

# **The Law Handbook**

**YOUR PRACTICAL GUIDE TO THE LAW IN NEW SOUTH WALES**

**15th EDITION**



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# Children and Young People

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**[7.10]** 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.

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.

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### ***Who is a child?***

Legally, a child in NSW is a person under the age of 18. (In some cases, eg, in the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (the *Care Act*), 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***

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 the views of the child.

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

- Article 2: Children should be protected from all forms of discrimination.
- Article 3: The best interests of the child must be a primary consideration in all actions concerning children.
- 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 and to have those views taken into account when decisions are made about them.

- Articles 19, 34, 36 and 39: Governments have a responsibility to protect children from neglect, abuse and all forms of exploitation. Child victims of neglect, abuse and exploitation 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 benefit from social security.
  - 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, to have legal or other assistance, and to be dealt with without resort to judicial proceedings where appropriate.
-

# 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.

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

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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* (NSW), 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 [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 [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 abuse material (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 abuse material 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.

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For an explanation of police powers, and of many of the terms and procedures referred to in this section, see Chapter 14, Criminal Law.

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# Children and police

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**[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 (eg, 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 23). In this situation, police may search the person and their bag and may search the school locker of a student;
- 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 (s 31). Generally, a child being strip searched should have a support person present (s 33).

Under no circumstances may a child under 10 be strip-searched (s 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.

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 at [7.70]) (*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, for example, by giving or sending 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 99(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.

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### 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.

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### 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 [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 six hours even without an extension (s 117).

### Rights during detention

Everybody who is detained under Pt 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 (cl 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 (eg, by giving them the telephone number for the Legal Aid Youth Hotline) (cl 29).

For any Aboriginal or Torres Strait Islander person (including a child) the custody manager must notify the Aboriginal Legal Service via the Custody Notification Service (cl 37). The Custody Notification Service can provide legal advice.

**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 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 a 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 (eg, a person can be required to provide details about an accident, and/or details about a vehicle's driver or passengers). A person is still entitled to obtain legal advice before answering these questions.

**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 proper and sufficient 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**

The independent adult should:

- support the child to understand their rights
- support the child to exercise their rights, and
- ensure the child is treated fairly.

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.

## [7.100] Photographs and fingerprints

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

### 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 s 33(1)(a)(i) of the *Children (Criminal Proceedings) Act*;
- 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).

## Forensic procedures

[7.110] 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 – that is, a person who police suspect on reasonable grounds has committed an offence;
- a *convicted indictable 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 [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 (eg, a person who is not a suspect but wants to clear their 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 (eg, 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]). 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

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[7.130] The *Young Offenders Act* 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 10 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;
- most 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* (NSW) (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* (NSW) 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*.

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### *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 9 am to midnight Monday to Friday and for 24 hours on weekends and public holidays. The phone number is 1800 10 18 10.

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 have a say over who the adult should be, are similar to those set out in the *Children (Criminal Proceedings) Act*, s 13) (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 10 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). Nevertheless, the caution may be taken into account in any subsequent application for appointment or employment as a judge, magistrate, justice of the peace, police officer, prison officer, teacher or teachers aide, or appointment/employment in fire fighting/fire prevention (if the offence was arson or attempted arson). It may also be taken into account in a working with children check (s 68).

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

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#### *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).

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## [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. A conference is a meeting to discuss the offence. The victim is invited to attend.

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).

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### *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 court or the Director of Public Prosecutions can also refer a child to a conference (s 40).

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### Eligibility for a conference

A conference can be arranged only if the child:

- has admitted the offence in the presence of a responsible adult (ss 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 10 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 Youth 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 Youth 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). Nevertheless, the conference may be taken into account in any subsequent application for appointment or employment as a judge, magistrate, justice of the peace, police officer, prison officer, teacher or teachers aide, or appointment/employment in fire fighting/fire prevention (if the offence was arson or attempted arson). It may also be taken into account in a working with children check (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 caution or 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, the Hunter region, the Central Coast, Coffs Harbour and Grafton, 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 [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 10 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 (eg, 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 nine months for a motorcycle); or
- the traffic offence arose out of the same circumstances as another charge that involves 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).

#### Committal proceedings

The Children's Court can conduct committal proceedings in relation to *serious children's indictable offences* (and other indictable offences where the court or the child has chosen to have the matter dealt with in accordance with *Children's Criminal Procedure Act 1986*, Div 3A).

The Children's Court may also hear committal proceedings against an adult if the adult is jointly charged with a child. For these purposes, the Children's Court may exercise the jurisdiction of the Local Court as regards to the adult (s 29).

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### 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 proceedings in these cases (see Chapter 14, Criminal Law).

#### *Other indictable offences*

For other indictable offences, the Children's Court magistrate may 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), 31(5)).

In some cases, a child charged with an indictable offence may choose to be committed for trial before a jury in the District Court (s 31(2)).

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## [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 children:

- children's rights and freedoms before the law are equal to those of adults;
- children who commit offences are responsible for their actions but, because of their dependence and immaturity, need guidance 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 youth justice centre (ie a detention centre).

If the child is held overnight awaiting court after being refused bail by the police, the child is usually held in a detention centre run by Youth 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 [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 Youth Justice officer also attends to assist children in custody with accommodation and other matters relevant to bail. The officer gives the court 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 (eg, a person who was previously homeless has found accommodation); or
- there is new information presented to the court (eg, 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 Youth 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 (eg, 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 no means test applied to the child or the child’s parents. For appeals (see [7.340]), legal aid is subject to a merit 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 9 am 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 NSW solicitor, or by a private solicitor or barrister chosen from the Legal Aid NSW 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.

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### *Keeping in touch with the lawyer*

It is important that children who have pleaded not guilty know who their lawyer is and keep in touch with them. This is because the lawyer 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 lawyer to be able to act for them.

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### 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.

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### 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.

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## [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

Procedure in 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.

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### When will the case be heard?

Most cases are listed to start at 10 am, 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 (eg, 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.

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### 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 Youth 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 [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 [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 [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.

***Youth Justice officers***

For more serious or repeat offences, the court usually requests a background report from Youth Justice. Most of these are provided by youth justice officers. Youth 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.

Youth Justice officers are located in all regions, and their services are available at most Children's Courts. For a full list of Youth Justice offices, 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 (eg, the Youth Drug and Alcohol Court was discontinued in 2012, the Youth Conduct Order scheme no longer operates, and there are programs such as 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 Koori Court

The Youth Koori Court operates at Parramatta and Surry Hills Children's Courts. Its aims 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](http://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 1990* (NSW) provides a special procedure for a magistrate to deal with charges against a person with an a cognitive impairment, 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 behaviour 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 (ie, 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 Youth 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 Youth Justice officer.

