpaid fines.

**Compensation**

*Payment to the victim*

The Children’s Court may require a child to pay compensation to the victim of an offence, for example, to cover the cost of replacing or repairing stolen or damaged property (*Victims Rights and Support Act, ss 94, 97*).

The court must consider the child’s means and income *Children (Criminal Proceedings) Act, s 24*). The maximum the court may order is 10 penalty units for a child who is under 16 when the compensation order is made, or 20 penalty units for a child aged 16 or over (*Children (Criminal Proceedings) Act, s 36*). A penalty unit is currently $110.

*Victims’ compensation restitution*

Under the *Victims Rights and Support Act*, the state government pays compensation to victims of violent offences (see Chapter 39, Victims Support). Part 5 of the Act allows NCAT’s Administrative and Equal Opportunity Division (formerly the Victims Compensation Tribunal) to take proceedings (restitution proceedings) to recover the amount from the offender.

Restitution proceedings may be taken against a child who has been found guilty by a court (but not against a child who has been given a caution or diverted to a conference under the *Young Offenders Act*).

Restitution proceedings often do not commence until several years after the offence. In the case of juvenile offenders, the tribunal usually waits till the person is 18 before commencing restitution proceedings.

The fact that an offender was a child at the time of the offence does not affect their obligation to pay restitution, but may influence the tribunal to reduce the amount payable.

**Apprehended Violence Orders**

If a child is found guilty of a personal violence offence, the court is usually required to make an apprehended violence order (AVO) for the protection of the victim (*Crimes (Domestic and Personal Violence) Act 2007, s 39*).

AVO applications may also be made against children in the absence of a criminal charge. These applications are made in a similar way to AVO applications against adults, except that they are heard by the Children’s Court if the respondent is under 18 when the application is made (see Chapter 19, Domestic Violence).

Instead of proceeding to a final AVO (as a Local Court usually would) the Children’s Court will often make an interim order and adjourn the proceedings for about 3–6 months. If there are no breaches of the interim order during this period, the AVO application will often be withdrawn and dismissed.

**Non-association and place restriction orders**

A court that sentences a child for an offence carrying a maximum penalty of six months’ imprisonment or more (in practice, this includes most offences) may impose an order prohibiting contact or association with certain people, or entry to certain areas (*Children (Criminal Proceedings) Act, s 33D*).

These orders cannot be used to prohibit a child from associating with close family members or from going to their own home, close family members’ homes, regular
workplace, educational institution or place of worship, unless there are exceptional circumstances.

Before making an order, the court must be satisfied that the order is reasonably necessary to ensure the offender does not commit further offences. The maximum duration of a non-association or place restriction order is 12 months. Breach of an order without reasonable excuse is an offence.

**Driver licence disqualification**
See Children and traffic offences at [7.310].

**[7.310] Children and traffic offences**

**Local Court jurisdiction**
Children charged with traffic offences will go to the Local Court unless:
- they are too young to obtain a learner’s licence (the licensable age is 16 for cars, or 16 and nine months for motorcycles), or
- they are charged with a related criminal offence (for example, stealing a motor vehicle) that is being dealt with in the Children’s Court.

**Sentencing options available to the Local Court**
If the child pleads or is found guilty, the Local Court may choose from adult sentencing options or the sentencing options in s 33 of the Children (Criminal Proceedings) Act. However, a child may not be sentenced to adult imprisonment (Criminal Procedure Act, s 210).

**Licence disqualification**
Many traffic offences carry automatic licence disqualification periods. These apply to children who are sentenced to adult penalties in the Local Court (unless the court decides to deal with the matter under s 10 of the Crimes (Sentencing Procedure) Act 1999 instead of recording a conviction).

A Local or Children’s Court using children’s sentencing options (except for a dismissal or bond under s 33(1)(a)) may impose a licence disqualification (Children (Criminal Proceedings) Act, s 33(5)(a)).

**[7.320] Sentencing in the District Court and the Supreme Court**

Many of the provisions of the Children (Criminal Proceedings) Act also apply to the District and Supreme Courts when a person is committed for trial or sentence from the Children’s Court.

**Serious children’s indictable offences**
For serious children’s indictable offences the young person is dealt with according to law (s 17). This means that the full range of adult penalties is open to the court, including:
- intensive correction orders (only if the child has turned 18 by the time of sentencing)
- home detention (only if the child has turned 18 by the time of sentencing)
- imprisonment.

**Other indictable matters**
For other indictable matters, the court may deal with sentencing in one of three ways:
- according to law (s 18(1)(a))
- by exercising the sentencing options and powers of the Children’s Court (s 18(1)(b))
- by remitting the person to the Children’s Court for sentence (s 20).

**Sentence to a juvenile detention centre**
Where the court imposes a sentence of imprisonment it may, if the person is under 21, order that the whole or part of the sentence be served in a juvenile detention centre, at least until the age of 21. Such an order may only be made if the judge considers there are special circumstances arising from the child’s vulnerability or the lack of suitable programs in adult correctional centres (s 19).

However, the judge’s decision may be over-ridden and the person may be transferred to an adult prison in the circumstances listed in [7.330].
[7.330] Juvenile offenders and prison

Children on remand
Children on remand (ie, children in custody awaiting trial or sentence) are usually held in juvenile detention centres.

Detainees aged under 16
A child under 16 cannot be remanded in an adult prison under any circumstances.

Detainees aged 16 or over
Under s 28A of the Children (Detention Centres) Act, a child over 16 may be remanded in an adult prison if:
- the child is charged with an indictable offence, or is already serving a sentence for an indictable offence and is charged with a detention centre offence (as defined by s 28C – for example, escape or assaulting a detention centre staff member), or another indictable offence, and
- application is made to the court by the Secretary of the Department of Justice (Juvenile Justice and Corrective Services are both part of this Department) or the prosecuting agency, and
- the court believes the child is not a suitable person for detention in a detention centre, and
- the minister administering the Crimes (Administration of Sentences) Act 1999 (NSW) (the Minister for Corrective Services) consents (s 28F), and
- the child not suitable for detention in a detention centre (assessed using the criteria in s 28E).

Under s 28 of the same Act, a remand detainee aged 16 or 17 may be transferred to a “juvenile correctional centre” if he or she is on remand for:
- a “serious children’s indictable offence”, or
- a less serious offence and his or her behaviour is thought to warrant a transfer (ss 28(2), (2B)).

A transfer under s 28 requires an order in writing from the Secretary of the Department of Justice, with the consent of the Commissioner of Corrective Services.

A “juvenile correctional centre” is a high-security centre for juvenile offenders, run by Corrective Services. Until 2015, there was only one such centre, at Kariong on the Central Coast. Kariong is now used as an adult prison, and most high-security male detainees now go to Cobham Juvenile Justice Centre.

Detainees aged 18-20
A remand detainee aged 18-20 may be transferred to a juvenile correctional centre or adult prison in a range of circumstances, including:
- on behavioural grounds
- if the detainee requests it in writing
- if the transfer is authorised by the Children’s Court
- if the detainee has been in a detention centre for at least six months and the Secretary thinks it would be “preferable” for the detainee to be in a correctional centre, or
- if the detainee has previously been in an adult prison for a period of (or periods totalling) more than four weeks (s 28(2A)).

A transfer under s 28 requires an order in writing from the Secretary of the Department of Justice, with the consent of the Commissioner of Corrective Services.

Detainees aged 21 or over
A detainee aged 21 or over may be transferred to an adult correctional centre simply by reason of their age, with an order in writing from the Secretary of the Department of Justice, with the consent of the Commissioner of Corrective Services (s 28).

Young people arrested on warrants
A young person aged 21 and over, who is arrested on a warrant in relation to an offence allegedly committed as a juvenile, may not be detained in a detention centre but must be held in an adult prison (Children (Detention Centres) Act, s 9A(1)).

A young person between the ages of 18 and 21, arrested on a warrant issued for breach of a court order (for example, a bond, probation or community service order) or for an alleged escape from custody, must also be detained in an adult prison (s 9A(2)).
Children sentenced by the Children’s Court
An offender may not be sentenced to an adult prison by a Children’s Court unless he or she has already reached the age of 21 at the time of sentencing. However, some children serving control orders may be transferred to a prison or a juvenile correctional centre.

**Detainees aged 16 or over**
A detainee aged 16 or over serving a control order may be transferred from a detention centre to a juvenile correctional centre if, in the opinion of the Secretary of the Department of Justice, their behaviour warrants the transfer (s 28).

Such a transfer requires an order in writing from the Secretary of the Department of Justice, with the consent of the Commissioner of Corrective Services.

**Detainees aged 18 or over**
A detainee aged 18 or over serving a control order may be transferred from a detention centre to a juvenile correctional centre or an adult prison if:

- the detainee requests it in writing
- the transfer is authorised by the Children’s Court
- the detainee has been in a detention centre for at least six months and the Secretary of the Department of Justice thinks it would be “preferable” for the detainee to be in a correctional centre
- the detainee has previously been in an adult prison for a period of (or periods totalling) more than four weeks, or
- in the opinion of the Secretary, their behaviour warrants the transfer (Children (Detention Centres) Act, s 28).

Such a transfer requires an order in writing from the Secretary of the Department of Justice, with the consent of the Commissioner of Corrective Services.

**Detainees aged 16 or over who commit further offences**
The Children’s Court may order that a child be committed to a prison (s 28B) if:

- the child is 16 or older, and
- the child is serving a control order for an indictable offence, and receives a further control order for certain types of offences committed in the detention centre, and

- an application is made to the court by the police or the Secretary of the Department of Justice, and
- the court decides that the child is not a suitable person to be in a detention centre, and
- the minister administering the Crimes (Administration of Sentences) Act 1999 (the Minister for Corrective Services) consents (s 28F).

**Detainees aged 18 or over who commit further offences**
A young person serving a control order will be required to serve the balance of their term in an adult prison if:

- they have turned 18, and
- they have committed an offence such as assaulting an officer in the detention centre (s 28BA).

**Detainees aged 21 or over sentenced to control orders**
If a young person is sentenced to a control order, and is 21 or over at the time of sentencing, the control order is deemed to be a sentence of imprisonment and must be served in an adult correctional centre (Children (Criminal Proceedings) Act, s 33(1)(g)(ii) and s 33(1C)).

Children sentenced according to law
A young person serving a sentence of imprisonment must be transferred to an adult prison on turning 21, unless the fixed term or non-parole period is due to expire within six months (s 19(2)).

A child serving a sentence of imprisonment for a serious children’s indictable offence will be transferred to an adult prison on turning 18, unless:

- the fixed term or non-parole period is due to expire within six months, or
- the sentencing court decides there are special circumstances (for example, vulnerability) justifying the person’s detention in a detention centre (s 19(3)).

However, even if a court makes an order under s 19(3), this can be overridden by an order made by the Secretary of the Depart-
ment of Justice under s 28 of the Children (Detention Centres) Act. A detainee who has been sentenced according to law may be transferred to a juvenile correctional centre (if aged 16 or over) or to an adult prison (if aged 18 or over).

Requirements applying to transfers under s 28 of the Children (Detention Centres) Act
As discussed above, s 28 of the Children (Detention Centres) Act gives the Secretary of the Department of Justice a very broad power to transfer detainees from detention centres to correctional centres.

In many situations (for example, if the detainee has been sentenced according to law), s 28 allows a transfer to be made without any specific reason. However, a Supreme Court decision (ID, PF and DV v Director-General, Department of Juvenile Justice [2008] NSWSC 966) suggests that a detainee being transferred under s 28 is entitled to procedural fairness (that is, to be given reasons and the right to have a say) before the transfer is made.

Transfer of adult prisoners to juvenile detention centres
Where the Minister for Corrective Services and the Minister for Juvenile Justice agree, a prisoner under 21 may be transferred from a prison to a detention centre (Children (Detention Centres) Act, s 10).

Appeals

[7.340] Appeal to District Court
Any child may appeal to the District Court against a conviction or sentence imposed by the Children’s Court (Crimes (Appeal and Review) Act 2001 (NSW), s 11).

Grounds of appeal
An appeal may be made against a finding of guilt, against the severity of a sentence, or both.

Time limits
Notice of the appeal must be given within 28 days of the matter being finalised in the Children’s Court. Leave to appeal may be obtained from the District Court if the 28-day period has expired, as long as the application is made within three months. Leave to appeal out of time is more likely to be given to children than to adults.

Appeal bail
A child who is appealing against a control order may apply for bail pending their appeal.

Hearing of appeal
The District Court deals with an appeal on its merits, that is, the judge does not need to find that the Children’s Court magistrate made an error of law.

When hearing an appeal against sentence, the judge will read the material that was tendered in the Children’s Court (for example, police facts, criminal history, background report) and will usually accept further evidence and information from the child. The District Court has power to increase the sentence, but must warn the child before doing so (this is known as a “Parker warning”). The child may then seek (and will usually be granted) leave to withdraw the appeal.

An appeal against conviction is usually dealt with by reading the transcript of evidence given in the Children’s Court. New evidence may be given with the leave of the court, if the court is of the view that it is in the interests of justice.

Legal representation
Legal aid for appeals is subject to a merits test. This means that aid will not be granted unless the appeal has a reasonable chance of success. Children are more likely to pass the merits test than adults, especially if they are
appealing against a custodial sentence (see also Chapter 14, Criminal Law).

[7.350] Appeal to Supreme Court

Instead of appealing to the District Court, a child may appeal to the Supreme Court on an issue of law. Appeals to the Supreme Court from the Children’s Court are rare.

[7.370] When no conviction can be recorded

The Children’s Court has no power to record a conviction against a child under 16 (Children (Criminal Proceedings) Act, s 14(1)).

This means that the Children’s Court can find a child guilty and impose any penalty, including the most severe, without the lasting stain of a conviction or criminal record that could affect the person for the rest of their life; for example, in employment, entry to certain professions, and visas for certain countries.

[7.380] Discretion to record a conviction

The Children’s Court (or the Local Court, if dealing with a traffic offence) has a discretion to record a conviction against a child aged 16 or over.

The Supreme or District Court may record a conviction against a child of any age (s 14).

What the courts consider

The Act does not set out a list of matters to be taken into account by the court in deciding whether or not to record a conviction. However, in practice, the court is likely to consider factors such as:

- the child’s age
- the child’s mental health or intellectual capacity
- whether the child has been dealt with before by a court or under the Young Offenders Act
- the seriousness or otherwise of the offence
- the particular circumstances of the offence (for example, others may have been more to blame)
- mitigating factors such as an apology to, or offer to compensate, the victim.

[7.390] Spent convictions

There is a commonly-held, but incorrect, belief that any convictions recorded against a child automatically disappear when the child turns 18.

Convictions can become spent after a period of time, which means that (for most purposes) they no longer form part of the person’s criminal record.

