# Youth Justice

## Your Guide to Cops and Court in NSW

4th Edition

Macquarie Legal Centre

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# Outcomes of court

This chapter explains what happens when you have pleaded or been found guilty at court. It also explains some alternative options available in the Local and Children's Courts for people with intellectual disabilities and mental health problems.

If you are a juvenile offender (under 18 when you did the crime) the following sections may be relevant to you:

- outcomes in the Children's Court
- juveniles and traffic offences in the Local Court
- outcomes in the District and Supreme Courts
- if you have an intellectual disability or mental illness.

If you are an adult offender (over 18) the following sections may be relevant to you:

- outcomes in the Local Court
- outcomes in the District and Supreme Courts
- if you have an intellectual disability or mental illness.

## Outcomes in the Children's Court

If you are being sentenced in the Children's Court, the big questions are:

- What penalty will you get?
- Will you get a criminal record?
- What else can they do to you?

*Sentencing* occurs when you are found guilty, or when you plead guilty. Sentencing is the final stage in the proceedings where the court decides what sort of punishment to impose.

The *Children (Criminal Proceedings) Act 1987* lists the sentencing options for Children's Courts. There are also some other Acts, such as the *Young Offenders Act 1997* and the *Children (Protection and Parental Responsibility) Act 1997* that provide some other options for Children's Court.

Other courts (Local, District and Supreme Courts) have different sentencing options (see *Outcomes in the Local Court* on page 331 and *Outcomes in the District and Supreme Courts* on page 335).

# Sentencing options under the Children (Criminal Proceedings) Act 1987

Children's Court sentencing options are listed in the *Children (Criminal Proceedings) Act 1987*, in section 33(1). Sometimes in court the magistrate or lawyer refers to one of these penalties by the paragraph number of this Act. So if the lawyer asks for you to be dealt with under *section 33(1)(b)* then they are asking for a *good behaviour bond*.

Most of these options can be imposed with or without a *conviction* being recorded (so you may or may not get a criminal record). See *Convictions and criminal records* on page 385.

## Dismissal with or without a caution – section 33(1)(a)(i)

This option is usually for offences that are not serious, where you don't already have much of a criminal history. The court can dismiss the charge. If this happens you will get:

- no punishment, and
- no conviction recorded, which means no criminal record.

When dismissing the charge, the magistrate may give you a caution (a short lecture about not offending again).

## Good behaviour bond without conviction – section 33(1)(a)(ii)

The court will discharge you, which means that you will get:

- a good behaviour bond, but
- no conviction recorded, which means no criminal record.

If you are given a good behaviour bond, you will have to sign a paper promising to be of good behaviour for a set period of time (up to 2 years). If you don't obey the conditions of the bond or commit another offence, then the court may resentence you for the original offence.

The court can give other conditions as well, for example, to accept Juvenile Justice supervision or attend school. If you don't obey the conditions of the bond or commit another offence, the court may resentence you for the original offence. See *Bonds, probation and suspended sentences* on page 364.

## Good behaviour bond – section 33(1)(b)

This option is similar to *good behaviour bond without conviction* (above), except that the court may record a conviction if you're 16 or over, which means that you will have a criminal record.

As well as a *good behaviour* condition, the court may impose other conditions. The most common one is supervision. You are normally supervised by the Department

of Juvenile Justice (DJJ) (unless you are 17 years and 6 months or older, in which case supervision will be by Probation and Parole).

If you don't obey the conditions of the bond or commit another offence, then the court may resentence you for the original offence. See *Bonds, probation and suspended sentences* on page 364.

## Fine – section 33(1)(C)

The court can give you a fine of up to $1100. The court should only fine you if you have some income or pocket money and you can reasonably afford to pay the fine (but some magistrates do give fines to people who can't afford to pay them).

You are usually given 28 days to pay the fine, but if you can't pay within the set time, go to the court office and ask for an extension of time to pay. If you don't pay the fine within the time, the government takes action to get you to pay. If you don't have much money, you can pay the fine in small amounts over time. See *Unpaid fines* on page 392.

## Send the case to a youth justice conference – section 33(1)(C1)

The court can send your case to a *youth justice conference*.

If the court approves the outcome plan decided on at the conference, and if you carry out the plan, then you might not have to go back to court and there is no further penalty. See *Youth justice conferences* on page 231.

Courts usually refer young people to youth justice conferences as a *diversionary* option at an early stage, not as a sentencing option at the end of the proceedings.

## Defer sentencing you – section 33(1)(C2)

The court can grant you bail and *adjourn proceedings* (delay or defer sentencing) until another day. This means that the court will give you some time to:

- rehabilitate (particularly if you have a drug or alcohol problem), or
- show the court that you have truly rehabilitated, or
- do any other thing the court thinks is appropriate.