If the child has turned 18 years old, 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 Youth 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), 33(1)(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 at [7.290].

## Unpaid fines

If a person fails to pay a fine, it is referred to Revenue NSW 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

Revenue NSW 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

Revenue NSW 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

Revenue NSW 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 Revenue NSW to make community service orders.

### Detention

Adult fine defaulters can only be imprisoned as a last resort if they have failed, without reasonable excuse, to comply with a community service order, and the Commissioner has revoked the order (*Fines Act*, ss 86 and 87). A person cannot be imprisoned because of fines incurred as a juvenile – unless they have defaulted on adult fines as well (s 92). In practice, Revenue NSW no longer uses community service orders and imprisonment as fine enforcement measures.

### 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, a serious addiction to drugs or alcohol, or acute 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 voluntary, 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 [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 Youth 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* (NSW).

### **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 Youth 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 Youth Justice officers.

## **Control orders**

A control order means that the child is sent to a detention centre run by Youth 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 Youth 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 [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* if the child has a mental illness or intellectual disability (see [7.270]; 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 Revenue NSW 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 2019, the levy is \$83 for matters dealt with in a Local or Children's Court, or \$184 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 Revenue NSW 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* (NSW), 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 3–5 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 (eg, 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 either by way of dismissal pursuant to s 10(1)(a) or Conditional Release Order without conviction in accordance with the *Crimes (Sentencing Procedure) Act 1999*).

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 overridden 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 16 or over 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 – eg, 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 Communities and Justice (Youth 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 (assessed using the criteria in s 28E); and

- the minister administering the *Crimes (Administration of Sentences) Act 1999* (NSW) (the Minister for Corrective Services) consents (s 28F); and

Under s 28 of the *Crimes (Administration of Sentences) Act 1999*, 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), 28(2B)).

A transfer under s 28 requires an order in writing from the Secretary of the Department of Communities and 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 Kariiong on the Central Coast. Kariiong is now used as an adult prison, and most high-security male detainees now go to Cobham Juvenile Justice Centre is now Cobham YOUTH 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 Communities and 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 Communities and 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 (eg, 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 Communities and Justice, their behaviour warrants the transfer (s 28).

Such a transfer requires an order in writing from the Secretary of the Department of Communities and 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 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 Communities and 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 Communities

and 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 Communities and 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 correctional centre 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), 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 (eg, 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 Department of Communities and 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 Communities and Justice a very broad power

to transfer detainees from detention centres to correctional centres.

In many situations (eg, 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 (ie, 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 (eg, 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.

## [7.360] Appeal to Court of Criminal Appeal

A child who is convicted or sentenced by the District or Supreme Courts may appeal to the

Court of Criminal Appeal. The child will need to show that the court's decision was based on an error of law.

# Convictions and criminal records

## [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 imposing a conviction.

## [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 (eg, 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 generally have their conviction spent after a 10-year crime-free period.

### Matters where no conviction was recorded

The *Criminal Records Act* governs what criminal records may be disclosed. In some cases, the *Criminal Records Act* deems a conviction to have been recorded even if the court has not recorded a conviction. Hence, even if no conviction was recorded by the court, it does not necessarily mean that the record will not be disclosed on a criminal record check for employment, visa or other purposes.

### 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, 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.

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### *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).

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### 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 Communities and Justice (the Department) protects children from abuse or neglect within the family. The Community Services Division of the Department (CS) 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 child care, to the action of removing children

from their families and recommending police action against the 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 CS to protect vulnerable children and young people from harm and abuse.

### Principles guiding decisions under the Act

The *Children and Young Persons (Care and Protection) Act 1998* sets out principles and objectives that are to guide decision making by CS 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 CS that will have a significant impact on their life. CS 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 (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 may be "in need of care and protection" by the state if some kind of intervention in their family is required due to an assessment by CS 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 not attended school or received necessary medical care due to the parents or caregivers not arranging or being unwilling to arrange this;
- they have been, or are at risk of being, physically or sexually abused or ill-treated;

- there have been incidents of domestic violence and, as a consequence, they are at risk of serious physical or psychological harm;
- they have suffered, or are at risk of suffering, serious psychological harm by their parents or caregivers;
- they were the subject of a prenatal report to CS and the mother did not engage with support services to eliminate or minimise the risks to them.

### Seeking help from CS

A child or young person may seek help from CS 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 CS may do after receiving a request for assistance**

If it is asked for help, CS 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, CS 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 CS 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 CS (s 24).

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### *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).

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### How to report or seek help

A phone call, which may be made anonymously to the CS helpline, is sufficient to make a report to CS 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 CS.

### Mandatory reporting

The Act provides that some people must make a report to CS 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 living away from home without parental permission***

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 CS (s 122).

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## **[7.440] What CS may do after receiving a report**

The Act provides flexibility in the options available to CS 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, CS must make whatever further investigation and assessments it considers necessary to determine whether a child or young person is at risk of significant harm.

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, known as the Joint Child Protection Response team.

If CS 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 CS;
  - 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 (s 34).
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### ***Action by police***

If the police are involved in the investigation through a joint child protection response team, or if CS 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.

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### **Requirement to consider alternative dispute resolution**

When responding to a report, CS 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, CS 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, CS 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

CS may make a temporary care arrangement for a child or young person who is 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 CS 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 CS 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 CS believes that the child or young person is still in need of care and protection, CS 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.

## [7.460] Agreed care plans

A care plan sets out the steps that will be taken by the family to resolve CS' 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).

### 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, the Children Court may make orders by consent to 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 CS 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 caregivers, 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, eg, courses relating to behavioural management and financial management) (s 38A(5)).

It may also include provisions regarding how and when CS 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 reallocation 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 CS filing a *contract breach notice* in the Children's Court. If the primary caregiver breaches a term of the contract may (not "must") file such a notice.

A contract breach notice is a care application. It must specify:

- the name of the party to the contract;
- how the primary caregiver is alleged to have breached the contract;
- the care orders sought in regard to the child or young person.

## **[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:

- The Secretary of CS 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 the Secretary of CS 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));

- the Secretary of CS may assume the care of a child or young person who is at risk of serious harm (rather than physically remove them), if it is not in their best interests to be removed from their location (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 (s 48).

### **From involvement in prostitution or pornography**

If the Secretary CS 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 CS 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**

CS officers or 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 not under the supervision or control of a responsible adult; and
- is living in or habitually frequenting a public place (s 43(2)).

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### **Effect of removal**

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

The Children's Court may by order, vest the care responsibility in a designated agency.