When Children’s Court convictions become spent

Children’s Court convictions will generally be spent after a three-year crime-free period (Criminal Records Act 1991 (NSW), s 10). This means that, for at least three years after the date of conviction, the child has not been:

- subject to a control order
- convicted of an offence punishable by imprisonment
- in prison because of a conviction for any offence, or
- unlawfully at large.

When convictions of other courts become spent

A child who has been convicted by the Local Court (for a traffic offence), District Court or Supreme Court will have their conviction spent after a 10-year crime-free period.
Matters where no conviction was recorded
There is some inconsistency between the Children (Criminal Proceedings) Act and the Criminal Records Act. In some cases, the Criminal Records Act deems a conviction to have been recorded even if the court has not recorded a conviction.

Convictions that cannot become spent
Some convictions never become spent. The main examples are:
- sexual offences
- offences for which the sentence was more than six months’ imprisonment (this does not include a control order) (s 7).

Disclosure requirements
If a conviction is spent (or there is a finding of guilt but no conviction recorded), the young person does not normally have to disclose it to anyone, including an employer (s 12).
There are exceptions for employment in certain occupations (s 15), including law, policing, childcare and firefighting. Exceptions also apply to applicants for certain types of licences, such as those relating to security and firearms.

Disclosing other people’s spent convictions
It is an offence for a person who has access to records regarding spent convictions to disclose to any other person information about the spent conviction.
There are some exceptions to this rule which relate to law enforcement agencies and others (Criminal Records Act, ss 13, 14).

Spent convictions and sentencing
Courts may still take into account spent convictions (and even matters where there was a finding of guilt but no conviction recorded) when sentencing someone for later offences.
However, an adult court cannot take a Children’s Court matter into account if:
- no conviction was recorded, and
- the offender has not been punished by a court for any other offence for at least two years before the adult court proceedings (Children (Criminal Proceedings) Act, s 15).

Care and protection of children and young people

[7.400] According to the United Nations Convention on the Rights of the Child, every child (person under 18) has the right to protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parents, legal guardians or any other person who has care of the child.

The convention also sets out that the child has the following rights in relation to decisions or actions designed to protect them:
- the best interests of the child must be a primary consideration.
- the child has a right not to be subjected to arbitrary or unlawful interference in their privacy, family, home or correspondence, or unlawful attacks on their honour or reputation.
- the child has a right not to be separated from their parents against their will except when competent authorities, subject to judicial review, determine, in accordance with applicable law and procedure, that it is necessary in the child’s best interests.
• a child separated from parents has the right to maintain their identity, personal relationships and direct contact with their family, except where this is contrary to their best interests.
• a child capable of forming their own views has a right to express those views freely in all matters concerning the child, and to have them given due weight according to the child’s age and maturity. In particular the child is entitled to be heard in any judicial or administrative proceedings concerning them.

**Protection of children in NSW**

In NSW, the Department of Family and Community Services (FACS) protects children from abuse or neglect within the family. FACS is authorised to provide assistance to families so as to prevent abuse or neglect, and to intervene where a child is in need of care and protection.

Such intervention can range from providing family support and other preventative services, such as respite care, to the action of removing children from their families and taking police action against perpetrators of abuse.

The police also have a role in ensuring the protection of children and young people from abuse and neglect, by investigating allegations of child abuse or neglect that involve criminal conduct, in bringing criminal proceedings against perpetrators of abuse or severe neglect and in applying for AVOs for the protection of children and young people.

**Children and young people in need**

**[7.410] Legislation**

The *Children and Young Persons (Care and Protection) Act 1998* (the Act) governs the work of FACS to protect vulnerable children and young people from harm and abuse.

**Principles guiding decisions under the Act**

The Act sets out principles and objectives that are to guide decision making by FACS and the Children’s Court (ss 8, 9). In any action or decision concerning a particular child or young person, the safety, welfare and well-being of the child or young person are to be paramount.

**Participation in decision-making**

The Act emphasises the importance of the child or young person’s participation in all decisions made by FACS that will have a significant impact on their life. FACS is required to provide the child or young person with adequate information concerning the decisions to be made, and to facilitate the child or young person’s participation in those decisions (s 10).

The Act encourages the use of alternative dispute resolution (ADR) as a way of resolving care and protection issues and avoiding court proceedings wherever possible, although this aspect has not been used extensively (s 37).

**Indigenous people**

The Act contains principles to be applied where a child or young person is an Aboriginal person or Torres Strait Islander. These principles provide for inclusion in decision-making, and set out the order of preferred placements where the child or young person must be placed in out-of-home care (s 13).

**Terminology**

**Children and young people**

The Act defines a child as someone under 16 and a young person as someone aged 16 or 17.

*In need of care and protection*

A child or young person “in need of care and protection” is essentially one who requires some kind of intervention in their family due to an assessment by FACS of risk of significant harm to the child or young person.
[7.420] Children and young people at risk

What is “risk of significant harm”? Under s 23, children or young people may be at risk of significant harm if there are current concerns for their safety, welfare or wellbeing because one of the following circumstances is present to a significant extent:

- their basic physical, psychological, medical or educational needs are not being met or are at risk of not being met
- they have been, or are at risk of being, physically or sexually abused or ill-treated
- they are living in a situation of domestic violence and are at risk of serious physical or psychological harm
- a parent or caregiver has behaved in such a way towards them that they have suffered, or are at risk of suffering, serious psychological harm
- they were the subject of a prenatal report to FACS and the mother subsequently did not engage with support services to eliminate or minimise the risks to them.

Seeking help from FACS

A child or young person may seek help from FACS for any reason (ss 20, 113). A parent may also seek assistance, specifically:

- to obtain services that would enable the child or young person to remain in or return to their home (s 21)
- where there is serious and persistent conflict between the parents and the child or young person to such an extent that the child or young person’s safety, welfare and wellbeing are in jeopardy (s 113)
- where the parents are unable to provide adequate supervision for the child or young person, such that their safety, welfare and wellbeing are in jeopardy (s 113).

The child or young person need not meet the definition of “at risk of significant harm” for assistance to be sought by them or by a parent.

What FACS may do after receiving a request for assistance

If it is asked for help, FACS must provide whatever assistance or referrals to services it considers necessary to safeguard or promote the safety, welfare or wellbeing of the child or young person (s 22). It may choose not to provide assistance if it is not considered necessary.

If the request relates to serious or persistent conflict between a parent and a child or young person, FACS may provide such advice or assistance as is necessary to:

- resolve the conflict
- ensure that the child or young person is adequately supervised, or
- enable the family to have access to appropriate services (s 113).

However, if FACS considers that any request for assistance from a child or young person or from a parent gives rise to concerns that the child or young person is at risk of significant harm, it may treat the request as a report (see below).

[7.430] Reporting a child or young person at risk of significant harm

Anyone who has reasonable grounds to suspect that a child or young person is at risk of significant harm may make a report to FACS (s 24).

Unborn children

A report may also be made about an unborn child who may be at risk of significant harm after birth (ss 23(f), 25).

How to report or seek help

A phone call, which may be made anonymously to the FACS helpline, is sufficient to make a report to FACS about a child or young person (s 26).

Under the Act, reports are treated confidentially, and a person who reports concerns that a child or young person is at risk of significant harm is protected from actions such as defamation or breach of professional ethics (s 29).
The helpline is also the first port of call for a parent, child or young person who is seeking help from FACS.

Mandatory reporting
The Act provides that some people must make a report to FACS if, during the course of their work, they become aware of a person under 16 who they suspect is at risk of significant harm.

Who must report?
The mandatory reporting requirement is broader than that under the previous Act. It extends to all paid workers who deliver to children, or are responsible for delivering to children:
- health care
- welfare services
- education
- children’s services
- residential services
- law enforcement (s 27).

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**Reporting children away from home**

Anyone who provides accommodation for a child who they believe, on reasonable grounds, to be under 16 and living away from home without parental permission is required to report the child’s whereabouts to FACS (s 122).

Reports where the circumstances do not meet the threshold of “risk of significant harm”

Once a report is made, FACS must make whatever further investigation and assessments it considers necessary to determine whether a child or young person is at risk of significant harm. It may decide not to investigate a report if it considers there is insufficient reason to believe, on the basis of the information contained in it, that this is the case.

If the allegations in the report include potentially criminal conduct, the police may be involved in investigation of the report through joint investigation and review teams.

If FACS is satisfied after its investigation and assessment that the child or young person is in need of care and protection, it can do one or more of the following:

- take no action if it considers that there are proper arrangements for the care and protection of the child, and that the concerns that led to the report are being adequately addressed
- arrange for support services to be provided to the family
- make an arrangement with the parents for the child or young person to be placed in the temporary care of FACS
- develop a care plan with the family to meet the needs of the child or young person
- develop a parental responsibility contract with the primary caregivers of the child or young person
- remove the child or young person from their family
- make a care application to the Children’s Court.

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**[7.440] What FACS may do after receiving a report**

The Act provides flexibility in the options available to FACS in responding to children and young people at risk of significant harm and/or in need of care and protection.

Once a report is made, FACS must make whatever further investigation and assessments it considers necessary to determine whether a child or young person is indeed at risk of significant harm. It may decide not to investigate a report if it considers there is insufficient reason to believe, on the basis of the information contained in it, that this is the case.

If the allegations in the report include potentially criminal conduct, the police may be involved in investigation of the report through joint investigation and review teams.

If FACS is satisfied after its investigation and assessment that the child or young person is in need of care and protection, it can do one or more of the following:

- take no action if it considers that there are proper arrangements for the care and protection of the child, and that the concerns that led to the report are being adequately addressed
- arrange for support services to be provided to the family
• make an arrangement with the parents for the child or young person to be placed in the temporary care of FACS
• develop an agreed care plan with the family to meet the needs of the child or young person
• develop a parental responsibility contract with the primary caregivers of the child or young person
• remove the child or young person from their family
• make a care application to the Children’s Court.

**Action by police**
If the police are involved in the investigation through a joint investigation and review team, or if FACS refers a matter to them during or after the investigation or assessment process, they may take additional or alternative actions, including laying charges against the adult or seeking an AVO on behalf of the child or young person.

**Requirement to consider dispute resolution**
When responding to a report FACS is to consider using dispute resolution services to seek early resolution of the issues and to reduce the likelihood that an application for care of the child to the Children’s Court will be needed. If an application for care orders is to be made, FACS is to work towards making of consent orders that are in the best interests of the child or young person (s 37).

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**Principles to be applied when responding to a report**
When deciding the appropriate response to a report, FACS must apply the following principles:
- the immediate safety, welfare and wellbeing of the child or young person, and of other children or young persons in that person’s usual residential setting, must be given paramount consideration
- any action must be appropriate to the age of the child or young person, any disability they or their family members have, and the circumstances, language, religion and cultural background of the family
- removal of the child or young person from their usual caregiver may occur only where it is necessary to protect the child or young person from the risk of serious harm (s 36).

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**[7.450] Temporary care arrangements**
The Director-General of FACS may make a temporary care arrangement for a child or young person who is, in the Director-General’s opinion, in need of care and protection. Such an arrangement can only be made with a parent’s consent, unless the parents cannot be reasonably located, and must include a *restoration plan* (s 151).
Temporary care arrangements cannot be for more than three months, though they can be extended by FACS for one additional three-month period.
A temporary care arrangement cannot be made for a child or young person who has been the subject of temporary care arrangements for more than six months in the previous 12 months.

**Termination of temporary care arrangements**
A temporary care arrangement can be terminated by FACS at any time if it believes that the child or young person is no longer in need of care and protection. It can also be terminated by the parent who made the arrangement. However, if a parent terminates a temporary care arrangement and FACS believes that the child or young person is still in need of care and protection, FACS will make a care application to the Children’s Court and seek care orders that would permit it to retain the child or young person away from the parent.

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**[7.460] Agreed care plans**
A care plan sets out the steps that will be taken by the family to resolve FACS’ concerns about the child or young person. It may:
• set out the support services that will be sought by and/or provided to the family, and/or
• reallocate parental responsibility to someone other than a parent.

Registering the plan
Care plans can be registered with the Children’s Court and used as evidence that alternative actions have been attempted if a subsequent application is made to the Children’s Court for a care order (s 38). However, registration has no legal effect.

Care orders by consent
If a care plan reallocates parental responsibility (or some aspect of parental responsibility) to a person other than a parent, or if it is intended that aspects of the care plan are to have legal effect, consent orders must be sought from the Children’s Court that give effect to those aspects of the plan (s 38).

The Children’s Court will only grant the order if it is satisfied that:
• the order will not contravene the principles of the Act
• the parties to the care plan understand its provisions and have freely entered into it
• each party to the plan who is affected by the consent orders has received independent advice concerning the provisions of the plan that the proposed order will give effect to.

[7.470] Parental responsibility contracts
A parental responsibility contract is an agreement between FACS and one or more people who are the primary caregivers for a child or young person (whether or not that person is their parent) that contains provisions aimed at improving the primary caregivers’ parenting skills and encouraging them to accept greater responsibility for the child or young person (s 38A). It has serious consequences for the adult, and ultimately for the child or young person, if it is entered into and subsequently breached.

Registering the contract
A parental responsibility contract must be registered with the Children’s Court and takes effect only upon registration (s 38F). Its term of operation cannot be more than 12 months from the date of registration (s 38A(2)).

What can be in the contract
A parent responsibility contract may include, but is not limited to, requirements that the primary caregiver:
• attend alcohol, drug or other substance abuse treatment during the term of the contract
• attend counselling
• undergo alcohol or drug testing
• permit information about the contract (including compliance with the contract) to be shared between agencies involved in implementing it
• participate in courses aimed at improving their parenting skills (including, for example, courses relating to behavioural management and financial management).

It may also include provisions regarding how and when FACS will monitor the primary caregiver’s compliance with the terms of the contract.

What cannot be in the contract
The contract cannot include placement of the child or young person in out-of-home care or re-allocation of parental responsibility for them. If they require out-of-home care or reallocation of parental responsibility, other action must be taken.

If the contract is alleged to have been breached
A parental responsibility contract must set out the circumstances in which a breach may result in FACS filing a contract breach notice in the Children’s Court. If the primary caregiver breaches a term of the contract under the specified circumstances, FACS may (not “must”) file such a notice.

A contract breach notice is a care application. It must specify:
• the terms of the contract alleged to have been breached
• how the primary caregiver is alleged to have breached them
• the care orders sought in regard to the child or young person.
In the care proceedings that ensue, the Children’s Court must presume that the child or young person concerned is in need of care and protection. That presumption may be rebutted by a party to the proceedings (s 38E).

It does not appear that there is any requirement for the Children’s Court to determine in these circumstances whether or not there was in fact a breach of the relevant term of the contract.