The court cannot delay sentencing you for any longer than 12 months from the day you are found guilty.

This option is sometimes called a *Griffiths remand*. It is an option commonly used by the Youth Drug and Alcohol Court (see *Drug Courts and other special programs* on page 308).

## A fine and a good behaviour bond together – section 33(1)(d)

See details of fines and bonds above.

## Probation – section 33(1)(e)

This is like a bond, except there is almost always supervision by DJJ (or Probation and Parole, if you are 17 year and 6 months or older).

Breach of a probation order is dealt with in a similar way to breach of bond. See *Breach of a bond or probation* on page 366.

## A fine and probation together – section 33(1)(e1)

See details of fines and probation orders above.

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

A *community service order* means that you will have to do unpaid work – up to a maximum of 100 hours if you are under 16, or 250 hours if you are 16 or over. Community service often involves gardening or cleaning up public places. Children under the age of 14 do not usually get CSOs.

A Children's Court magistrate can only give a CSO if they are considering a *control order* (detention). Before giving you a CSO the court must first get a background report from Juvenile Justice. An order cannot be made unless work is available, and the court is satisfied that you are suitable for the work.

If you breach the CSO (ie you don't do all the work as directed), you might get more hours of community service, or may have to go to court to be sentenced again.

See *Community service orders* on page 367 for more information.

## Probation order and community service together – section 33(1)(f1)

See details of probation orders and community service orders above.

## Control order (locked up) – section 33(1)(g)

A control order means you go to a Juvenile Justice Centre (detention centre). Before giving you a control order the court must first get a background report from Juvenile Justice.

The Children's Court cannot give you a control order unless it is satisfied that it is wholly inappropriate to deal with you less severely. A control order can be no longer than 2 years (or 3 years if the court is sentencing you for more than one offence).

If the control order is for 6 months or less, it will be a fixed term. For orders of more than 6 months, the court must set a non-parole period (which is usually three quarters of the total sentence unless there are special circumstances why you should spend longer on parole).

### Parole

At the end of the non-parole period, you will be let out on parole. This is a bit like a bond or probation, but if you breach it you will go straight back to detention (unless the Children's Court decides you shouldn't). See *Parole* in *After court* chapter on page 382.

#### *Early release*

In some cases the DJJ can release you from detention early (before the end of your fixed term or non-parole period). This doesn't happen very often.

If you are released early, you continue to be supervised by DJJ and will have to be involved in an intensive program – for example, counselling two or three times each week. Some young people are not able to stick to these programs, so you should decide carefully before accepting early release. If you don't stick to the program, they lock you up again to finish your sentence.

### Suspended control order – section 33(1B)

Instead of locking you up straight away, the court can *suspend* your control order and put you on a bond.

If you breach the conditions or commit another offence, your suspended sentence will be revoked and you will have to do the time in detention.

## Options under the Young Offenders Act 1997

### Caution

Instead of giving you a caution under section 33(1)(a), the court may give you a caution under the *Young Offenders Act 1997*. This is only available for less serious offences that are eligible to be dealt with under the *Young Offenders Act 1997*.

If you get a caution, the fact that you have been cautioned will be recorded but you will not get a criminal record. See *Young Offenders Act: warnings, cautions and conferences* chapter.

### Conference

See *Sentencing options under the Children (Criminal Proceedings) Act 1987* above and *Young Offenders Act: warnings, cautions and conferences* chapter.

# Sentencing options under the Children (Protection and Parental Responsibility) Act 1997

Instead of sentencing you under the *Children (Criminal Proceedings) Act 1987,* the Children's Court may use the *Children (Protection and Parental Responsibility) Act 1997*. They do not do this very often.

## Undertakings by young persons

If you are found guilty of an offence a court can release you on condition that you promise (*give an undertaking*) to do anything that the court requires you to do. This might mean you have to:

- submit to parental or other supervision that the court orders
- take part in a particular program or go to a particular activity centre
- live with a certain person who the court wants you live with.

If the court requires you do these things and you do not do it then the court can vary or cancel the undertaking. If the court cancels the undertaking then the court can punish you in any other lawful way.

## Undertakings by parents

A court can also release you on condition that one or both of your parents:

- give a security (usually money) for your good behaviour (which will not be given back if you are not of *good behaviour*) for up to 6 months (or 12 months if there are *exceptional circumstances*) and so long as you remain under 18 during that period
- promise to do something or to not do something for up to 6 months (or 12 months if there are exceptional circumstances) and so long as you remain under 18 during that period
- guarantee that you will comply with an order of the court, and
- take any action that the court orders to make sure you do not commit any more offences, and
- report regularly on your progress.