A child or young person removed by a police officer must not be held in police cells while awaiting

placement with CS. A child or young person who is in the care responsibility of CS after a removal (or under the parental responsibility of the Minister on the making of an interim order) cannot be accommodated or held in police cells or detention centres.

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## Reasons for removal to be given to certain persons

A person who removes a child or young person from any premises under this Act advise the child (if over 10) 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).

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### Care responsibility

Care responsibility 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 (s 157).

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## Information to be given following removal

If a child or young person is in the care responsibility of the Secretary or a warrant is issued under s 233, the Secretary must as soon as practicable give notice that the child is in the care responsibility of the Secretary to a child who is the age of 10 or over and to a young person, to a person nominated by a young person and to each of the child or young person's parents who can be reasonably located (s 51).

In the case of a child, CS must also advise the parents of the child's whereabouts. If CS believes that full disclosure would be prejudicial to the safety, welfare or wellbeing of the child, it may

disclose only information that is not *high level identification information*.

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### "High level identification information"

High level identification information about a child or young person in the care responsibility of a foster carer may only be disclosed to a parent with the foster carers consent in writing.

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.

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## Following removal

Community Service 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 CS 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.

Community Service 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 by agreement and registered with the Children's Court.

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

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### 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 CS 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 the Legal Aid NSW Early Intervention Unit on 1800 551 589, at one of the 23 Legal Aid NSW offices across NSW, the Aboriginal Legal Service and at Community Legal Centres.

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.

Legal Aid NSW provides free advice and representation for parents at all specialised Children's Courts in NSW and at all regional Children's Court Circuits by way of a duty service.

## 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 CS (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.

CS 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.

#### 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 CS 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.

#### Application for a care order

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 (other than guardianship orders), or one or more aspects of parental responsibility, to:
  - the Minister for Families, Communities and Disability; or
  - one parent rather than the other; or
  - one or both parents jointly with the Minister for Families, Communities and Disability; or
  - any other suitable persons.

## [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 CS, 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* (NSW), r 22).

If the application is for final care orders, CS 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

Community Service 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

Care proceedings should be conducted with as little formality and legal technicality as possible (s 93). The Children's Court is not bound by the rules of evidence unless it decides to apply them in a given case.

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?

In proceedings that relate to a child or young person, the following have a right to appear or be legally represented before the court:

- the child or young person;
- each person with parental responsibility;
- the Secretary of the Department of CS;
- the Minister for Families, Communities and Disability.

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 and making submissions only on 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 at [7.510]). 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.

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 (eg, the person may be a parent or other adult who is a party to the proceedings) (s 104A).

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### **Evidence from children and young people**

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

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## **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 who acts as either an *independent legal representative* or a *direct legal representative* depending on the child or young person's age and capacity to provide proper instructions.

### **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.

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### **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.

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## 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 all care applications other than s 90 applications to vary or rescind a final order subject to a means test only;
- parents in applications for s 90 applications and all applications which are not care applications such as an application for joinder (s 98), subject to both a means and a merits test;
- other adults who have been made party to the proceedings, 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.

## [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 a order brought by CS 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 the CS 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

Other interim care orders the court may make for the safety, welfare and wellbeing of the child or young person (s 70), include:

- 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 with an 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 such as eg, a relative. (s 79).

## [7.530] Determining need of care and protection

Before making a final care 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 at [7.530]) has been proved (s 72), and that the child or young person is therefore "in need of care and protection".

The determination of need for care and protection is often called the *establishment phase* or "*a finding.*"

## Proof of need of care and protection

Community Service, 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 CS 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 (s 106A).

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.

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### ***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
  - CS consents in writing (s 69ZK FLA).
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### **Consent to a finding of need for 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 in s 71 without admitting or denying that any of the evidence provided by CS in support of its application is true.

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### ***The preliminary conference***

After the Court has determined the finding 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 Dispute Resolution Conference ("DRC") 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 DRC (s 65(3)).

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### ***Grounds for 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 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.

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## [7.540] Care orders

### Principles and considerations

When deciding whether a care order 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)).

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### *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, there are other permanency planning issues and timeframes that it must take into account.

In preparing a permanency plan, the Secretary must consider whether adoption is the preferred option for a child or young person for whom there is no realistic possibility of restoration to his or her parents.

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### Care 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 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 Apprehended Violence Order-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 CS 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 CS, to provide support services if they do not consent to do so.

### *Order for supervision (s 76)*

This order places the child or young person under the supervision of CS. 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 (other than by guardianship order) (ss 79)**

The court can make an order allocating parental responsibility, or aspects of parental responsibility:

- between the parents;
- to a parent or both parents jointly with Minister or another suitable person;
- solely to the Minister;
- 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 and dental treatment.

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 may 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). A guardian means a person or persons who have been allocated all aspects of parental responsibility for a child or young person until they reach 18 years of age. The Court cannot make a guardianship order unless it is satisfied there is no realistic possibility of restoration of the child or young person and that the guardian can provide a safe, nurturing, stable and secure environment (s 79A).

The court may make such an order by consent, without the need for finding that there is no realistic possibility of the child or young person being restored to his or her parents

### **Contact orders between a child or young person and a parent, relative or other person of significance (s 86)**

The court may 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 by CS or delegate, 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 (see s 86(6) and (7)).

### **Evidence required for an order reallocating parental responsibility**

#### **Care plans**

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

#### **Permanency plan**

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 CS 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 CS 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 CS considers must be achieved before it would be safe for the child or young person to return to their parents;
- details of the services CS 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**

The Children's Court must decide whether to accept the Secretary's assessment of whether there is a realistic possibility of restoration and is required to make the decision within a specific timeframe of having made the interim order reallocating parental responsibility:

- 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)).

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 and prior to approving a permanency plan involving restoration that there is indeed a realistic possibility of restoration within a reasonable timeframe 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)).

**[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;
- the child or young person;
- CS;;

- 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 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.

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 t CS, 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

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 are:

**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.

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### The Children's Guardian

The role of the Children's Guardian was established by the Act (s 178). Generally, the oversight functions of the Office of the Children's Guardian are to:

- accredit and monitors agencies that arrange out-of-home care in NSW;
  - maintains the NSW Carers Register, a centralised database of people who are authorised, to provide out-of-home care;
  - administers the Working With Children Check and encourages organisations to be safe for children.
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## [7.570] Reviews and investigation by the Office of the Children's Guardian

The Office of the Children's Guardian has the authority to:

- review agency investigations into reportable conduct by employees providing out-of-home care services to a child or young person in care;
- monitor and review how community services are delivered relating to accommodation provided to children in care

The Ombudsman cannot make a substitute decision, only a recommendation.