[7.480] Removing a child or young person

From home

A child or young person can be removed from their family under the Act in a number of different ways, depending on the circumstances:

• FACS or the police may obtain a warrant to search for and remove children or young people believed to be at risk of serious harm (s 233)
• if FACS or the police believe that a child or young person is at immediate risk of serious harm and that an AVO would be insufficient to protect them, they may remove them from the place of risk without a warrant (s 43(1))
• FACS may assume the care of a child or young person who is at risk of serious harm but is currently in a safe location (for example, they are in hospital) (s 44)
• on the making of a care application, the Children’s Court may order the removal of a child or young person if they have not already been removed.

From involvement in prostitution or pornography

If FACS or the police suspect that a child or young person is in need of care and protection and that the child or young person either is or has recently been:

• on premises where it is suspected that acts of child prostitution take place or where persons are used for pornographic purposes, or
• participating in child prostitution or been used for pornographic purposes

the child or young person can be removed from the place where such activities are occurring or any adjacent place (s 43(3)).

There is no need for FACS or the police officer to seek a warrant or to believe that the child or young person is at immediate risk of serious harm to remove a child or young person in this situation.

From a public place

FACS officers and police can remove a child or young person from any public place if they suspect on reasonable grounds that the child or young person:

• is in need of care and protection, and
• is living in or habitually frequenting a public place (s 43(2)).

Effect of removal

FACS has care responsibility (see below) for children and young people removed in any of the circumstances described above (s 49).

A child or young person removed by a police officer must not be held in police cells while awaiting placement in FACS’ care. A child or young person who is in the care responsibility of FACS after a removal (or under the parental responsibility of the minister after a court hearing) cannot be accommodated or held in police cells or detention centres.

Information to be given on removal

At the time of the removal, the person removing the child or young person must advise the child (if over ten) or young person, and anyone who is present and appears to have care responsibility for the child or young person, of:

• their name and the nature of their authority
• why the child or young person is being removed
• the fact that the law authorises them to remove the child or young person
• what is likely to happen in relation to the care and protection of the child or young person as a consequence of their being removed (s 234).

Care responsibility
Care responsibility is defined in s 157. It is essentially the power to make decisions about the day-to-day care and control of a child or young person, including decisions about:
• minor medical or dental treatment not involving surgery
• emergency medical or dental treatment
• permission to participate in activities
• correcting and managing behaviour.

Information to be given after removal
Once a child or young person is in the care responsibility of FACS, FACS must inform the parents and the child (if over ten) or young person how to apply for discharge from FACS’ care (s 51(1)).

FACS must also advise the parents of the child or young person’s whereabouts. If FACS believes that full disclosure would be prejudicial to the safety, welfare or wellbeing of the child or young person, it may disclose only information that is not high level identification information.

“High level identification information”
High level identification information about a child or young person in the care responsibility of FACS may only be disclosed to a parent by order of a Children’s Court.

It includes:
• the family names of the foster carers and any other person living in their household
• the foster carers’ street address and locality
• the foster carers’ telephone number
• details of the foster carers’ employment or activities that would be sufficient to identify them
• the name of the school that the child or young person is attending.

Following removal
FACS may discharge a child or young person from its care responsibility (ie, return them to their family) at any time after a removal (s 50).

A Children’s Court order must be sought if FACS does not want to return the child or young person to their parents after an emergency removal (s 45(1)). The application must be made no later than three working days after the removal.

FACS need not seek an order if it considers that no order is necessary, because, for example:
• the child or young person is returned to the care of a parent
• a temporary care arrangement is signed by a parent, or
• a care plan is made and consent orders sought.

However, if no order is sought by three working days following a removal, FACS must explain to the court at the first available opportunity why no care application was made (s 45(3)).

Legal advice and assistance
If a child or young person is removed from their family, the parents or any other person with a significant interest in their welfare should contact FACS immediately and seek information on:
• the reasons for the removal
• the actions that may be taken to effect the child or young person’s return, and/or
• the likelihood of a care application being made to a Children’s Court.

They may also seek legal advice. Free legal advice is available from community legal centres, the Legal Aid Commission and other specialist legal services.

Children and young people may also seek legal assistance following a removal. However, if an application is made to the Children’s Court for a care order following a removal, a solicitor will be automatically appointed to represent the child or young person and to provide legal assistance or advice in the course of the proceedings.
Care applications to the Children's Court

[7.490] Types of care applications

For emergency care and protection orders

An emergency care and protection order places a child or young person in the care responsibility of FACS (s 46). It lasts for up to 14 days, and may be extended once only, by order of the Children’s Court, for an additional period of up to 14 days.

An emergency care and protection order may only be made if the court is satisfied that the child or young person is at risk of serious harm. It is a final order, and may be appealed.

FACS typically applies for emergency care and protection orders when it has removed a child or young person without a warrant and requires more time to conduct its investigation before deciding whether an application should be made for a final care order or whether other actions are appropriate, such as returning the child or young person to the family, providing support services, making a temporary care arrangement or reaching agreement on a care plan and consent orders.

For assessment orders

An assessment order permits:

• the physical, psychological, psychiatric or medical examination and assessment of a child or young person (s 53), or
• an assessment of the parenting capacity of a person with, or who is seeking, parental responsibility for a child or young person (s 54).

Any party to care proceedings may apply for an assessment order, but FACS may also apply for an assessment order even if there are no care proceedings on foot. In practice, applications for assessment orders are usually made only in conjunction with or in the course of ongoing care proceedings.

The Children’s Court Clinic

Assessments made under assessment orders must be carried out by the Children’s Court Clinic, unless it is unwilling or unable to do so. The clinic does not usually undertake physical or medical assessments.

Right to refuse assessment

A child or young person may refuse to submit to the examination or assessment if they have enough understanding to make an informed decision (s 53(4)).

An assessment of a person’s parental capacity can only take place with the person’s consent (s 54(2)), although it is possible that an adverse inference could be drawn by the Children’s Court if the person refuses.

For final care orders

Applications for final care orders include applications for any of the following:

• orders accepting undertakings
• orders for provision of support services
• orders for supervision
• orders allocating parental responsibility, or one or more aspects of parental responsibility, to:
  – the Minister for Family and Community Services, or
  – one parent rather than the other, or
  – one or both parents jointly with the Minister for Family and Community Services, or
  – any other suitable persons.

Applications for final care orders are discussed in more detail in Court proceedings at [7.510] and Final care orders [7.540].

[7.500] Formal requirements

Information that must be in the application

A care application must be accompanied by a written report succinctly summarising the information available to FACS, sufficient to support a determination that the child or
young person is in need of care and protection (see Children’s Court Practice Note No 2). If an application is made for an emergency care and protection order it must be accompanied by an affidavit (Children’s Court Rule 2000, r 22).

If the application is for final care orders, FACS must set out:

• the support and assistance provided for the safety, welfare and wellbeing of the child or young person
• the alternatives to seeking care orders that it has considered, and
• why those alternatives were rejected (s 63).

Who must be notified
FACS must:

• notify the child or young person about the application in a way they can understand
• make reasonable efforts to notify the parents and serve them with a copy of the application and supporting documents (s 64).

However, the Children’s Court may order that:

• a child or young person not be notified of the care application
• a parent not show a care application to, or discuss it with, their child (ie, whether that child or young person is the subject of the application or not), or
• a particular parent not be served with the care application and/or supporting documents.

[7.510] Court proceedings
The conduct of proceedings
Under s 93, care proceedings should be conducted with as little formality and legal technicality as possible. The Children’s Court is not bound by the rules of evidence unless it decides to apply them in a given case.

Proceedings are “not to be conducted in an adversarial manner”, although this provision appears to be aimed at minimising open hostility between the parties rather than changing the general structure of court proceedings.

In any proceedings before the Children’s Court, the standard of proof is “on the balance of probabilities”, and if the court must be “satisfied” as to something, it must be satisfied on the balance of probabilities.

Who can appear in court?
Under s 98, in any proceedings that relate to a child or young person, the following have a right to appear before the court:

• the child or young person
• each person with parental responsibility
• FACS
• the Minister for Family and Community Services.

The court has a discretion to allow other interested people to appear in the proceedings (ie, become a party to the proceedings) if they have a genuine concern for the safety, welfare and wellbeing of the child or young person. A person granted leave to appear in these circumstances may be restricted to appearing as a party in respect of only certain aspects of the case.

Participation by the child or young person
Generally, children and young people participate in care proceedings through their independent or direct legal representatives (see Legal representation for the child or young person below). While the Children’s Court must take reasonable steps to ensure that the child or young person understands the proceedings and has the fullest opportunity practicable to be heard and to participate (s 95), it generally does this by appointing the legal representative for the child (Practice Direction 24, cl 11).

At the request of the child or young person, or of anyone on their behalf, the Children’s Court must explain to them directly any aspect of the court’s procedure or any ruling or decision of the court (s 95(2)).

Attendance at court
If a parent does not attend
The court may proceed to hear and determine a care application in the absence of a parent if the parent has been given notice of the application but fails to attend (s 97).
Compelled attendance
The court may, on its own initiative or at the request of a party to the proceedings, require the child or young person, or a parent, to attend the courthouse (s 96(1)). In doing so the court must take into account any wishes of the child or young person not to attend (s 96(2)).

The court may also require the attendance of:
- anyone else who has, or has had, care responsibility for the child or young person, or
- if the whereabouts of the child or young person are unknown, any person the Children’s Court has reasonable cause to believe knows, or has information about, their whereabouts (s 96(1)).

The court issues a care proceedings attendance notice to the person required to attend.

If a person fails to attend the court after receiving such a notice, the court may issue an arrest warrant to compel attendance (s 109B).

Compelled absence
The court may require a child or young person to leave the court at any time if it considers that the prejudicial effect to them of making such a direction is outweighed by the psychological harm they are likely to suffer if they remain present (s 104).

The court may require any other person who is present when the proceedings are heard to leave the court if the interests of the child or young person so require, even if that person is directly interested in the proceedings (for example, the person may be a parent or other adult who is a party to the proceedings) (s 104A).

Evidence from children and young people
Children and young people cannot be compelled to give evidence in care proceedings (s 96(3)).

Legal representation for the child or young person
In care proceedings in the Children’s Court, children and young people are represented by a solicitor, provided or paid for by Legal Aid NSW, who acts as either an independent legal representative or a direct legal representative, depending on the circumstances.

Independent legal representatives
The solicitor must act as an independent legal representative if:
- the child or young person is not capable of giving the solicitor proper instructions, or
- a guardian ad litem is appointed for the child or young person (s 99A).

Children under 12 are presumed to be not capable of giving proper instructions. However, this presumption can be rebutted, and the legal representative for a child under 12 may make an application for a declaration that the child is capable of giving proper instructions and that the solicitor must act as a direct legal representative (s 99B).

Independent legal representatives assess and then act in the child or young person’s best interest. The representative should interview the child or young person and present their wishes to the court, but is not bound to act in accordance with those wishes.

Direct legal representatives
The solicitor must act as a direct legal representative if:
- the child or young person is capable of giving proper instructions, and
- no guardian ad litem (see below) is appointed for the child or young person (s 99A).

Children aged 12 and over, and young people, are presumed capable of giving proper instructions. However, this presumption can be rebutted and the legal representative for a child aged 12 or over or for a young person may make an application for a declaration that the child is not capable of giving proper instructions and that the solicitor must act as an independent legal representative (s 99C).

The presumption of capacity to give proper instructions is not rebutted merely because the child or young person has a disability.
A direct legal representative must act on the instructions of the child or young person.

**Guardians ad litem**

In special circumstances (such as the child or young person having special needs due to age, disability or illness), the Children’s Court may appoint an adult called a guardian *ad litem* to instruct the legal representative on their behalf (s 100). Guardians *ad litem* may also be appointed for parents in some circumstances, such as where the parent has an intellectual disability or mental illness and is incapable of giving proper instructions to their legal representative (s 101).

The role of a guardian *ad litem* is to safeguard and represent the best interests of the person for whom they are appointed, and to instruct the legal representative on behalf of that person.

Legal representation for parents and other adults

Parents and other adults who are parties to care proceedings are entitled to either appear in person, or be legally represented. They may also appear by an agent who is not a legal representative, with the leave of the court (s 98).

**Legal aid**

Legal aid is available to:

- all children who are the subject of care proceedings
- parents in applications for emergency care and protection orders (s 45 of the Act) subject to a means test only
- parents in applications for all other care applications, subject to both a means and a merits test (though Legal Aid NSW has issued guidelines for the interpretation of the merits test when it is applied to parents who are respondents to a s 61 application for final care orders)
- other adults who have been made party to the proceedings, subject to both a means and a merits test.

If the application is for variation or rescission (cancelling) of an existing care order, for an extension of an existing supervision order or for further orders due to a breach of an existing order accepting an undertaking, legal aid is only available for parents or other adults subject to both a means and a merits test.

Publication of proceedings

The Children’s Court is a closed court, but members of the news media are permitted to observe proceedings (s 104C), and information can be published or broadcast about care matters as long as it does not identify the child or young person who is or is likely to be the subject of the proceedings, or who is the subject of a report (s 105(1)).

The prohibition against publication lasts until the child or young person turns 25, or dies.

An exception is made if:

- in the case of a child, the Children’s Court consents
- in the case of a young person, the young person consents
- in the case of a child or young person under the parental responsibility of the minister, the Children’s Guardian consents.

[7.520] **Interim care orders**

The Children’s Court can make *interim care orders* that provide for the care and protection of a child or young person pending its determination of an application for final care orders (ss 62, 69, 70). The court may make an interim care order before determining whether the child or young person is in fact in need of care and protection (see below) (s 69(1A)).

In practice, most applications for final care orders brought by FACS also seek interim care orders that enable the child or young person to remain in, or to be placed in, out-of-home care pending the final determination of the application. If FACS seeks such an interim order, it must prove to the court that it is in the best interests of the child or young person for them not to remain in the care of their parents pending determination of the application.

**Interim orders that may be made**

The court may make such other interim care orders as it considers appropriate for the safety, welfare and wellbeing of the child or young person (s 70), including:

- interim orders accepting undertakings (s 73) or interim supervision orders (s 76), if the court determines that the child or
young person should remain in the care of the parents rather than be placed in foster care pending the determination of the application.

- interim orders allocating parental responsibility, or aspects of parental responsibility, to a person other than a parent (s 79).
- orders prohibiting action (s 90A).

If the court is satisfied that it is in the best interests of the child or young person to be placed in out-of-home care pending final orders, it can make an interim order allocating parental responsibility, or the residential aspects of parental responsibility, to the Minister for Community Services or any other suitable person (for example, a relative) (s 79).

[7.530] Determining need of care and protection

Before making any final care orders (other than an emergency care and protection order), the Children’s Court must be satisfied that one of the grounds for making a care order found in s 71 (see Grounds for making final care orders below) has been proved (s 72), and that the child or young person is therefore “in need of care and protection”.

This is often called the establishment, threshold test, finding or determination phase of court proceedings in relation to a care application.

The hearing at which the court determines “in need of care and protection” is usually held separately from and well before the hearing at which final care orders are determined.