### Services for children in care

The Ombudsman has a *youth liaison officer* to help make it more accessible to children. It can also help to resolve complaints about services provided by CS.

- resolve complaints;
  - refer serious issues to the Ombudsman for action.
- 

### Children and young people leaving care

The Act also gives the 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.

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# ADOPTION

[7.580] Adoptions in NSW are regulated 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 abiological 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 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*.

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### Why adopt?

It is through adoption that the law recognises the adoptive 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.

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### [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 a registered 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 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 or 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 (*Act*, s 136).

Foster care must be arranged or authorised by the Community Service (CS) division of the Department of Communities and Justice or a designated agency accredited 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)).

#### Mandatory written information

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

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.

## The adoption process

### [7.630] Who can arrange an adoption?

Under the *Adoption Act*, adoption arrangements can only be made by CS 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 CS, 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 relative;
- *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 CS 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), 60F(4)).

## Adopting a child through a NSW adoption service

### **Local adoptions**

In this case, the adoption process begins with an expression of interest to CS 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 CS 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.

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Full details of NSW and intercountry adoption programs can be located at CS website ([www.dcj.nsw.gov.au](http://www.dcj.nsw.gov.au)). For information on Australia's intercountry adoption scheme see: [www.intercountryadoption.gov.au](http://www.intercountryadoption.gov.au).

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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 of 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 child or young person under 18 years on the date on which the application was made; 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:

- a married or de facto couple, (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;
- fit and proper persons to fulfil the responsibilities of a parent (s 27, 28).

## 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) and both are domiciled or resident in NSW for at least 3 months before the application for adoption is filed (s.23).

### *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 a 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 child 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 CS, the consent of both the Minister for CS and the Minister for Aboriginal Affairs is also required (*Act*, s 78A(4)).

## Applicants seeking to adopt

Applicants who seek to adopt a child are assessed against eligibility criteria (see the *Adoption Regulation 2015* (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 who are not approved by one agency (including CS) 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 with the consent the Secretary; or
- by the or principal officer of an accredited adoption agency.

Applications can be made directly to the Supreme Court without the consent of the Secretary of CS 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).

## [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 [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 years old.

In all other cases, consents are required from:

- each person who is a parent the child;
- any person who has parental responsibility for the child; and

## 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.

## Notification requirements

Where the Secretary of CS 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. A separate form must be signed by each person whose consent is required.

## General consent

Parents consenting to the adoption of their child by any person use a form called a *general consent*. 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, 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 CS 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 by them until at least seven days after the written information about Aboriginal culture and customs was given to them (s 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).

## [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 and at least 14 days after the person giving the consent is given a copy of the instrument of consent (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 by notice

in writing 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 post or personally deliver 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 which is usually provided to a person with their consent documents, 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

At least fourteen days' notice of an application to dispense with consent must be given to a person whose consent is sought to be dispensed with.

### 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 foster carer and the adoption of the child by the foster carer would promote the child's interests and welfare, and in the case of an Aboriginal child, alternatives to placement for adoption have been considered in accordance with s 36 of the Act (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 condition as not to be capable of properly 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

Any one 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 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).

Registering an adoption plan, 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 to an adoption plan can apply to the court to review the plan 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 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, the adoption proceedings; or
- the Family Court after the adoption order is made.

## [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 (ie, 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.

## *Open access to adoption information*

Since 2010, there has been a move towards greater access to adoption information, to better reflect the principle of openness in adoption. Open access to adoption 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 CS *Contact Veto Register* to ensure that their wishes are recorded before an Adoption Information Certificate or any identifying information, such as 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 CS office, taking suitable identification (eg, a photo driver's 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 an Adoption Information Certificate or any identifying information, such as the birth certificate will only be allowed if the person seeking it signs an undertaking not to 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 Secretary CS, 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 message with CS 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**

CS 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 subject to the contact veto.

### **Notification to the person who lodged the contact veto**

CS is required to notify a person who has lodged a contact veto of any application for the supply of adoption information. CS may, approach the person who lodged the contact veto and ask if they wish to confirm, cancel or vary the veto. 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 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, or with the consent of CS if there are no surviving adoptive parents or birth parents, or if they cannot be found or CS is of the view that there is any other sufficient reason to dispense with their consent.

### 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 birth parents may receive the amended birth certificate, and any other identifying information relating to the adopted person on the adopted person turning 18 years of age (s 136).

For adopted children less than 18 years, the birth parents may receive, non-identifying information about the adoptive parents and the health and welfare of the child after placement for adoption, if the Secretary of CS is satisfied 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 identifying adoption information, must first apply to CS 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, CS checks the registers mentioned below and takes any necessary action.

Once an Adoption Information Certificate is obtained, and provided there are no restrictions on the supply of information to them, a person 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 paren, and provided there are no restrictions on the supply of information to

them, a person can then apply to the Registryts 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*. If a request for adoption information is received, they are notified, and the supply of personal information can be delayed for up to three months, or longer in special cases with the approval of the Secretary of CS.

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### *What information is available?*

It is possible to obtain certain "social and medical" information from adoption files held by CS and other agencies. The *Adoption Regulation* specifies the type of additional information a person is entitled to receive, or may be supplied with, from CS, 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.

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## [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 Secretary of CS 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 person (s 133D).

## Birth parents

A birth parent will be entitled to receive adoption information about their child unless the Secretary of CS 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, a CS may refuse to supply the information if they are of the opinion that the release of the information would pose a risk to the safety, welfare or wellbeing of the adopted child or adoptive parents (s 133G).

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### *If one of the parties to the adoption dies*

If the adopted person or the birth parent dies, certain relative or significant other persons can apply to CS for the release of identifying information by CS 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*.

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an adoption, extended family members 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, reunion is arranged by adoption workers in consultation with the parties (s 166). People may apply to enter their name on the Register by contacting completing the "Application to obtain adoption information" form and sending it to CS.

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### *If you want to make contact*

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

The CS website ([www.facs.nsw.gov.au/families/adoption](http://www.facs.nsw.gov.au/families/adoption)) contains useful information to assist people wishing to gain information relating to an adoption.

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, including information about accessing records and family tracing, and intermediary services.

Find and Connect – Family Tracing Service may be able assist with additional searches when a people connected to an adoption has gained all the adoption information they are entitled to, and have been unable to locate the person they are looking.

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 an adoption caseworker involved, but it can progress to direct contact between the parties if everyone agrees.

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## [7.840] The Reunion and Information Register

CS operates a *reunion information register* for people who wish to be contacted). Any party to

# 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 who has completed year 10 may engage in paid work or approved education or training (such as an apprenticeship) 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 or other approved education or training).

### 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 the Department of Communities and Justice 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 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). Principals have the delegated 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).