Proof of need of care and protection

FACS, as the applicant in care proceedings, has the responsibility for proving one or more of the grounds for need of care to the required standard (on the balance of probabilities). The child or young person, the parents or any other person who has been made a party to this aspect of the proceedings has the right to test the evidence presented by FACS and to provide the Children’s Court with evidence in support of their own case in regards to the need for care.

The parent or caregiver’s history

If the parent or primary caregiver has previously had children removed by order of a court and those children have not been restored, or if the parent or caregiver has been named as a person of interest by a coroner or police in relation to the death of a child or young person (if that death is reviewable by the Ombudsman), this must be admitted as evidence by the Children’s Court. Such evidence establishes a “prima facie” case that the child or young person who is the subject of a later care application is in need of care and protection.

The parents or primary caregivers can rebut this presumption that the child or young person is in need of care and protection by satisfying the court that the circumstances that gave rise to the removal of the other children no longer exist, or that they were not involved in the death.

If there is not a need for care and protection

The court may dismiss a care application if it finds that the child or young person is not in need of care and protection (s 72(2)). Although this is not a directive, it is unlikely that a court would not dismiss a care application if it cannot make a finding as to need of care.

Family Court orders

Orders cannot be made by the Family Court about a child who is the subject of Children’s Court care orders unless:
- the Family Court order is specified to take effect after the child or young person ceases to be the subject of the Children’s Court order, or
- FACS consents in writing.

Consent to a finding of need of care and protection

The parents and child or young person can consent to the Children’s Court finding that the child or young person is “in need of care and protection” based on one of the grounds
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in s 71 without admitting or denying that any of the evidence provided by FACS in support of its application is true.

**The preliminary conference**

After the determination phase of the case, but before the application proceeds to a final hearing (the hearing at which the Children’s Court determines what, if any, final care orders should be made), a Children’s Registrar usually arranges a preliminary conference between the parties to attempt to resolve the matter by consent (s 65). If the matter cannot be resolved by agreement the Children’s Registrar and the parties determine the issues in dispute, and a timetable is set that ensures the case is ready for the final hearing (s 65). Parties may be legally represented in the preliminary conference (s 65(3)).

**Grounds for making final care orders**

The Children’s Court may only make final care orders if it is satisfied, on the balance of probabilities, that the child or young person is in need of care or protection for any of the following reasons (s 71):

- there is no parent available to care for the child or young person
- the parents acknowledge that they have serious difficulties caring for the child or young person and that the child is in need of care and protection
- the child or young person has been or is likely to be physically or sexually abused or ill treated
- the child or young person is suffering, or is likely to suffer, serious developmental impairment or serious psychological harm as a consequence of the domestic environment in which they are living
- the child or young person’s basic physical, psychological or educational needs are not being met, or are not likely to be met by their parents or primary caregivers
- a child under 14 has exhibited sexually abusive behaviours and an order is necessary to ensure attendance or access to an appropriate service
- the child or young person is the subject of a care and protection order of another state or territory that is not being complied with
- the child or young person is presumed to be in need of care and protection due to the filing of a parental responsibility contract breach notice, and that presumption has not been rebutted.

The fact that a parent has a disability or that the family is in poverty is not sufficient reason to determine that the child or young person’s basic needs are not likely to be met.

[7.540] **Final care orders**

Principles and considerations

When deciding what final care orders should be made, the court is guided by the principles of the Act.

Under principles set out in s 9:

- the court’s paramount concern is the safety, welfare and wellbeing of the child or young person
- the court must adopt the least intrusive intervention in the life of the child or young person and their family that is consistent with that principle
- the views of the child or young person must be given due weight in accordance with their capacity and the circumstances
- the permanent placement principles are to guide all actions if the child or young person is placed in out-of-home care.

**The views and interests of siblings**

The views of any siblings may be obtained by the court, and their interests must be considered in making a final decision (s 103).

**Orders reallocating parental responsibility**

An order reallocating parental responsibility for the child or young person is the most drastic measure available to the Children’s Court, and must not be made unless the court is satisfied that no other order would be sufficient to meet their needs (s 79(3)).

**Permanency planning**

The Children’s Court must not make any final care order unless it expressly finds that permanency planning for the child or young person has been appropriately and adequately addressed (s 83(7)).

If the court is considering making an order that places or retains a child or young person away from their parents,
Final orders that may be made

If the court is satisfied that the child or young person is in need of care and protection, it can make one or more of the final care orders specified in the Act.

Order accepting undertakings (s 73)
This order is usually made when the child or young person:
• is to remain in the care of their parents, or
• is to remain in out-of-home care in the short term and restoration is planned to a parent provided that the parent does certain things, or
• is placed under the parental responsibility of another person such as a relative, and the court wishes to ensure that this person complies with certain requirements.

Order prohibiting action (s 90A)
The court may, at any stage in care proceedings, make an order prohibiting any person, including a parent of the child or young person, from doing anything that could be done by the parent in carrying out their parental responsibility. This could include AVO-type prohibitions.

Order for support services (s 74)
The support services must be directed at the child or young person, and the order cannot last for more than 12 months.
The court cannot make an order for support services unless:
• it gives notice of its intention to consider making the order to the person or organisation who would be required to provide support, and
• the person or organisation is given an opportunity to appear and be heard by the Children’s Court before it makes the order, and
• the person or organisation consents to the making of the order, and
• the views of the child or young person in relation to the proposed order have been taken into account.
The support services may be provided by FACS or any other agency, and can include counselling, family support, supervision of contact, and so on.
The court cannot require any person or agency, including FACS, to provide support services if they do not consent to do so.

Order that the child or young person attend a program for sexually abusive behaviour (s 75)
This order can only be made if the ground on which the child or young person was found to be in need of care and protection was that relating to the exhibiting of sexually abusive behaviours.

Order for supervision (s 76)
This order places the child or young person under the supervision of FACS. It is usually made when the child or young person:
• is to remain in the care of their parents, or
• is placed under the parental responsibility of another person such as a relative, and the court wishes to ensure that this person complies with certain requirements.

A supervision order cannot last for more than 12 months, though it can be extended by the court up until 24 months.

Order allocating parental responsibility (ss 79, 81)
The court can make an order allocating parental responsibility, or aspects of parental responsibility:
• to one parent
• to a parent or both parents jointly with the Minister for Community Services or another suitable person
• to the Minister for Family and Community Services solely, or
• to any other suitable person or persons jointly.
The aspects of parental responsibility that may be allocated include, but are not limited to:
• residence
• contact
• education and training
• religious and/or cultural upbringing
• medical decisions.
If the court makes an order allocating parental responsibility to the minister, it must specify what, if any, aspects of parental responsibility:
• may be the sole responsibility of anyone else
• are to be the sole responsibility of the minister
• are to be exercised jointly by the minister and other persons.
Orders allocating parental responsibility can be made for any period until the child or young person turns 18. If the order is made in anticipation that the child or young person is to be restored to the care of their parents, it is usually made for a short period (often six months to two years).

Allocation of parental responsibility by guardianship order
The court allocate all aspect of parental responsibility for a child or young person until the child or young person reaches the age of 18 years of age by a guardianship order (s 79A). The court may make such an order only if satisfied that there is no realistic possibility of the child or young person being restored to his or her parents and that the child or young person will be provided with a safe, nurturing, stable and secure environment.

Orders in relation to contact between a child or young person and a parent, relative or other person of significance to the child or young person (s 86)
The Act currently enables the court to make orders setting out a minimum contact regime for a child or young person with their parents, relatives or any other person of significance. It can also order that such contact be supervised, but only with the consent of both the person with whom the child is to have contact and the person who is to supervise that contact.
The duration of initial contact orders (where there is no realistic possibility of restoration of the child or young person to his or her parents) is a maximum period of 12 months.

Evidence required for an order reallocating parental responsibility

Care plans
Before an order reallocating parental responsibility is made by the Children’s Court, FACS must prepare, and the court must consider, a care plan (s 78).

Permanency planning
FACS must also prepare a permanency plan that considers options for permanent placement of the child or young person (s 83), which could include placement back with the parents (restoration) or long-term placement away from the parents.
If FACS considers that there is no realistic possibility of the child or young person being restored to their parents, the permanency plan must set out the plans being made for their long-term placement, including whether adoption is the preferred option.
If FACS considers that there is a realistic possibility of restoring the child or young person to their parents, the permanency plan must include:
• a description of the minimum outcomes that FACS considers must be achieved before it would be safe for the child or young person to return to their parents
• details of the services FACS can provide, or arrange, to the child or young person or their family in order to facilitate restoration
• details of other services the Children’s Court could ask other government departments or funded non-government agencies to provide to the child or young person or their family in order to facilitate restoration
• a statement of the length of time during which restoration should be actively pursued (s 84).

What the court must decide
Before making an order allocating parental responsibility during which the child or young person is to be restored to the care of their parents, the court must find that there is indeed a realistic possibility of restoration having regard to:
• the circumstances of the child or young person, and
the evidence, if any, that the parents are likely to be able to satisfactorily address the issues that have led to the removal of the child or young person from their care (s 83(7)(b)).

Before making any final care order, the court must expressly find that permanency planning for the child or young person has been appropriately and adequately addressed (s 83(7)(a)).

The court is required to make a decision about the feasibility of restoration within a specific timeframe of having made interim orders:

- for a child who is less than two years, the court must make a decision within six months
- for a child or young person over the age of two years, the court’s decision is to be made within 12 months (s 83(5)).

[7.545] Rights of appeal

A party to the proceedings who is dissatisfied with a final order of the Children’s Court may appeal to the District Court (s 91(1)).

Such an appeal is a new hearing, and new evidence – or evidence in addition to or substitution for the evidence that was before the Children’s Court – may be introduced.

[7.550] Applying to cancel or vary orders

Under the Act, an application may be made to rescind (cancel) or vary final care orders at any time until the young person turns 18 (s 90). Such an application may only be made with the leave of the Children’s Court.

Who may make an application?

An application to rescind or vary care orders may be made by:

- the child’s parents or caregivers
- the child or young person
- FACS
- anyone who has a sufficient interest in the welfare of the child or young person (s 90).

What the court must consider

The Children’s Court may (not “must”) grant leave to a person to bring an application to vary or rescind final care orders if it appears that there has been a significant change in any relevant circumstance since the orders were last made or varied.

Before granting leave to apply to vary or rescind the order, the court must take the following matters into consideration:

- the nature of the application
- the age of the child or young person
- the length of time for which the child or young person has been in the care of the present carer
- the plans for the child
- whether the applicant has an arguable case.

Effect of a grant of leave

Once leave has been granted, the Children’s Court considers the evidence presented by all parties as to whether it is appropriate to vary or rescind the orders.

If FACS relies on a ground in support of its own application, or in opposition to an application by any other person, that was not considered by the Children’s Court when it made the relevant final care orders, FACS must prove that ground as if the application was a fresh care application (see Grounds for making final care orders at [7.530]).

If the Children’s Court decides to rescind a final care order, it may make any other care orders in place of the order that was rescinded.

[7.560] Reviews

Periodic review is very important to the wellbeing of children and young people in care, particularly to guard against systems abuse. The Convention on the Rights of the Child recognises the right of children in care to a periodic review of the care provided, and all the other circumstances of their placement.
Reviews of Children’s Court orders

Orders for supervision
If the Children’s Court makes an order placing a child or young person under the supervision of FACS, it can require that one or more written reports be provided to it during the period of the supervision, setting out whether the outcomes of the supervision have been met and whether there is a need for further supervision (s 76(4)).

Orders allocating parental responsibility
If the Children’s Court makes an order allocating parental responsibility of a child or young person to anyone other than a parent, it may also order that a written report be provided to it, at such a time as it decides, regarding progress in implementing the care plan, and progress towards achieving a permanent placement.

If the court is not satisfied that proper arrangements have been made for the care and protection of the child or young person, it can order that the case be brought back before it and may review the final care orders that were made (s 82).

Reviews of placements
Section 150 of the Act requires reviews of the placements and case plans of children and young people who have been placed in out-of-home care by order of the Children’s Court.

Reviews by the agency responsible for placement
Agencies responsible for the placement of a child or young person must conduct reviews:
• within two to four months of the Children’s Court order, depending on the age of the child
• within every 12-month period after that, and
• in certain other circumstances (s 150).

Reviews of permanency plans involving restoration
Where the court order places a child or young person in out-of-home care but also approves a permanency plan involving restoration, a review must be conducted by the agency responsible for the placement:
• at the end of the period stated in the permanency plan as the period during which restoration should be actively pursued, or
• if a review is directed by the Children’s Guardian, or
• within 12 months after it was last considered by the Children’s Court (s 85A).

The review is to consider:
• whether the provisions of the permanency plan should be changed, particularly with regard to the length of time during which restoration should be actively pursued
• whether other arrangements should be made for the permanent placement of the child or young person, and
• whether an application for a care order or for variation or rescission of the care order should be made.

The Children’s Guardian
The role of the Children’s Guardian has been established by the Advocate for Children and Young People Act 2014 (NSW). Generally, the oversight functions of the Children’s Guardian in relation to out-of-home care are to:
• promote the best interests of children and young people in out-of-home care
• prescribe accreditation for agencies that provide out-of-home care.

Reviews by the NSW Ombudsman
The NSW Ombudsman has the authority to:
• carry out a review of the circumstances of a child or young person in care
• make a recommendation about the care arrangements of a child or young person
• advise the Minister for Family and Community Services whether any change in the circumstances or status of a child or young person would promote their welfare and interests (Community Services (Complaints, Reviews and Monitoring) Act 1993 (NSW); Ombudsman Act 1974 (NSW)).

The Ombudsman cannot make a substitute decision, only a recommendation.
[7.570] Investigation of complaints
The NSW Ombudsman can investigate complaints about services provided by FACS and any agency it funds, and make recommendations.

Services for children in care
The Ombudsman has a children’s liaison officer to help make it more accessible to children.

It also manages a team of community visitors authorised to:
• visit residential care units
• advocate for residents
• resolve complaints
• refer serious issues to the Ombudsman for action (Community Services (Complaints, Reviews and Monitoring) Act 1993; Ombudsman Act 1974).

Parental responsibility of the minister
The Minister for Family and Community Services has parental responsibility for those children and young people (formerly called state wards) who have been placed in the minister’s care.

The minister’s powers and duties have never been precisely defined. It is clear that the minister owes a general duty of care to these children and young people (as stated by the High Court in Bennett v Minister for Community Welfare (1992) 176 CLR 408), as well as a statutory duty to provide accommodation under the Children and Young Persons (Care and Protection) Act (s 164).

Children and young people leaving care
The Act also gives the minister authority to provide for the reasonable needs of people for whom the minister had parental responsibility until they are 25, and beyond that age at the minister’s discretion (s 165).

Leaving care and after care services have been established to assist young people in care through their transition to independence.