### 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: *Suspension and Expulsion of School Students – Procedures*

2011. Anyone faced with or enquiring about a suspension or expulsion from a government school 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.

## Suspension

There are two types of suspensions:

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

With the exception of serious cases warranting immediate suspension, outlined below, the school should implement alternative disciplinary, personalised learning and support measures to try and improve a student's behaviour before imposing a suspension. The school should also have a discussion with the student and their parents regarding the specific misbehaviour which the school considers unacceptable and which may lead to 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 (eg, knuckle-dusters, nunchakus) or knife without reasonable cause;
- uses, or is in possession of, a suspected illegal substance (not including alcohol or tobacco) or supplies a restricted substance (eg, a prescription drug); or
- engages in serious criminal behaviour related to the school.

The above types of conduct generally warrant a long suspension.

Some of these matters must also be reported to the police.

### **Who may be suspended**

A short suspension may be imposed on any student who:

- is persistently disobedient; or
- behaves in an aggressive manner.

A long suspension may be imposed on any student who:

- engages in the abovementioned behaviour that warrants an immediate suspension; or
- uses an implement as a weapon; or
- engages in persistent or serious misbehaviour.

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### **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.

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See ss 6.1.4, 6.3.4, 7 and Appendix 2 of *Suspension and Expulsion of School Students – Procedures*.

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### **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:

- serious circumstances 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 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 at [7.870]).

#### **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. Appeals are made to the Director or the Executive Director of Public Schools NSW, depending on the circumstances (see s 10 of *Suspension and Expulsion of School Students – Procedures*).

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

A complaint can also be made to the NSW Ombudsman.

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### **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.

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## **[7.875] Non-attendance directions**

In 2017, the *Education Act* was amended to enable the Minister for Education to direct a student not to attend school during a specified period if:

1. the Minister believes on reasonable grounds that:
  - (a) there is a significant risk that the student will engage in serious violent conduct; or
  - (b) the student supports terrorism or violent extremism; and
2. the Minister believes on reasonable grounds that issuing the non-attendance direction is necessary to protect the health or safety of the students or staff of any school.

However at the time of writing, these amendments had not commenced.

## **[7.880] Discipline**

### **Discipline policy**

Each government school is required to develop a school discipline policy. The school discipline policy must be developed in consultation with school community members, and must be consistent with legislation and reflect government and departmental policy. The school discipline policy must contain four components:

- the discipline code or school rules;
- strategies and practices to promote positive student behaviour;
- strategies and practices to recognize and reinforce student achievement;
- strategies and practices to manage inappropriate student behaviour.

All schools must also develop and implement an Anti-Bullying Plan. There are also departmental policies on a range of other issues, including Anti-Racism, Drugs in School, and School Uniforms (see <https://education.nsw.gov.au/policy-library>).

### Corporal punishment

Corporal (physical) punishment is not allowed in any NSW school, state or private (*Education Act*, ss 35(2A), 47(1)(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 NSW Department of Education has an Excursions Policy (<https://education.nsw.gov.au/policy-library/policies/excursions-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. It states that signed consent forms granting permission for students to participate in excursions and a medical information form are to be obtained from parents or caregivers. When it is inappropriate to obtain parental or caregiver consent because of the age or living circumstances of the student, consent can be sought from any other person considered appropriate by the principal. If no other person is available, written agreement to participate in the excursion must be obtained from the student.

## Leaving home and other legal transitions

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### [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 [7.400]).

Young people living away from home are legally entitled to sign a residential tenancy agreement for private rental accommodation (see [7.920]).

### [7.915] Education

A young person who is living independently may make decisions about their schooling without the involvement of parents. This includes enrolment decisions where students and parents/carers disagree. The NSW Department of Education has a Legal Issues Bulletin on students under 18 years making their own decisions when they are living independently from their parents or carers, see <https://education.nsw.gov.au/about-us/rights-and-accountability/legal-issues-bulletins/bulletin-53-students-under-18-living-independently>.

### [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* (NSW), ss 17, 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 (*Minors (Property and Contracts) Act*, s 47).



It is against the law for a landlord to require a guarantor in a residential tenancy agreement (lease) (*Residential Tenancies Act 2010* (NSW), 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 (or the consent of one parent if they are the sole parent named in the registration of the child's birth or there is no other surviving parent of the child). In some circumstances, a court may dispense with the consent of one parent if satisfied that the change is in the child's best interests. 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* (NSW), 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 (*Road Transport (Driver Licensing) Regulation 2017* (NSW), cl 12).

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 generally need:

- the consent of all people with parental responsibility (in most cases this would mean both parents); or
- a court order.

However, there is provision for the Minister to issue a passport without the consent of both parents or a court order in "special circumstances". Special circumstances include, but are not limited to:

- the child urgently needs to travel internationally because of a family crisis and it is not possible to contact the non-consenting parent within a reasonable period;
- the existence of a family violence order against the non-consenting parent;
- the child's physical or psychological welfare would be adversely affected if the child were not able to travel internationally (*Australian Passports Act 2005* (Cth), s 11, see also Australian Passport Office website <https://www.passports.gov.au/passports-explained/childrens-passports/special-circumstances>).

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 (*Commonwealth Electoral Act 1918* (Cth), s 101; *Electoral Act 2017* (NSW), s 32).

If a person is 16 or 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](http://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

There is no minimum legal age limit for starting work in NSW but there are restrictions that apply around leaving school (see [7.915]).

The *Industrial Relations (Child Employment) Act 2006* (NSW) regulates the employment of people under 18 by certain employers. 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, an industrial court will determine whether there is a detriment to the child.

Protections against unfair dismissal under Federal laws also apply to children (see Chapter 22, Employment).

### 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 modelling) in various branches of the entertainment industry and in door-to-door sales.

Under the *Care Act* and the *Children and Young Persons (Care and Protection) (Child Employment) Regulation 2015* (NSW), employers in the prescribed industries must:

- apply for an *authority to employ children* (there are some exemptions);

- 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 under 16 in the case of modelling), or consent to a child under 15 (or under 16 in the case of modelling) 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 (*Care 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 wellbeing at risk (*Care Act*, s 222).

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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](http://www.kidsguardian.nsw.gov.au)).

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## Sexual relationships

### [7.990] The age of consent

Sexual intercourse, sexual touching and sexual acts are defined under ss 61HA–61HC of the *Crimes Act 1900* (see Chapter 35, Sexual Offences).

A person can legally consent to sexual activity at 16. A person who has sexual activity with someone under 16 may be guilty of an offence (*Crimes Act*, ss 66A–66D). Consent is no defence to most sexual offences against children under 16 (*Crimes Act*, s 80AE).