Adoption
[7.580] Adoptions in NSW are covered by:
• the Adoption Act 2000 (NSW), which deals with:
  – adoption procedures
  – the effects of adoption orders
  – the rights of the parties to an adoption to obtain adoption information
• Supreme Court Rules, which deal with Supreme Court procedures for applications under the Adoption Act
  • the Family Law Act 1975 (Cth), which deals with:
    – certain effects of an adoption order
    – procedures for adopting a step-child
    – procedures for recognising adoption orders from some overseas countries.

What is adoption?
[7.590] Adoption is the permanent legal transfer of all parental rights from biological parents to another person or couple. Adoptive parents have the same rights and responsibilities as biological parents, and adopted children have all of the emotional, social, legal and kinship benefits of biological children.

This change in parentage is permanent unless the Supreme Court (which deals with adoption applications) discharges the order, or another adoption occurs.
Where adoption provides for continued contact to be given to birth parents, this is documented in an adoption plan approved by the court. The arrangement is often referred to as an open adoption.

**Why adopt?**

It is through adoption that the law recognises the adopted parents as the child's parents, rather than just legal guardians and custodians. Adoption is often seen as an expression of a higher level of commitment, but it is also a means of giving the child security in the permanency of the relationship, family identity and family membership beyond the age of legal independence.

Adoption is seen as a service for children who, for whatever reason, are unable to grow up in the care of their birth parents.

[7.600] Effects of adoption

An adoption order changes legal relationships in a number of ways.

**Birth family's rights**

The birth family loses all rights concerning the child except those specifically preserved under the legislation (such as the right to information) or granted by a court (such as the contact arrangements set out in an adoption plan).

**Adoptive parents' responsibilities**

The adoptive parents have parental responsibility for, and a duty to care for, the child.

**Change of name**

The child gets a new birth certificate in their adopted name, with the details of the adoptive parents and their other children (if any) shown on the certificate rather than the birth family's details. The original birth record is filed.

The given name of a child can only be changed if the court is satisfied that the change of name is in the best interests of the child (s 105(1)). The court, in making decisions about the adoption is to take into account the general principles of the Adoption Act, which include that a child’s given name or names, identity, language and cultural and religious ties should, as far as possible, be identified and preserved (s 8(1)).

**Rights to inherit**

The child’s right to inherit from the birth family will cease (unless the child is referred to by name in a will) and be replaced by a right to inherit from the adoptive family.

This change does not affect any vested or contingent rights (s 97). For example, a member of the birth family may have died but the estate has not been distributed before the child’s adoption. If the child (as a member of the birth family) was entitled to a share in the estate or a gift, they will not lose that share or gift because of the adoption.

[7.610] Is adoption appropriate?

Adoption is just one of the legal options for giving a child long-term or permanent care, and its appropriateness should be assessed according to the needs and wishes of the parties (especially the child) and existing relationships.

The Adoption Act sets out the principles to be taken into account when making decisions about the adoption of a child. The emphasis is that the best interests of the child are the paramount consideration, both in childhood and later life. The Adoption Act recognises that adoption is a concept that is absent in customary Aboriginal child care arrangements and includes special provisions that Aboriginal people should be given the opportunity to participate with as much self-determination as possible in decisions relating to the placement for adoption of Aboriginal children.

[7.620] Alternatives to adoption

Given the effects of an adoption and the fact that it is permanent, it is important to be aware of the alternatives so that the most appropriate choice can be made.

When people want long-term care of a non-related child their choices are:
• foster care
• adoption
• parenting or guardianship orders until the child turns 18.

When the child is already with the carers
When the child is already with the carers, especially if one of them is a birth parent, options to be considered as alternatives to adoption include:
• a power of attorney from the parents of the child to the step-parent living with the child
• a change of name for the child
• parenting orders under the Family Law Act (see Chapter 24, Family Law)
• specific inclusion of the child in a will or family trust.

Long-term foster care
Like adoption, long-term foster care of a non-related child cannot be arranged privately (Children and Young Persons (Care and Protection) Act, s 136).
Foster care must be arranged or authorised by the Department of Family and Community Services (FACS) or a designated agency authorised to provide out-of-home care services.

Parenting orders
The Family Court cannot make a parenting order by consent in favour of people who are not the child’s parents, grandparents or other relatives, either about who the child is to live with or parental responsibility for the child, unless the parties have attended a conference with a family consultant to discuss the matter, or this requirement has been dispensed with (Family Law Act, s 65G(2)).

Considering the alternatives
The Adoption Act requires that people consenting to an adoption be given certain information, including information about alternatives (s 59).

What the Supreme Court must consider
In making an adoption order the Supreme Court will also be asked to consider that the best interests of the child will be promoted by the adoption and that the prospective adoptive parent or parents have been selected in accordance with the eligibility and selection criteria set out in the Act (s 90(1)).

The adoption process

[7.630] Who can arrange an adoption?
Under the Adoption Act, adoption arrangements can only be made by FACS or an accredited adoption service provider except when:
• one of the people adopting the child is a step-parent or relative of the child, or
• the person to be adopted is over 18 years of age.
A private arrangement made in any other circumstances is an offence unless it is specifically authorised by FACS, and may lead to the prosecution of anyone involved in making or facilitating it (ss 177–179).

[7.640] Types of adoption
There are several types of adoption in NSW, which can be grouped as:
• relative adoption, which involves the adoption of a child by a step-parent or close relation.
• local adoptions, which include:
  – foster care adoptions, a process by which a child living in foster care is connected with an adoptive family through the assistance of FACS or an accredited service provider.
  – private adoptions, a process where birth parents or expectant parents wish to relinquish their child and are connected with a prospective adoptive family through an accredited adoption service provider,
• intercountry adoptions, the process by
which a family adopts a child from another country. The adoption process involves applying to the Supreme Court for an adoption order.

**Step-parents**

Step-parents must also apply to the Family Court for permission to adopt before making an application to the Supreme Court (*Family Law Act*, s 60G).

If permission is not granted, any subsequent adoption order will not be fully recognised by the court, any pre-adoption court orders will remain in force and, for a child of a marriage, the *Family Law Act* will still regard the child as being a member of their birth family (s 60F(3), (4)).

**Adopting a child through a NSW adoption service**

**Local adoptions**

In this case, the adoption process begins with an expression of interest to FACS or an accredited adoption service provider, followed by an application seeking approval of suitability to adopt.

Applicants are then assessed and, if they are considered suitable, their application is approved.

Approved applicants are included in the pool of eligible applicants.

There is a period following placement where the placement is monitored to ensure it is progressing well. Once that period has passed, approval can be given for any court action to finalise the adoption.

**Intercountry adoptions**

The procedure is the same as for NSW local adoptions, but applicants must meet the eligibility requirements of both the *Adoption Act* and the overseas adoption authorities. If they are approved, the details of their application are sent by FACS to the nominated overseas country’s approved adoption program.

If the applicants are selected as the most suitable to adopt a particular child, and they accept the selection, the child is placed with them. Following placement and return to Australia, there is a period where the placement is monitored to ensure that it is progressing well. Reports are often sent to the overseas authority about the placement. Once that period has passed, approval can then be given for any court action to finalise the adoption.


The next step is an application to the Supreme Court for an adoption order or, in some cases, recognition of a foreign adoption order (see below).

**Overseas adoptions**

Where an adoption order has been made in a country which (like Australia) is a signatory to the Hague Convention on Intercountry Adoption, or a country with which Australia has a bilateral arrangement about adoption, that country can issue an adoption certificate.

If this certificate has been issued the adoption will automatically be recognised in Australia, (*Family Law (Hague Convention on Intercountry Adoption) Regulations* 1998 (Cth), reg 16).

For intercountry adoptions where an adoption order has been made overseas and the residency requirements of the adoptive parents being resident in that country for 12 months or domiciled in that country have been met (s 116), the adoptive parents on return to Australia must apply to the Supreme Court for recognition of the foreign order.

**The Hague Convention on Intercountry Adoption**

The Hague Convention came into force in Australia on 1 December 1998. Details of the convention are in Sch 1 to the *Adoption Act*.

Under the convention, if an adoption of a child from one convention country to another takes place and an adoption compliance certificate is issued by the appropriate authority, the adoption order will be automatically recognised in any other convention country.

Where recognition of an Australian adoption in another convention country is required, an adoption certificate under the Hague Convention should be arranged.

Details of countries that have signed and ratified the Hague Convention can be found at [www.hcch.net/index_en.php?act=conventions.status&cid=69](http://www.hcch.net/index_en.php?act=conventions.status&cid=69).
[7.650] Who can be adopted?
Section 24 of the Adoption Act allows for the adoption of:
• a person under 18, or
• a person who has turned 18 and has been cared for by the applicants prior to reaching the age of 18 years.

[7.660] Who can adopt a child?
Under the Adoption Act, the court can make adoption orders in favour of:
• married couples, (ss 26, 28 and definition of couple)
• de facto couples (including same-sex couples), where their relationship is of at least two years’ duration, unless the court finds that there are special circumstances (ss 26, 28 and see definition of couple)
• single applicants (ss 26, 27).

Age limits
Except in adoptions by step-parents and relatives or where there are exceptional circumstances, the court cannot make an order if either of the applicants is:
• under 21
• less than 18 years older than the child (ss 27, 28).

Character requirements
Applicants must also be considered by the court as suitable to adopt; that is, they must be:
• of good repute (this is usually demonstrated by references and police screening reports)
• fit and proper persons to fulfil the responsibilities of a parent (s 27).

Other requirements

Stability of the relationship
For adoptions by all couples, the couple must have lived together continuously for at least two years immediately before the application is made (s 28).

Step-parent adoptions
For adoptions by step-parents:
• the child must be at least five
• the step-parent must have lived with the child and the birth parent for at least two years
• the adoption must be clearly preferable, in the child’s best interests, to any other action (s 30).

Adoptions by relatives
For adoptions by relatives:
• the child must have had a relationship with the applicants for at least two years
• the adoption must be clearly preferable, in the child’s best interests, to any other action (s 29).

Indigenous children
For Aboriginal children (ss 33–36) and Torres Strait Islander children (ss 37–39):
• the placement must be in accordance with the Aboriginal placement principles
• appropriate consultation must have taken place with a local, community based and relevant Aboriginal organisation
• the adoption must be clearly preferable, in the child’s best interests, to any other action.

The Aboriginal and Torres Strait Islander placement principles
The principles set out in ss 35 and 39 of the Act require that Aboriginal and Torres Strait Islander children be placed with members of their own cultural communities wherever possible or, if this is not possible or not in their best interests, with people able to give them a positive cultural identity, knowledge of their culture and protection against discrimination.

If Aboriginal children are to be placed with non-Aboriginal carers for adoption, the placement must be approved by the court at a preliminary hearing (s 80(2)). If the placement is by FACS, the consent of both the Minister for FACS and the Minister for Aboriginal Affairs is also required (Children and Young Persons (Care and Protection) Act, s 78A(4)).

Applicants seeking to adopt through FACS
Applicants who seek to adopt a child through departmental processes are assessed by FACS against eligibility criteria (see the Adoption Regulation 2003 (NSW)).

If applicants are not approved, they have the right to a review of that decision or, in
some circumstances, to possibly take action in the Supreme Court.
Similar rights of review and appeal exist for accredited adoption agency programs. Applicants rejected by one agency (including FACS) are not barred from applying to another agency.

[7.670] Who can apply for an adoption order?
For local adoptions, applications can be made to the Supreme Court:
• by, or with the consent of, the Director-General of FACS, or
• by the principal officer of an accredited adoption agency.
Applications can be made directly to the Supreme Court without the consent of the Director-General of FACS for:
• intercountry adoptions
• step-parent adoptions
• relative adoptions (s 87(2)), or
• adoption of a person aged over 18 years (s 91).

[7.680] Telling the child
The Adoption Act encourages openness in adoption and the participation of the child
in decisions by the provision of information in a manner and language that the child can understand (s 9).
If the child is under five, the applicants must give an undertaking to the court to do this.

[7.690] The child’s consent
At 12 and above, the child’s consent is required unless there are special reasons why the court should dispense with this requirement (s 55) (and see Consents to adoption at [7.700]).

Explanation and counselling
Before being asked to consent, the child must be given written information about adoption, together with a copy of the consent instrument, and the legal effect must be explained by a counsellor (s 55).

Indigenous children
For Aboriginal and Torres Strait Islander children, the child should also receive special counselling about their customs and culture from an appropriate Indigenous person (ss 64, 65).

Consents to adoption

[7.700] Whose consent is required?
Only the child’s consent is required if the child is:
• 18 or over, or
• between 12 and 18, and has been brought up, maintained and educated by the applicants for two years or more.
In all other cases, consents are required from:
• each person who is a parent or guardian of the child, and
• the child, if the child is 12 or more.

Rights of the father
Under the Adoption Act a birth father has the same rights as a birth mother to give consent, but if his name is not on the child’s birth certificate he must establish paternity first.

Notification requirements
Where the Director-General of FACS or the principal officer of an accredited adoption agency knows or reasonably believes a person to be the birth father, they must send him a notice telling him how he can establish paternity and be registered as the father, as well as his right to consent to adoption once this is done (s 56).

[7.710] Consent forms
There are official forms for giving consent.
General consent
Parents and guardians consenting to the adoption of their child by any person use a general consent.

Consent nominating the adoptive parents
When the consent is for adoption by a step-parent or relative or by a foster carer who has had the care of the child for two years or more, a consent form nominating the adoptive parents is used.

The child's consent
The child’s consent is given on a special form.

Information in consent forms
The content of the forms of consent are prescribed under the Regulations to the Adoption Act.

The forms include acknowledgments that:
- the person giving consent has been given, and had explained to them, written information about adoption and the alternatives (s 58), and has received adoption counselling before giving consent (ss 63–65)
- the person witnessing the consent is not the person giving counselling (s 62).

Time limits
The person must be given the written information and the form of consent at least 14 days before being asked to give consent and at least 30 days after the child is born (s 60).

[7.720] Counselling
A person giving consent to adoption should first be counselled by a registered counsellor approved by FACS about:
- the legal effect of signing the consent
- the procedure for revoking consent
- the written information about adoption
- the emotional effects of adoption
- the alternatives to adoption (including, in the case of a birth parent, whether it is possible for them to keep the child) (s 63)
- if the child to be adopted is an Aboriginal or Torres Strait Islander child, the information about their culture and customs (ss 64, 65).

The counsellor must sign a statement saying that:
- the consenting person has received the written information and counselling
- the counsellor is of the view that the person understands the effect of giving consent (ss 61, 62).

If a person refuses certain counselling
If counselling on Aboriginal and Torres Strait Islander culture and customs is refused by the person being asked to consent, consent cannot be given until at least seven days after the written information about culture and customs was given (ss 64).