These 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.

There is a legal defence of being a similar age if both partners are at least 14 years old and no more than two years apart in age (*Crimes Act*, s 80AG). For example, a 16-year-old that has consensual sex with a 15-year-old has a legal defence of being a similar age. In any criminal proceedings, the onus is on the prosecution to prove beyond a reasonable doubt that the victim was under 14 years old or that the age difference was more than two years.

## [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).

# Medical treatment

## [7.1010] Consent

A young person is legally capable of giving consent for medical or dental treatment (including abortion and contraception), 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 s 49 of the *Minors (Property and Contracts) Act*, 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 will accept consent from children aged 14 and over. However, medical practitioners must make a case-by-case assessment depending on the individual child and the nature of the treatment proposed.

The *Minors (Property and Contracts) Act* does not afford protection to medical practitioners who treat children under 14 without parental consent. Therefore some medical practitioners may be reluctant to accept the consent of a child under 14.

It is important to note that young people under 14 may be capable of giving informed consent. The medical practitioner 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.

Non-medical health services such as counselling and information can be provided to young people who are mature enough to give informed consent. Health education can be provided to children of any age.

### *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 JWB 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. Nor is there any age restriction on the distribution of items such as condoms, lube and safe injection equipment.

## Abortion

Terminating a pregnancy is no longer a criminal offence in NSW. Under the *Abortion Law Reform Act 2019* (NSW), a medical practitioner may undertake a termination on a person who is not more than 22 weeks pregnant. A termination of pregnancy on a person who is more than 22 weeks pregnant may be performed by a specialist medical practitioner provided that the medical practitioner:

- considers that, in all the circumstances, there are sufficient grounds for the termination to be performed, and
- has consulted with another specialist medical practitioner who also considers that, in all the circumstances, there are sufficient grounds for the termination to be performed.

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.

### 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 "special medical treatment" (such as treatment likely to render the child permanently infertile), there are additional restrictions. Generally, "special medical treatment" can only be carried out on a child under 16 with the consent of the Guardianship Division of NCAT, or if a medical practitioner is of the opinion it is urgently necessary to save the child's life or prevent serious damage to the child's health (*Care Act*, s 175). NCAT can only give consent to special treatment of a child if it is satisfied that it is necessary in order to save the child's life or to prevent serious damage to the child's psychological or physical health.

## [7.1015] Confidentiality

Young people have a right to confidentiality with respect to their medical records. Where a young person has given consent to treatment, the young person's parents must not be informed without the young person's consent.

Where a parent has consented to treatment on behalf of the young person, the confidentiality obligation is owed to the parent and the young person has no independent right to confidentiality.

### Exceptions to confidentiality

A child's right to confidentiality is subject to the reporting procedures in the *Care Act*. Anyone who has reasonable grounds to suspect that a child or young person under 18 is at risk of significant harm may make a voluntary report to CS (*Care Act*, s 24).

Chapter 16A of the *Care Act* provides for "prescribed bodies" to exchange information relating to the safety, welfare and well-being of

children aged under 16 or young people aged under 18. This information may be provided even though the prescribed body would normally owe the client a duty of confidentiality. A prescribed body may refuse to provide information in certain circumstances (eg, where it would: endanger a person's life or physical safety; prejudice the conduct of an investigation; contravene any legal professional or client legal privilege; or not be in the public interest).

A prescribed body cannot refuse to provide information about the safety, welfare, and well-being of a particular child or young person, where directed by CS to do so, under s 248 of the *Care Act*.

A subpoena or court order may require a health service provider to disclose information to a court.

### Privacy and access to health records

The *Health Records and Information Privacy Act 2002* (NSW) applies to all persons, regardless of age. Anyone, including a child, has a right to access their health records, a right to request that the records be corrected if inaccurate, and a right to ask for their health information not to be shared with other health providers or third parties.

*My Health Record* is an online summary of a person's key health information managed by the Commonwealth Government, and includes details of the person's medical conditions and treatments, medicine details, allergies, and test or scan results. Recent changes to *My Health Record* law mean that for young people 14 and older, parents will no longer have access to their *My Health Record* unless the young person invites them to be a nominated representative (*My Health Records Act 2012* (Cth), s 3(3)). Up to the age of 14, parents or guardians manage their child's health record.

Young people over 14 can remove medical documents at any time, or set privacy controls to restrict who can see them.

In a medical emergency, doctors can access important health information when time is critical, such as allergies, medicines and immunisations, to assist in determining treatment and care.

### Medicare card

Young people aged 15 or older can have their own Medicare card, without parental consent. Those under 15 can apply with parental consent.

Young people do not need their own Medicare card to access a health service. Where the young

person is still on the family Medicare card, the health professional may accept the Medicare number without physically seeing the card.

Where a young person has their own Medicare card, parents and guardians cannot access Medicare record information without the consent of the young person. If the young person is still on the family Medicare card and aged 14 or 15, generally their consent must be obtained before information about Medicare records is released to parents or guardians.

Once a child is 16, Medicare can only give information to parents or guardians with the young person's consent.

## [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, including scarification and branding.

A person performing tattooing or similar procedures without parental consent is committing a criminal offence under s 230 of the *Care Act*.

### Piercing

A child under 16 may not lawfully have their genitalia or nipples pierced, even with parental consent. A person performing such a piercing on a child under 16 will be committing an offence under s 230A of the *Care Act*.

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 s 230A of the *Care Act*.

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 confiscate 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 (ie, 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 tobacco products, e-cigarettes or "non-tobacco smoking products" (eg, herbal cigarettes) 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).

It is an offence to smoke tobacco or an e-cigarette in a motor vehicle if a person under the age of 16 years is in the vehicle (*Public Health (Tobacco) Act*, s 30).

# 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*. A tutor is a person appointed to make decisions on behalf of a young person in legal proceedings. The tutor must be legally represented unless otherwise ordered by the court (*Uniform Civil Procedure Rules 2005* (NSW), r 7.14 (UCPR)). The tutor makes decisions in accordance with what they believe are the best interests of the young person (as opposed to being a direct representative), and the legal representative acts on the instructions of the tutor. A person may be appointed as a young person's tutor without a formal instrument of appointment or an order of the court (UCPR, r 7.15).

The tutor's name will appear on the court documents, and he or she is liable to pay costs if they are ordered against the young person. The court has the power to remove the child's tutor (UCPR, r 7.18).

There is no requirement for a child to appoint a tutor when commencing and participating in proceedings in NCAT or the Commonwealth Administrative Appeals Tribunal. However if a young person is the subject of an application in the Guardianship Division of the NCAT and lacks capacity, a separate representative may be appointed. A separate representative is an independent person, usually a lawyer, who is appointed to represent the interests of the person.