Witnesses
The signature on the consent form must be witnessed. The witness must certify that:
- the witness is not aware of any mental, emotional or physical unfitness of the person to give consent
- the witness is satisfied as to the identity of the person signing the form
- the person signing the form has been given ample opportunity to read the form, and understands the effect of signing it (s 62; Adoption Regulation, cl 36).

The Regulations list the people who can witness an adoption consent (cl 35).

Notice of consent being given
If someone other than an officer of an accredited adoption service provider or FACS witnesses the signing of a general consent to adoption, that person must send a notice to the Director-General of FACS about the signing of the consent within seven days of the consent being signed (Adoption Regulation, cl 37(2)).

[7.730] When consent is not effective
The child's consent
A child’s consent is only effective if (s 58(1)):
- it is informed consent
- it has been given in accordance with procedures set out in the Act.
The parent’s or guardian’s consent
The consent of a parent or guardian can be regarded as defective if:
• the proper procedures are not followed
• the proper forms are not used
• the consent has been altered materially without authority
• the consent was obtained by fraud, duress or improper means
• the person giving consent was not fit to give consent at that time (s 58(2)).

Newborn children
If the child to be adopted is a newborn child, the consent of the birth parents cannot be given until at least 30 days after the birth (s 60(a)).

Birth parent less than 18 years of age
Consent given by a birth parent who is less than 18 years of age is not effective if the birth parent has not received independent legal advice before signing the instrument of consent (s 58(4)).

[7.740] Revoking a consent

The child
A child over the age of 12 who has consented to his or her adoption can revoke consent at any time before the adoption order is made (s 73).

Parents and guardians
Parents or guardians can only revoke their consent within 30 days after it has been given. If a parent or guardian does not revoke their consent within that period, it cannot be revoked unless there are grounds for the court to set it aside (ss 58, 73).

How consent is revoked
To revoke a consent, the person must forward a notice to the adoption clerk at the Supreme Court no later than the last day of the revocation period. This notice can be in a special form, obtainable from the adoption service worker, or it can be a simple letter (with all relevant names and details, including contact details), addressed to the court, stating that the person wishes to revoke consent. The court will send the notice to the appropriate people to let them know of the revocation (s 73).

[7.750] If consent is not given
If a person whose consent is required under the Act refuses to consent or cannot be found, the adoption can only proceed if the court dispenses with that person’s consent.

Applying to dispense with consent
An application for a consent dispense order can be made either before, or at the same time as, the adoption application (s 70).

Notice requirements
Fourteen days’ notice of the application must be given to:
• the person whose consent is to be dispensed with
• the Director-General of FACS, if the Director-General is not applying for the order (s 69).

Dispensing with parents’ consent
The court may dispense with the consent of a parent or guardian where:
• the person after reasonable inquiry cannot be found or identified
• the person is in such a physical or mental state as not to be capable of considering whether or not to consent
• there is serious concern for the welfare of the child and it is in the child’s best interests to override the wishes of the parent or guardian
• the court is satisfied that the child has established a stable relationship with an authorised carer and the adoption of the child by the authorised carer would promote the child’s interests and welfare (s 67).

Dispensing with the child’s consent
The court may also dispense with the consent of a child between 12 and 18 where the child is in such a physical or mental state as not to be capable of considering whether or not to consent (s 69).

If the child is 18 or over
The court cannot under any circumstances dispense with the consent of the person to be adopted if they are 18 or older (s 69).
Applying for revocation of the order
If the consent dispense order is made, the court can be asked to revoke it at any time before it makes an adoption order (s 71).

### Court procedure and court orders

#### [7.760] Preliminary hearings

The Supreme Court can hold a preliminary hearing before an adoption order is applied for, most commonly about:

- dispensing with the consent of a parent or guardian
- placement of the child, and whether adoption action should proceed
- contact arrangements in an adoption plan (s 80).

The court must hold a hearing if placement of an Aboriginal or Torres Strait Islander child with someone other than an Aboriginal person or Torres Strait Islander is being considered (s 80).

**Opposing adoption**

Anyone wanting to oppose an adoption can apply to be made a party to the adoption proceedings.

The court is only obliged to agree to this where that person’s consent was required and not given, especially birth fathers (s 118).

**Who may attend the hearing?**

Adoption proceedings take place in closed court and anyone not directly involved in the case, including lawyers, will not be allowed into the courtroom without leave of the court (s 119).

**Representation and support persons**

The Adoption Act allows for the appointment of legal representatives and guardians ad litem for the child (ss 122–123), as well as guardians ad litem and an amicus curiae for the birth parents (s 124). See the box below for what these terms mean.

Support people are also allowed to be present in court, with its leave (s 125).

#### [7.770] Court orders

**Adoption plans**

The Act allows parties to agree on an adoption plan (s 47) dealing with issues like exchange of information, contact, financial and other post-adoption support arrangements, and cultural upbringing (s 46). If a plan is agreed to, it is put in writing and lodged with the court at any time before the adoption order is made (s 48).

If the court agrees with the plan it is registered, giving it the effect of a court order (s 50).

**Changing or revoking adoption plans**

Parties wishing to change or revoke a registered adoption plan, including after the adoption order is made, must apply to the court for a review.

On review, the court can make orders confirming, varying or revoking the plan if it is satisfied it is in the best interests of the child to do so (s 51).

**If an adoption order is not made**

The Supreme Court’s primary role is to decide whether an adoption order is appropriate. If the court decides to refuse the order, it can still make other orders (such as orders like the parenting orders made in the Family Court) (s 92).

**Contact orders**

Contact orders can be made by:

- the Supreme Court during the adoption proceedings (see Re Adoption Application A6507/83 [1984] 2 NSWLR 590), or
- the Family Court after the adoption order is made (see In the Marriage of Newling & Mole (1986) 11 Fam LR 974).
[7.780] Discharge of orders

The Adoption Act allows any of the parties to an adoption, as well as the NSW Attorney-General, to apply to the court for discharge (that is, termination) of an adoption order (s 93).

The court can only make an order discharging the adoption order if:

• the order, or any consent, was obtained by fraud, duress or other improper means, or
• there is some other exceptional reason why the adoption order should be discharged.

What the court must consider

The court must be satisfied that discharge will not be prejudicial to the best interests of the child.

If the application is brought by the child

If the application is brought by the child, the court must not make the order if it believes the application is motivated by emotional or other considerations that do not affect the child’s welfare, where those considerations arise out of a relationship the child has formed following access to adoption information or contact with a person through an adoption reunion (s 93(5)).

Effect of discharge

When an adoption order is discharged, the legal relationships that existed between the child and the birth parents before the adoption are restored.

Vested property rights are not affected, and the court can also make other orders it thinks necessary in the interests of justice or to promote the child’s welfare and interests (s 93).

General consents to the original adoption remain in operation unless the court orders otherwise.

Information rights after adoption

[7.790] Adopted people and their birth parents in NSW have access to identifying information and may be able to contact each other.

Legislation

Since 2010, there has been a shift towards greater access to adoption information, to better reflect the principle of openness in adoption. A new scheme of open access to information applies to all adoption orders made on or after 1 January 2010.

[7.800] Contact vetoes apply to adoptions before 26 October 1990

An adopted person or birth parent who does not wish to be contacted may register their name on the Department of Family and Community Service’s (FACS) contact veto register to ensure that their wishes are recorded before a birth certificate is issued by the registry. A veto can only be registered for adoptions that occurred prior to 26 October 1990.

Lodging a veto

A contact veto can be registered by making an appointment and going to any FACS office, taking suitable identification (for example, a photo licence or a combination of other documents such as a passport and birth certificate). If your name has changed (for instance, through marriage) you will also need to provide documentation linking your previous and current names (such as a marriage certificate).

Effect of the veto

If a contact veto is registered, access to the birth certificate will only be allowed if the person seeking it signs an undertaking not to make contact with the other person.

It is an offence to contact or procure another person to make contact with, an
adopted person or birth parent who has registered a contact veto, and penalties apply.

A contact veto does not prevent the release of identifying information.

When does a veto expire
A veto on contact expires when the person who lodged the veto cancels it by notification in writing to the Director-General of FACS, or when the person who lodged the contact veto dies.

Leaving a statement
A person who registers a contact veto is encouraged to leave a statement with FACS about their wellbeing, their family background and their reasons for not wanting contact. This may help the person seeking contact to understand the decision.

Notification that a veto has been cancelled or varied
The Director-General of FACS is required to notify a person of any cancellation or variation of a contact veto that affects them if the person requests such notification at the time they receive adoption information and are subject to a contact veto.

Notification to the person who lodged the contact veto
The Director-General of FACS is required to notify a person who has lodged a contact veto of any application for the supply of adoption information. The Director-General of FACS may approach the person who lodged the contact veto and ask if they wish to confirm, cancel or vary the veto, where circumstances exist that justify the approach in order to promote the welfare and best interests of either or both parties concerned.

[7.810] Access entitlements before 1 January 2010
For adoption orders made before the new open access scheme commenced on 1 January 2010, the entitlements to adoption information are as follows.

Adopted person
An adopted person aged 18 and over is entitled to access to their:

- original birth certificate
- birth record, and
- any other information relating to their birth parents.

An adopted child under the age of 18 years is only entitled to receive their original birth certificate and other information with the consent of both their adoptive parents and birth parents.

Adoptive parents
The adoptive parents may have access to the child’s original birth certificate, the child’s birth record and any other additional identifying information once the adopted child turns 18 or is over the age of 18 years, and with the consent of the adopted child.

Birth parents
The acknowledged birth parents may receive the amended birth certificate and any other identifying information relating to the adoptive parents and the health and welfare of the child after placement for adoption, if the Director-General of FACS is satisfied it would, if disclosed, promote the welfare and best interests of the birth parents and adopted child.

Obtaining the original birth certificate and other identifying information
An adopted person who is over the age of 18 years, or birth parent(s) seeking adoption information, must first apply to FACS for a supply authority. The supply authority fulfils two functions. First, it provides identifying information (including full name and date of birth) of the other party. Second, the supply authority authorises other adoption information sources to release information they might hold. Prior to issuing a supply authority, FACS checks the registers mentioned below and takes any necessary action.

Applicants can then apply to the Registry of Births, Deaths and Marriages for the birth certificate.
[7.820] Advance notice of information requests

Birth parents, adoptive parents and adopted people over 17 years and six months can apply for advance notice of any request for adoption information that includes personal information about themselves (s 146). This is to give the person time to prepare for any effect the release of information may have on themselves and their family or associates.

An application for advance notice must be in writing and be accompanied by proof of identity (s 147). The applicant’s name and contact details are put on the advance notice register and, if a request for adoption information is received, they are notified.

The supply of information can be delayed for up to three months, or longer in special cases with the approval of the Director-General of FACS.

What information is available?

It is possible to obtain certain “social and medical” information from adoption files held by FACS and other agencies. The Adoption Regulation 2003 sets out the type of additional information a person is entitled to receive, or may be supplied with, from FACS, the hospital where the adopted person was born, an adoption agency that arranged the adoption or the Supreme Court. There is, however, great variation in the quantity and quality of the information available from different sources.

[7.830] Access entitlements after 1 January 2010

For adoption orders made on or after 1 January 2010, it has become easier for adopted people, adoptive parents and birth parents to access records about an adoption before the adopted person is 18 years of age.

Adopted person

An adopted person under the age of 18 will be entitled to receive his or her birth certificate, birth record and other adoption information with the consent of his or her adoptive parents (or the Director-General of FACS in certain circumstances). The consent of the surviving birth parents will not be required (s 133C).

An adopted person who is 18 or over will have access to their original birth certificate and other identifying information, without the need for consent from their adoptive parents.

Adoptive parents

Adoptive parents will be able to access the child’s birth certificate, birth records and other information at any age without the consent of the adopted child (s 133D).

Birth parents

A birth parent will be entitled to receive adoption information about their child, unless the Director-General of FACS is of the opinion that supplying the information would pose a risk to the safety, welfare or wellbeing of the adopted child or adoptive parents (s 133E).

Non-adopted siblings

Non-adopted siblings of either birth parent will be entitled to access information about their adopted sibling (with the consent of their parents if the sibling is under 18 years of age). If the adopted person is under 18 years, the -Director-General of FACS may refuse to supply the information if the release of the information would pose a risk to the safety, welfare or wellbeing of the adopted child or adoptive parents (s 133G).

If one of the parties to the adoption dies

If the adopted person or the birth parent dies, certain relatives or significant other persons can apply to FACS for the release of identifying information by FACS or the Registry of Births, Deaths and Marriages, if approved, the applicant can then apply for a supply authority that would have otherwise been issued to the birth parent or adopted person. This is referred to as inherited rights.

[7.840] The reunion information register

FACS operates a reunion information register for people who wish to be contacted. Any party to an adoption, extended family mem-
bers and other people with a legitimate connection to the adopted person can ask to have their names entered. Over 30,000 people have registered their details.

When the details of two or more registered people match, a reunion is arranged by adoption workers in consultation with the parties (s 166). People may register by contacting FACS.

If you want to make contact

FACS holds adoption records for all adoptions that occurred in NSW since 1923.

The FACS website (www.community.nsw.gov.au/adoption) contains useful information to assist people wishing to gain information or search.

The Post Adoption Resource Centre (PARC) can assist to mediate contact between parties and provides support and assistance to people who have a connection to an adoption.

The Salvation Army Special Search Service can assist with additional searches when people connected to an adoption have gained all the adoption information they are entitled to, and have been unable to locate the person they are looking for via the usual search methods. Each person has different feelings about how much contact or news they would like. The agency that arranged the adoption can assist birth and adoptive families to stay in touch, for example by facilitating the exchange of letters/emails, sending photographs or by face-to-face meetings. The exchange of news and contact usually begins with the support of the adoption caseworker involved, but can progress to direct contact between the parties if everyone agrees.

Other legal issues affecting children

School

[7.850] Enrolment

Parents of children aged from six to 16 inclusive must enrol their child in school (Education Act 1990 (NSW), s 22) or register their child for home schooling (ss 70–74). A child aged 15 or over may engage in paid work instead of attending school (s 21B).

It is not uncommon for older students who are no longer living with their parents to enrol in school without parental permission or involvement. Students in this situation can sometimes encounter problems because the law does not specifically provide for this situation, but in most cases a student will be able to enrol.

[7.860] Attendance

Children must attend school or enrol in approved education from the age of six until they turn 17 (unless the child completes Year 10 before age 17, or is aged 15 or over and is in paid employment).

Truancy

If a child misses a lot of school without a good reason, this is called truancy. The child is not committing any offence but the parent(s) may be committing an offence and can, in theory, be fined (Education Act, s 23).

A home-school liaison officer might go to the child’s home and speak to the child and their parents about why they have not been
at school. The school principal must contact FACS if they think the child might be in need of care.

An officer authorised by the Minister for Education or a police officer may, during school hours, approach any child who is apparently of or above the age of six and below the age of 17 and request the child to provide the officer with their name, home address and school details. They may then accompany the child to their home or school (s 122).