### Limitation periods

In general, the limitation period for claims by children is suspended until they reach 18 years of age (*Limitation Act 1969* (NSW), ss 11(3), 52).

However, for personal injury claims (post 2002), the limitation period will start to run immediately if the child has a capable parent or guardian

(*Limitation Act 1969*, s 50F). There is provision for a court to extend the limitation period if the failure to bring an action within time is attributable to an irrational decision by the person's parent or guardian when he or she was a child (see *Limitation Act 1969*, s 62D).

If a child has a personal injury claim against a parent or guardian or a close associate of a parent or guardian, the applicable limitation period will not start running until the person turns 25 years of age or when the cause of action becomes discoverable, whichever is the later (*Limitation Act 1969*, s 50E).

There are no longer any limitation periods for claims resulting from the sexual or serious physical abuse of a child (*Limitation Act 1969*, s 6A).

### Reaching settlement

A court must approve a settlement in proceedings brought by, on behalf of, or against a person under 18 years of age (*Civil Procedure Act 2005* (NSW), s 76). A person under 18 may settle a claim before or without commencing court proceedings. However it will only be binding on the young person if it is approved by a court (*Civil Procedure Act*, s 75).

### 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).

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Legal advice should be sought about any legal proceedings either contemplated by or commenced against the child.

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## [7.1060] Giving evidence in court

### Competence to give evidence

Under the *Evidence Act*, every person (including a child) is presumed to be competent to give evidence (s 12). The test for whether a child is competent to give evidence is the same as for an adult. It turns on the child's capacity to understand a question

about a fact, and provide an answer about the fact that can be understood (see *Evidence Act*, s 13(1)). A child who is not competent to give evidence in relation to one fact may be competent to give evidence about other facts.

A child is not competent to give sworn evidence if he or she does not have the capacity to understand that, in giving evidence, he or she is under an obligation to give truthful evidence (s 13(3)). If a child is not competent to give sworn evidence, the child may give unsworn evidence if the court has told them:

1. it is important to tell the truth;
2. they may be asked questions they do not know, or cannot remember, the answer to, and they should inform the court if that happens;
3. they may be asked questions that may aim to influence their answer, and they should feel no pressure to agree with statements that they believe are untrue (*Evidence Act*, s 13(5)).

## Protections for children giving evidence in criminal proceedings

The *Criminal Procedure Act* provides a range of protections for certain witnesses and complainants giving evidence in criminal proceedings, including children. Most relevantly, Pt 6 of Ch 6 affords protections to “vulnerable persons” giving evidence, which includes children and people with a cognitive impairment. For instance, there is provision for giving evidence by CCTV in some proceedings (see ss 306ZA–306ZI), and having a support person present when giving evidence (s 306ZK). Part 4B of Ch 6, which deals with the giving of evidence by domestic violence complainants, and Pt 5 of Ch 6, which deals with evidence in sexual offence proceedings, may also be relevant.

## Cyber-crime and cyber-safety

[7.1070] “Cyber-crime” and “cyber-safety” are important issues for children and young people. Children and young people conduct a great deal of their social lives online through various social media, chat and messenger apps. Friendships and relationships are formed, developed and maintained online.

“Sexting” is the creation and distribution of sexually intimate images via technology. When children and young people get involved with the development or distribution of intimate images online, they are (often unwittingly) committing a child pornography criminal offence.

In NSW, it is an offence for someone under 16 years old to create, possess or distribute sexually intimate images of themselves to another young person (*Crimes Act 1900*, s 91H). The Commonwealth Criminal Code also sets out similar offences around child pornography (*Criminal Code Act 1995* (Cth), Sch 1, ss 474.17, 474.19, 474.20 (the *Commonwealth Criminal Code*)), but defines child pornography material as material depicting a person who is or appears to be under 18 years of age (s 473.1).

Children and young people are committing criminal offences if they:

- ask another child or young person for a sexually intimate image (*Crimes Act*, ss 91G, 91H; *Commonwealth Criminal Code*, s 473.1);
- make and send a sexually intimate image of themselves (*Crimes Act*, s 91H). However it will be a defence to a charge under s 91H of making or sharing child abuse material if the only person shown in the material is the accused person and the offence happened when the accused person was under 18 years old (*Crimes Act*, s 91HA);
- possess a sexually intimate image of themselves (*Crimes Act*, s 91H). However it will be a defence to a charge under s 91H of possession of child abuse material if the only person shown in the material was the accused person (*Crimes Act*, s 91HA);
- possess a sexually intimate image of another child or young person (*Crimes Act*, s 91H) However there is an exemption to the offence of possession of child abuse material if the possession of the material happened when the person was under 18 years old, and a reasonable person would consider the possession of the material acceptable having regard to certain factors (*Crimes Act*, s 91HAA).

Children and young people can easily become victims of online offences such as cyber bullying, threats, harassment, and intimate image abuse. Children and young people can also be the perpetrators of such offences.

Children and young people are also committing criminal offences if they:

- use a carriage service to menace, harass or offend (*Commonwealth Criminal Code*, s 474.17);
- record an intimate image of another person without that person's consent (*Crimes Act*, s 91P);
- distribute an intimate image of another person without that person's consent (*Crimes Act*, s 91Q);
- threaten to record or distribute an intimate image of another person without that person's consent (*Crimes Act*, s 91T).

If a child or young person is the victim of a cyber bullying or intimate image abuse offence, they can make a complaint to NSW Police and/or the e-Safety Commissioner <https://www.esafety.gov.au/complaints-and-reporting>.

Other technology offences that a child or young person can become involved with online include:

- hacking – for example, unauthorised modification of data (*Crimes Act*, s 308D);
- copyright infringement (eg, *Copyright Act 1968* (Cth), 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.communications.gov.au](http://www.communications.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](http://www.tisnational.gov.au)

Changes are expected to the websites for many NSW government departments that were not available at the time of printing. See [www.service.nsw.gov.au](http://www.service.nsw.gov.au) for further details..

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## Advice, information and help

### Association of Children's Welfare Agencies (ACWA)

[www.acwa.asn.au](http://www.acwa.asn.au)

ph: 9281 8822

### Australian Children's Contact Services Association (ACCSA)

[www.accsa.org.au](http://www.accsa.org.au)

### Child Abuse Prevention Service (CAPS)

[www.childabuseprevention.com.au](http://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, Wyong and Broadmeadow Children's Courts)*

ph: 4353 4988

*Illawarra Legal Centre (Port Kembla Children's Court)*

ph: 4276 1939

*Macarthur Legal Centre (Campbelltown Children's Court)*

ph: 4628 2042

*Western Sydney Legal Centre (Surry Hills and Parramatta Children's Courts)*

ph: 0418 520 461 or 8833 0920

### CREATE Foundation

[www.create.org.au](http://www.create.org.au)

ph: 1800 655 105 or 9267 0977

### Kids Helpline

[www.kidshelpline.com.au](http://www.kidshelpline.com.au)

ph: 1800 55 1800

Keep them safe (guidelines for reporting young people at risk)

[www.keepthemsafe.nsw.gov.au](http://www.keepthemsafe.nsw.gov.au)

### Lifeline

[www.lifeline.org.au](http://www.lifeline.org.au)

ph: 131 114

### Link2home (for emergency accommodation)

ph: 1800 152 152

### Salvation Army

(24 hrs)

[www.salvos.org.au](http://www.salvos.org.au)

13 SALVOS (13 72 58)

### Sexual Assault Services

See [www.kidsfamilies.health.nsw.gov.au/current-work/programs/programs-and-initiatives/sexual-assault-services](http://www.kidsfamilies.health.nsw.gov.au/current-work/programs/programs-and-initiatives/sexual-assault-services) for a list of services across NSW

*Rape Crisis Centre*

[www.nswrapecrisis.com.au](http://www.nswrapecrisis.com.au)

ph: 1800 424 017 (24 hours) or 1800RESPECT (1800 737 732)

### Victims Access Line (VAL)

ph: 1800 633 063 (24 hours) or 8688 5511

### YFoundations (formerly Youth Accommodation Association of NSW)

[www.yfoundations.org.au](http://www.yfoundations.org.au)

ph: 8306 7900

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## Youth Action

[www.youthaction.org.au](http://www.youthaction.org.au)

ph: 8354 3700

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## Legal information, advice and representation

### Aboriginal Legal Service

[www.alsnswact.org.au](http://www.alsnswact.org.au)

*Head office*

ph: 8303 6600

*Criminal matters*

ph: 1800 765 767

*Care matters*

ph: 1800 733 233

### An Employee's Guide to Unfair Dismissal – [www.lawaccess.nsw.gov.au/Pages/representing/lawassist\\_employmentrights/lawassist\\_employmentrights.aspx](http://www.lawaccess.nsw.gov.au/Pages/representing/lawassist_employmentrights/lawassist_employmentrights.aspx)

### Australasian Legal Information Institute (AustLII)

[www.austlii.edu.au](http://www.austlii.edu.au)

### Burn (film produced by Legal Aid relating to group offending)

[www.burn-movie.com.au](http://www.burn-movie.com.au)

### Children's Legal Service (Legal Aid NSW)

[www.legalaid.nsw.gov.au/what-we-do/criminal-law/children-and-young-people](http://www.legalaid.nsw.gov.au/what-we-do/criminal-law/children-and-young-people)  
*Legal Aid Youth Hotline*

ph: 1800 101 810

Weekdays: 9 am 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)**

lacextra.legalaid.nsw.gov.au/  
publicationsresourcesservice/  
publicationimprints/files/109.pdf

**Inner City Legal Centre**

www.iclc.org.au

ph: 1800 244 481

**Law Access**

www.lawaccess.nsw.gov.au

**Find Legal Answers**

www.legalanswers.sl.nsw.gov.au/

**Macarthur Legal Centre**

www.maclegal.net.au

ph: 4628 2042

**Marrickville Legal Centre**

www.mlc.org.au

ph: 9559 2899

**Youth Law Australia**

www.yla.org.au

ph: 9385 9588

**Welfare Rights Centre**

welfarecenter.org.au/

ph: 9211 5300

**NSW Caselaw**

www.caselaw.nsw.gov.au

**The Shopfront Youth Legal Centre**

www.theshopfront.org

ph: 9322 4808

**Tenants NSW**

www.tenants.org.au

**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

**NSW Department of Education Guide to Staying Safe Online**

antibullying.nsw.gov.au/for-students/Staying-safe-online

**Adoption****Adoption and Permanent Care Association of NSW**

www.apansw.org.au

ph: 8091 5157

**Adoption and Permanent Care Services**

(Pre-adoption enquiries)

*Community Services (CS) division of the Department of Communities and Justice*

www.facs.nsw.gov.au/families/adoption

ph: 9716 3000

**Adoption Information Unit**

(Post-adoption enquiries)

*Community Services (formally CS)*

ph: 1800 003 227

**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.

**Find and Connect – Family Tracing Service**

www.findandconnect.gov.au

ph: 1800 161 104

**Government****Communities and Justice, Department of – previously Department of Family and Community Services (FACS)**

www.dcj.nsw.gov.au

ph: 9377 6000

*Child Protection Helpline*

ph: 132 111 (to report child abuse and neglect, 24 hrs)

*CS Domestic Violence Line*

ph: 1800 656 463 (24 hrs)

See website for Community Service Centres.

*Adoption and permanent care services*

See [7.580].

*Family information service*

See [7.580].

**Department of Communities and Justice**

The online gateway to law and justice information in NSW.

www.justice.nsw.gov.au/

**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 Communities and 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: 9286 7276

**Ombudsman, NSW**

www.ombo.nsw.gov.au

ph: 9286 1000

**NSW Bureau of Crime Statistics and Research (BOCSAR)**

www.bocsar.nsw.gov.au

ph: 8346 1100

**Registry of Births, Deaths and Marriages**

www.bdm.nsw.gov.au

ph: 13 77 88

**Roads and Maritime Services**

www.rms.nsw.gov.au

ph: 13 22 13

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**Revenue NSW**

[www.revenue.nsw.gov.au](http://www.revenue.nsw.gov.au)

ph: 1300 138 118

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**Victims Services**

[www.victimsservices.justice.nsw.gov.au](http://www.victimsservices.justice.nsw.gov.au)

ph: 8688 5511

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**Youth Justice Conferencing**

[www.juvenile.justice.nsw.gov.au](http://www.juvenile.justice.nsw.gov.au)

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**Youth Strategy and Participation Unit, NSW Department of Communities and Justice**

[www.youth.nsw.gov.au](http://www.youth.nsw.gov.au)

ph: 8753 8413

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**Courts and Tribunals**

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**Children's Courts**

[www.childrencourt.justice.nsw.gov.au](http://www.childrencourt.justice.nsw.gov.au)

*Surry Hills*

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

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**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](http://www.localcourt.justice.nsw.gov.au).

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**NSW Civil and Administrative Tribunal (NCAT)**

[www.ncat.nsw.gov.au](http://www.ncat.nsw.gov.au)

ph: 1300 006 228