Compulsory schooling order
The Secretary of the Department of Education and Communities may apply to the Children’s Court for a compulsory schooling order. The order is usually made against the child’s parents. However, an order may be made against a child aged 12 years or over if the child is living independently, or if the parents cannot get the child to attend school because of his or her disobedience (s 22D).

A compulsory schooling order may require a child to attend school, or where they have finished year 10, participate in training or work. It is an offence for a parent or child to fail to comply with a compulsory schooling order without reasonable excuse (s 22D(9)).

Exemption from school attendance
The Minister for Education may grant a certificate exempting a child from attending school in certain circumstances (s 25); for example, if the child has obtained employment.

This will usually not be granted until the child is at least 14 years and six months old.

[7.870] Suspension and expulsion
The Act gives the Minister for Education authority to control and regulate student discipline in government schools (s 35).

Departmental policy
The grounds on which a student may be suspended or expelled are not set out in the Act or regulations, but are covered by departmental policy.

The procedures are set out in full in the document Suspension and Expulsion of School Students – Procedures released by the Department of Education and Training (now the Department of Education and Communities) in 2011. Anyone faced with or enquiring about a suspension or expulsion should refer to these procedures, since school principals must follow them.

The procedures contain rights to procedural fairness – the right to be heard, the right to an impartial decision, and the right to appeal.

The principal’s authority
Principals now have the authority to:

- suspend or expel a student from a particular school, and
- recommend expulsion from the government school system (the decision is made by the minister on a recommendation from senior officers from the Department of Education and Communities).

Suspension
Who must be suspended
Principals must immediately suspend any student who:

- is physically violent, resulting in pain or injury, or who seriously interferes with the safety and wellbeing of other students, staff or other persons
- is in possession of a firearm, prohibited weapon (for example, knuckle-dusters, nunchakus) or knife without reasonable cause, or
- uses, or is in possession of, a suspected illegal substance (not including alcohol or tobacco) or supplies a restricted substance (for example, a prescription drug).

In such instances the matter may also be reported to the police.

Who may be suspended
Principals may suspend any student who:

- is persistently disobedient
- behaves in an aggressive manner, or
- engages in criminal behaviour related to the school.
Procedural fairness

In coming to a decision, principals are required to apply rules of procedural fairness. These include:

- conducting an interview with the student before making a decision to suspend (the student can have an independent person at the interview)
- informing the student about the nature of the allegations
- giving the student an opportunity to respond to the allegations
- considering the student’s response before a decision is made
- notifying parents or caregivers in writing of the date, duration and reasons for suspension
- providing:
  - a copy of the school’s discipline code
  - the Suspension and Expulsion of School Students Procedures
  - information about the right to appeal against the principal’s decision
- making an impartial decision.

See ss 6.1.4, 6.3.4 and Appendix 2 of Suspension and Expulsion of School Students – Procedures.

Types of suspension

Suspensions are either:

- short suspensions (up to and including four school days), or
- long suspensions (up to and including 20 school days).

When can a child be sent home?

Students should not be sent home before the end of the school day unless a parent or caregiver specifically agrees or is formally notified by the principal of the decision to suspend.

Expulsion

There are two forms of expulsion.

Expulsion from a school

A student may be expelled from a particular school on the decision of the principal.

A decision to expel from a particular school can be made on the basis of:

- misbehaviour by a student of any age, or
- unsatisfactory participation in learning by a student of post-compulsory school age.

Expulsion from the government school system for misbehaviour

A student may be expelled from the government school system on the decision of the minister on a recommendation from the Secretary of the Department of Education and Communities (and the principal).

The student is expelled from all government schools in NSW, and cannot re-enrol without the approval of the minister.

Procedure

The student is put on a long suspension of 20 school days while a decision is being made about expulsion. During this time the student and parents or caregivers are given seven days in which to respond to the notification that expulsion is being considered.

If a decision is made to expel a student from a particular school or to recommend expulsion from the government school system, the student and parents or caregivers must be informed in writing of the decision, and the right to appeal.

Principals must apply the rules of procedural fairness (see Procedural fairness above).

Appeals

Students, parents or carers can appeal against a decision to suspend or expel on the grounds that:

- correct procedures were not followed, or
- the decision is unfair.

The appeal should be in writing on the appropriate departmental appeal form.

If the appeal does not succeed at this level, it may be possible to appeal to the Supreme Court.

A complaint can also be made to the NSW Ombudsman.

Suspension and expulsion in private schools

Private schooling is based on an agreement between the school and the parents, which may indicate the circumstances in which a student can be suspended or expelled. If there is no specific term in the enrolment contract, there is an implied term that a student will not be suspended or expelled unreasonably.
Before suspending or expelling a student, private schools must make sure that:
- the student and their parents are told of the grounds on which suspension or expulsion is being considered, and
- they have an opportunity to answer the allegations and to be heard before a decision is made.

[7.880] Discipline

Discipline policy
Each government school is required to develop a school discipline policy that includes a discipline code for the school based on guidelines provided by the Department of Education and Communities. The discipline code should include:
- a school dress code or uniform policy
- a policy on anti-racism (including a grievance procedure) that reflects Department of Education and Communities policy
- a school anti-bullying plan
- a drugs-in-school policy.

Corporal punishment
Corporal (physical) punishment is not allowed in any NSW school, state or private (Education Act, ss 35(2A), 47(h)).

[7.890] School fees
Instruction in state schools is free (Education Act, s 31). State schools cannot ask parents to pay fees for education, but they can ask them to make a voluntary contribution towards expenses.
Students should not be disadvantaged in any way because their parents or caregivers do not make the voluntary contribution.

[7.900] Excursions and activities
The Department of Education and Communities in NSW has an excursion policy. It promotes the view that excursions are valuable educational experiences that are integral to teaching and learning. The policy also provides guidelines for managing the risks to health, safety and welfare of participants on excursion.
For students to participate in excursions, written parental consent is usually required. However, it is important to note that this is not a legal requirement and is simply part of the department’s policy. The policy also states that excursions should be inclusive and all students should be given the opportunity to participate. The policy allows older students to attend excursions without parental consent if there is no parent readily available and the student is mature enough to consent in their own right.

Leaving home and other legal transitions

[7.910] Leaving home
A person under 18 has no absolute right to leave home but there is no law preventing them from doing so. A person over 16, or a young person at risk of violence or abuse at home, would normally not be forced to return home against their wishes.
The law may intervene if the young person is considered in need of care. No child, no matter what their age, should be forced to return home to a violent or abusive situation (see Care and protection of children and young people at [7.400]).

Young people living away from home are legally entitled to sign a residential tenancy agreement for private rental accommodation (see Contracts and leases below).

[7.920] Contracts and leases
As a rule, people under 18 are not bound by contracts, leases and other transactions unless it is for their benefit and they are mature enough to understand what they are entering into (Minors (Property and Contracts) Act 1970, ss 18, 19).
A child is not bound by unfair and exploitative transactions, but would
probably be bound by ordinary transactions, freely chosen, in ordinary market conditions (such as renting a flat, or buying something on credit).

Leases
Like most contracts, a residential tenancy agreement (lease) is enforceable if it is for the young person’s benefit and he or she is mature enough to understand it.

Guarantors
In practice, people doing business with a person under 18 often require someone else (such as a parent) to guarantee that the person will fulfil their part of the bargain. This makes the guarantor (the person giving the guarantee) liable as well.

It is against the law for a landlord to require a guarantor in a residential tenancy agreement (lease) (Residential Tenancies Act 2010, s 160).

[7.930] Change of name
To register a change of name, a person under 18 must generally have the consent of both parents or their legal guardian. In some circumstances, a court may dispense with the consent of one parent.

The child must also consent, unless the child is unable to understand the meaning and implications of the change (Births, Deaths and Marriages Registration Act 1995, ss 28, 29).

[7.940] Driving
A young person may obtain a learner’s licence for a car at age 16, or for a motorcycle at age 16 and nine months.

A young person may apply for a provisional licence if they are 17 or over, have had a learner’s licence for at least 12 months, and have logged 120 hours’ driving time.

The person is required to drive for 12 months with a provisional P1 licence and then two more years with provisional P2 plates before being eligible for a full licence. For more information about licences, contact Roads and Maritime Services or check its website.

A learner who drives without being accompanied by a fully-licensed driver faces a heavy fine and an automatic three-month licence suspension. Learners and provisional licence holders who commit speeding and other traffic offences also face suspension due to loss of demerit points. Young people in this situation may be able to appeal the suspension and should seek legal advice. Driving while suspended is a serious offence and usually leads to at least 12 months of licence disqualification.

[7.950] Passports and travel
To obtain a passport, a person aged under 18 will need:

- the consent of all people with parental responsibility (in most cases this would mean both parents), or
- a court order, or
- special circumstances, such as an urgent need to travel internationally (Australian Passports Act 2005 (Cth), s 11).

In some cases a young person under 18 may be able to renew their existing passport without parental consent if they are living independently.

[7.960] Voting
Voting becomes compulsory at 18 for federal and state government elections (and for local government elections, for those who are enrolled to vote).

It is up to each person to apply to the Electoral Office to be listed on the electoral roll. A person can be fined for failing to do so. A person has 21 days from the time of becoming eligible to vote to have their name placed on the electoral roll (Electoral Act 1918 (Cth), s 101).

If a person is 17 years old and an Australian citizen, they may enrol but are not entitled to vote until they turn 18. If the young person will turn 18 years between the announcement of the election (date of the writ) and polling day and has not already applied for provisional enrolment, they have until close of rolls to apply for enrolment. If a person is homeless they may still enrol by using the “no fixed address” enrolment form.
To find out more information, contact the Australian Electoral Commission or visit its website (www.aec.gov.au).

[7.970] Income support
See Chapter 36, Social Security Entitlements, for information about Centrelink payments for young people.

[7.980] Employment
Children under 18
The Industrial Relations (Child Employment) Act 2006 (NSW) regulates the employment of people under 18.
Under the Act, employers must ensure certain minimum standards, determined by reference to conditions in a comparable state award. Where conditions differ from those in a comparable state award, the NSW Industrial Commission will determine whether there is a detriment to the child.
The unfair dismissal provisions of the Industrial Relations Act 1996 (NSW) also apply to children, subject to some modifications.

Children under 15
Role of the Children’s Guardian
The NSW Office of the Children’s Guardian regulates the employment of children under 15 (or under 16 in the case of modeling) in various branches of the entertainment industry and in door-to-door sales.
Under the Children and Young Persons (Care and Protection) Act and the Children and Young Persons (Care and Protection) (Child Employment) Regulation 2015, employers in the prescribed industries must:
• apply for an authority to employ children
• submit pre-employment information at least seven days before employing a child
• comply with a code of practice.
The Children’s Guardian:
• assesses employer applications
• monitors employer compliance with the legislation
• consults with employers about identified safety and welfare issues
• investigates complaints and alleged breaches of the statutory provisions.
The Children’s Guardian also has an educational role, and generally promotes the welfare of children employed in the relevant areas.
Offences
It is an offence for a person to employ a child under 15, or consent to a child under 15 in their care being employed, for the purpose of participating in entertainment, exhibition or offering anything for sale, unless the employer is exempt or is authorised by the Children’s Guardian (Children and Young Persons (Care and Protection) Act, ss 223, 224).
It is an offence to cause or allow a child under 15 to take part in employment that puts the child’s physical or emotional well-being at risk (s 222).

For further information on the regulation of child employment, contact the Office of the Children’s Guardian or visit its website (www.kidsguardian.nsw.gov.au).

Sexual relationships

[7.990] The age of consent
Sexual intercourse is defined very widely under s 61H of the Crimes Act 1900 (see Chapter 35, Sexual Offences).
A person can legally consent to have sexual intercourse at 16. A person who has sexual intercourse with someone under 16 is guilty of an offence (ss 66A–66D). Consent is no defence (s 77).
The provisions are mainly aimed at preventing the sexual exploitation of children by older people, but sometimes operate to criminalise young people for what is age-appropriate and consensual sexual activity.
If both partners are under the age of consent, both may be guilty of an offence. In most cases, however, neither will be charged
Medical treatment

[7.1010] Consent
A young person is legally capable of giving consent for medical or dental treatment, without parental consent, if he or she is mature enough to understand the nature and implications of the treatment. This is sometimes referred to as “Gillick competence” (see box below).

Medical or dental treatment provided without proper consent may be an assault. Under the Minors (Property and Contracts) Act 1970 (NSW), s 49, medical practitioners and dentists have a defence to assault if they obtain consent for treatment from:

• the child, if he or she is aged 14 or over, or

• a parent, if the child is aged under 16.

For this reason, most medical practitioners and health workers will accept consent from children aged 14 and over. Because the Minors (Property and Contracts) Act does not afford protection to medical practitioners who treat children under 14 without parental consent, there may be some reluctance to accept the consent of a child under 14.

However, it is important to note that young people under 14 may be capable of giving informed consent. The health worker must consider the nature of the treatment and the ability of the young person to understand the treatment.

Conversely, a child over 14 may lack capacity to consent.

Dwindling parental authority
An English decision gives some protection to children’s own wishes in the area of medical treatment. In the Gillick case (Gillick v West Norfolk and Wisbech Area Health Authority [1985] 3 All ER 402), the House of Lords dismissed a parent’s claim that it was necessarily wrong for a medical practitioner to give contraceptive advice or treatment to children under 18 without parental knowledge or consent.

The court decided that children with the maturity to give informed consent should be legally able to consent to treatment on their own behalf. The decision was based partly on the idea that parental powers over children “dwindle” as children grow up and their autonomy increases.

These principles have been adopted by the Australian courts (Secretary, Department of Health and Community Services v JW8 and SMB (1992) 175 CLR 218 (Marion’s case)).

Contraception
A doctor can prescribe contraception subject to the “Gillick competence” test, discussed in the previous section.

There is no age limit for buying contraceptives like condoms and spermicides from a chemist.

Abortion
The Crimes Act 1900 forbids unlawful termination of pregnancies. Abortion is unlawful unless a doctor honestly and reasonably believes that continuing with the pregnancy will result in serious damage to the mother’s physical and/or mental health, taking into account the economic, social and medical aspects of her condition.

As with most types of medical procedure, a girl who is mature enough to give informed consent does not need parental consent to have an abortion.

Below the age of 14, most doctors would request parental consent for an abortion. If the girl’s parents do not consent, she could go to another doctor or could seek a court or tribunal order.

[7.1000] Marriage
The marriageable age for both women and men is 18 (Marriage Act 1961 (Cth), s 11).

Young people between 16 and 18 wishing to get married may apply to a court for authorisation, which will only be granted in “exceptional and unusual” circumstances (s 12). Parental consent is also required, unless dispensed with by a court (ss 13, 14).
In an emergency
In a genuine emergency, medical treatment may be carried out without the consent of either the patient or a parent or guardian.

When court or tribunal orders may be required
If a child is over 16 but still lacks the capacity to consent (because of an intellectual disability, for example), an order may need to be obtained from the Guardianship Division of NCAT or from a court (see Chapter 16, Disability).

Where the medical treatment is a “special treatment” defined by regulation (such as treatment likely to render the child permanently infertile), such treatment of a child under 16 can only be carried out with the consent of the Guardianship Division of the NSW Civil and Administrative Tribunal (Children and Young Persons (Care and Protection) Act, s 175).

Some kinds of medical treatment may not be performed on children under 18 (even with the child’s or parents’ consent) without a court or tribunal order. These procedures include sterilisation and certain psychiatric treatments.

[7.1020] Tattoos and piercing

Tattooing
A person under the age of 18 must have parental consent to get a tattoo or any permanent marking on the skin.

A person performing tattooing or similar procedures without parental consent is committing a criminal offence under the Children and Young Persons (Care and Protection) Act, s 230.

Piercing
A child under 16 may not lawfully have their genitalia or nipples pierced. A person performing such a piercing on a child under 16 (even with parental consent) will be committing an offence under the Children and Young Persons (Care and Protection) Act, s 230A.

A child under 16 may have piercing to another part of the body with parental consent. A person performing piercing on a child under 16 years of age without parental consent will be committing an offence under the Children and Young Persons (Care and Protection) Act 1998, s 230A.

Children aged 16 and over may have piercing done without parental consent.

Alcohol and tobacco

[7.1030] Alcohol

At home
Generally it is not an offence for a person under 18 to drink alcohol at home or in a private place.

However, children may not lawfully purchase alcohol and it is an offence to supply alcohol to (or buy alcohol on behalf of) a person under 18. The only exception is if the alcohol is supplied by a parent, or a person authorised by a parent, and is consistent with responsible supervision of a minor (Liquor Act 2007 (NSW), s 117).

In public places
It is an offence for a person under 18 to possess or consume alcohol in a public place, unless they have a reasonable excuse or are with a responsible adult. Police can take the alcohol and impose a $20 fine (Summary Offences Act 1988, s 11).

Licensed premises
It is an offence for a person under 18 to be on licensed premises in a restricted area. The Liquor Act allows licensed premises to be authorised for use by people under 18 only if they are in the company of a responsible adult (s 124).

If a person under 18 drinks or is given liquor on licensed premises, the young person, the licensee and anyone else who supplied the liquor are guilty of an offence (ss 117, 118).

Licensees must ask for proof of age if there is the slightest suspicion that a person
is under 18. Proof of age cards are available for 18 to 25-year-olds from Roads and Maritime Services. A person who uses false documentary evidence (that is, fake ID) to enter or obtain liquor from licensed premises is guilty of an offence (s 129).

[7.1040] Cigarettes
It is not against the law for children to possess or smoke cigarettes. However, the police may seize cigarettes or “non-tobacco smoking products” from persons under 18 (Public Health (Tobacco) Act 2008 (NSW), s 26). It is illegal to supply such products to people under 18 (Public Health (Tobacco) Act, s 22).

Court proceedings

[7.1050] Civil proceedings in court
The need for a tutor
Civil proceedings, as distinct from criminal proceedings, typically involve private disputes between individuals or organisations. Examples of civil actions include suing someone for compensation for a personal injury, or taking legal action to recover a debt.

In most situations a person under 18 cannot commence or conduct civil proceedings without a tutor; that is, an adult whose name appears on the court documents and who has guaranteed to pay costs if they are ordered against the young person. The tutor must be legally represented unless the court orders otherwise (Uniform Civil Procedure Rules 2005 (NSW), r 7.14).

Limitation periods
Until a few years ago, limitation periods for children (restrictions on the time within which they must commence a civil action) did not start to run until the child turned 18.

The law now states that, if the child has a competent parent or guardian, in most cases the limitation period will start to run immediately.

However, if a child does not have a capable parent or guardian, he or she is considered to be under a “disability” and then the limitation period does not start to run (Limitation Act 1969 (NSW), ss 50F, 52).

Reaching settlement
If a person under 18 is suing and wants to settle out of court, the court must approve the settlement in order for it to be binding (Civil Procedure Act 2005 (NSW), ss 75, 76).

For example, a 16-year-old injured in a car accident may sue to recover damages for their injuries. In almost all such cases, negotiations take place before the case actually goes to court and an agreement may be reached on the amount to be paid (see also Chapter 3, Accidents and Compensation.)

Damages for people under 18
If a person under 18 recovers damages (also referred to as compensation), the money is paid as directed by the court. A court will commonly direct that the money be paid to the NSW Trustee and Guardian and held in trust for the child (Civil Procedure Act, s 77).

Legal advice should be sought about any legal proceedings either contemplated by or commenced against the child.

[7.1060] Giving evidence in court
Competence to give evidence
In all courts, a child may give sworn evidence if they can understand the nature and consequences of taking an oath or affirmation.
Under the *Evidence Act* (NSW), a person (including a child) is presumed to be competent to give evidence unless the court decides they are incapable of understanding that they are under an obligation to tell the truth (ss 12, 13).

Someone who is not competent to give evidence on oath may give unsworn evidence if:

- the court is satisfied that they know the difference between the truth and a lie
- the court tells them it is important to tell the truth
- the person indicates, by responding appropriately when asked, that they will not tell any lies during the proceeding.

**Warnings about reliability of children’s evidence**

In a proceeding before a jury, a judge should not give a warning or suggest to the jury that children are a class of unreliable witness, but a judge may warn a jury about a particular child with specific reasons as to why that child is unreliable. A judge may also give a caution as to the weight to be given to the evidence of a particular child (*Evidence Act*, s 165A).

**Alternative means of giving evidence in criminal proceedings**

A child under 16 does not necessarily have to appear in court to give evidence in criminal proceedings.

Part 6 of the *Criminal Procedure Act* provides a range of protections for vulnerable people, including children under 16, giving evidence in court. These apply mainly to cases involving offences against the person (for example assaults and sex offences).

In many cases, a child who is a victim or a prosecution witness will have participated in a recorded interview with the police (*Criminal Procedure Act*, s 76). This recording may be played in court instead of requiring the child to give evidence-in-chief from the witness box. However, the child must be available for cross-examination and re-examination (s 306U).

A child under 16, whether a victim, accused or other witness, may also be entitled to give evidence via closed-circuit television (ss 306ZB, 306ZC). A child under 16 also has the right to a support person when giving evidence (s 306ZK).

### Cyber-crime and cyber-safety

[7.1070] “Cyber-crime” and “cyber-safety” are increasingly important issues for children and young people.

Children can easily become victims of online offences such as fraud, identity theft, threats and harassment and grooming.

Children can (often unwittingly) find themselves charged with offences associated with:

- cyber-bullying – eg, using a carriage service to menace, harass or offend (*Commonwealth Criminal Code* (Cth), s 474.17)
- sexting – eg, producing, possessing or disseminating child abuse material (*Crimes Act*, s 91H)
- hacking – eg, unauthorised modification of data (*Crimes Act*, s 308D)
- copyright infringement (eg, *Copyright Act* 1968, s 132AC)
- recording private conversations without consent (*Surveillance Devices Act* 2007 (NSW), s 7)

For more information on the internet and other online issues see Chapter 30, Internet Law.
Contact points

[7.1080] If you have a hearing or speech impairment and/or you use a TTY, you can ring any number through the National Relay Service by phoning 133 677 (TTY users, chargeable calls) or 1800 555 677 (TTY users, to call an 1800 number) or 1300 555 727 (Speak and Listen, chargeable calls) or 1800 555 727 (Speak and Listen, to call an 1800 number). For more information, see www.relayservice.gov.au.

Non-English speakers can contact the Translating and Interpreting Service (TIS National) on 131 450 to use an interpreter over the telephone to ring any number. For more information or to book an interpreter online see www.tisnational.gov.au.

Advice, information and help

Association of Children’s Welfare Agencies (ACWA)
www.acwa.asn.au
ph: 9281 8822

Australian Children’s Contact Services Association (ACCSA)
www.accsa.org.au

Child Abuse Prevention Service (CAPS)
www.childabuseprevention.com.au
ph: 1800 688 009 or 9716 8000

Children’s Court Assistance Program (court support)
Central Coast Community Legal Centre (Woy Woy and Wyong Children’s Courts)
ph: 4353 0111

Illawarra Legal Centre (Port Kembla Children’s Court)
ph: 4276 1939

Macarthur Legal Centre (Campbelltown Children’s Court)
ph: 4628 2042

Macquarie Legal Centre (Bidura and Parramatta Children’s Courts)
ph: 8833 0920

CREATE Foundation
www.create.org.au
ph: 1800 655 105 or 9267 1999

Kids Helpline
www.kidshelpline.com.au
ph: 1800 55 1800

Keep them safe (guidelines for reporting young people at risk)
www.keepthemsafe.nsw.gov.au

Lifeline
www.lifeline.org.au
ph: 131 114

Link2home (for emergency accommodation)
ph: 1800 152 152

MyNite (NSW Police advice on safe parties)
www.mynite.com.au

Relationships Australia NSW
www.nsw.relationships.com.au
ph: 1300 364 277

Salvation Army
(24 hrs)
www.salvos.org.au

13 SALVOS (13 72 58)

Sexual Assault Services


Rape Crisis Centre
www.nswrapecrisis.com.au

1800 424 017 (24 hours) or 1800RESPECT (1800 737 732)

Victims Access Line (VAL)
ph: 1800 633 063 (24 hours) or 8688 5511

Y Foundations (formerly Youth Accommodation Association of NSW)
www.yfoundations.org.au
ph: 8306 7900

Youth Action
www.youthaction.org.au
ph: 8218 9800

Legal information, advice and representation

Aboriginal Legal Service
www.alnswact.org.au

Head office
ph: 8303 6600

Criminal matters
ph: 1800 765 767

Care matters
ph: 1800 733 233


Australasian Legal Information Institute (AustLII)
www.austlii.edu.au

Burn (film produced by Legal Aid relating to group offending)
www.burn-movie.com.au

Children’s Legal Service (Legal Aid NSW)

Legal Aid Youth Hotline
ph: 1800 101 810

Weekdays: 9am to midnight. Weekends and public holidays: 24 hours.

Sydney
ph: 9219 5120

Newcastle
ph: 4929 5482
Campbelltown
ph: 4628 2922
Parramatta
ph: 8688 3800
Sutherland
ph: 9521 3733
Fined Out (guide to fine enforcement process)
laceextra.legalaid.nsw.gov.au/
publicationsresourcesservice/
publishimationprints/files/109.pdf
Inner City Legal Centre
www.iclc.org.au
Free legal assistance to Sydney families with children who have
gender dysphoria.
Law Access
www.lawaccess.nsw.gov.au
Lawstuff (legal information site for young people)
www.lawstuff.org.au
Legal Information Access Centre
-see now
Macarthur Legal Centre
www.maclegal.net.au
ph: 4628 2042
Marrickville Legal Centre
www.mlcltd.com.au
ph: 9559 2899
National Children’s and Youth Law Centre
www.ncylc.org.au
ph: 9385 9588
National Welfare Rights Network
www.welfarerights.org.au
ph: 8384 0389
NSW Caselaw
www.caselaw.nsw.gov.au
The Shopfront Youth Legal Centre
www.theshopfront.org
ph: 9322 4808
Tenants NSW
www.tenants.org.au/publications

Cyber bullying information and advice
Office of the Children’s e-safety Commissioner
esafety.gov.au
Bullying. No Way!
bullyingnoway.gov.au
Stay Smart Online
www.staysmartonline.gov.au

Adoption
Adoption and Permanent Care Association of NSW
www.apansw.org.au
ph: 8091 5157
Adoption and Permanent Care Services
(Pre-adoption enquiries)
FACS
www.community.nsw.gov.au/adoption
ph: 9716 3000
Adoption Information Unit
(Post-adoption enquiries)
FACS
ph: 1300 799 023
Link-Up Aboriginal Corporation
www.linkupnsw.org.au
ph: 1800 624 332 or 9421 4700
Post Adoption Resource Centre
www.benevolent.org.au/connect/
post-adoption--support
ph: 9504 6788
Registry of Births, Deaths and Marriages
See under Government bodies below.
Salvation Army Special Search Service
ph: 9466 3478 or 1300 667 366

Government
Department of Family and Community Services
(FACS)
www.community.nsw.gov.au
ph: 9377 6000
Child Protection Helpline
ph: 132 111 (to report child abuse and neglect, 24 hrs)
FACS Domestic Violence Service
ph: 1800 656 463 (24 hrs)
See website for Community Service Centres.
Adoption and permanent care services
See Adoption above.
Family information service
See Adoption above.
Department of Justice
The online gateway to law and justice information in NSW.

Director of Public Prosecutions,
Office of
www.odpp.nsw.gov.au
ph: 9285 8606 or 1800 814 534
Witness Assistance Service
www.odpp.nsw.gov.au
ph: 1800 814 534 or 9285 2502

Juvenile Justice (Department of Justice)
www.juvenile.justice.nsw.gov.au
Head Office
ph: 8346 1333
See website for a list of Juvenile Justice Centres and services.
Office of the Children’s Guardian
www.kidsguardian.nsw.gov.au
ph: 8219 3600
Ombudsman, NSW
www.ombo.nsw.gov.au
ph: 8219 3600

NSW Bureau of Crime Statistics and Research (BOCSAR)
www.bocsr.nsw.gov.au
ph: 8346 1100
Registry of Births, Deaths and Marriages
www.bdm.nsw.gov.au
ph: 13 77 88 or 9354 1370
Roads and Maritime Services
www.rms.nsw.gov.au
ph: 13 22 13
State Debt Recovery
www.sdro.nsw.gov.au
ph: 1300 138 118
Children and Young People

Victims Services
www.victimsservices.justice.nsw.gov.au
ph: 8688 5511

Youth Justice Conferencing
www.youth.nsw.gov.au

Youth Strategy and Participation Unit, NSW Department of Family and Community Services
www.youth.nsw.gov.au
ph: 8753 8413

Courts and Tribunals

Children’s Courts
www.childrenscourt.justice.nsw.gov.au
Bidura
ph: 8667 2100
Broadmeadow
ph: 4915 5200
Campbelltown
ph: 4629 9777
Illawarra
ph: 4274 0735
Parramatta
ph: 8688 1888

Woy Woy
ph: 4344 0111
Wyong
ph: 4350 3010

Local Courts
The Children’s Court can also sit at non-specialist Local Courts with a specialist children’s magistrate. For a complete list of Local Courts go to www.localcourt.justice.nsw.gov.au.

NSW Civil and Administrative Tribunal (NCAT)
www.ncat.nsw.gov.au
ph: 1300 006 228 or 1300 00 NCAT