The court can also order that you and your parents receive family counselling (see section 10 of the *Children (Protection and Parental Responsibility) Act 1997*). In extreme cases, where the court decides that your parent or parents are partly to blame for your offences they can receive a fine or be forced to get counselling.

A court cannot take any action against you if your parent/s do not comply with anything they were required to do.

## Dismissal of Charges under Mental Health (Forensic Provisions) Act 1990

A Children's Court Magistrate can decide to dismiss charges under section 32 or 33 of the *Mental Health (Forensic Provisions) Act 1990* if you have a mental illness or intellectual disability.

A section 32 or 33 dismissal is not really a sentencing option, since you don't have to enter a plea, there is no finding that the offence is proved, and no conviction is recorded. However, section 32 or 33 may be used at any stage of the proceedings, including the sentencing stage. See *If you have an intellectual disability or mental illness* on page 347.

# Outcomes in the Local Court

If you are being sentenced in the Local Court, the big questions are:

- What penalty will you get?
- Will you get a criminal record?
- What else can they do to you?

## Sentencing options under the Crimes (Sentencing Procedure) Act 1999

Sentencing options in the Local Court are set out in the *Crimes (Sentencing Procedure) Act 1999*, and you will often hear lawyers and magistrates refer to them by section numbers.

All of these options, except section 10, carry a *conviction* which means you get a criminal record. See *Convictions and criminal records* on page 385.

### Dismissal or bond without conviction – section 10

The court can dismiss the charge and not record a conviction. This means that you are free to go without a penalty and without a criminal record.

Instead of dismissing the charge outright, the court can order you to enter into a good behaviour bond for up to 2 years. You will not get a conviction or penalty unless you breach the bond.

See *Bonds, probation and suspended sentences* on page 364.

### Conviction but no penalty – section 10A

The court will give you a *section 10A* if it does not want to impose any punishment but wants to record a conviction. This might be the case if you have a string of less

serious offences that the court wants to get out of the way when sentencing you on a more serious matter.

## Fine – sections 14-17

*Fines* are a common penalty at the Local Court. A fine may be imposed on its own or (for some offences) with a bond or other penalty. The magistrate must take into account your ability to pay.

You must pay the fine within 28 days, or you can apply to the court for more time to pay the fine. If you don't pay the fine on time, other things happen – see *Unpaid fines* on page 392.

## Good behaviour bond – section 9

Instead of imposing a sentence of imprisonment, the court can put you on a *good behaviour bond* for up to 5 years (but it is not very common for a bond to be longer than 2 years). You must not commit any offences during the term of the bond.

The court often, but not always, imposes conditions on a bond. The most common condition is that you accept the supervision of the Probation and Parole Service and obey their reasonable directions. Other conditions may include that you complete a rehabilitation program or traffic offender program. It is also a standard condition of every bond that you must notify the court of any change of address.

If you break the bond by reoffending or breaking the conditions, you have to appear in court again to be sentenced for the original offence.

See *Bonds, probation and suspended sentences* on page 364.

## Defer sentencing you – section 11 bond

The court can grant you bail and *adjourn* (delay or defer) sentencing until another day. This means that the court will give you some time to:

- rehabilitate (particularly if you have a drug or alcohol problem), or
- show the court that you have truly rehabilitated, or
- do any other thing the court thinks is appropriate.

The court cannot delay sentencing you for any longer than 12 months from the day you are found guilty.

This procedure is sometimes called a *Griffiths remand* after a case of that name.

## Community service order (CSO) – section 8

If the offence is punishable by imprisonment, the court can instead order that you do unpaid community work. The magistrate can only give you a *community service order* (CSO) if you agree to it and if there is suitable work available in your area. The maximum number of community service hours for adults is 500.

Usually, before ordering community service, the court orders a *pre-sentence report* from the Probation and Parole Service. This report tells the court whether there is work available that is suitable for you. See *Community service orders* on page 367.

If the court imposes a community service order, it may also order that you attend a *development program* run by the Probation and Parole Service. This may involve an educational course on drugs and alcohol, anger management, literacy and so on.

If you don't do your community service hours, you may be breached. See *Community service orders* on page 367.

## Suspended sentence – section 12 bond

If the court imposes a sentence of imprisonment for 2 years or less, it may suspend the sentence on the condition that you enter into a good behaviour bond for a certain period of time. If you comply with the conditions of the bond for the time specified, you don't have to serve the time in prison.

If you breach the bond, the court must send you to prison, unless the breach was trivial or there are good reasons to excuse it. See *Bonds, probation and suspended sentences* on page 364.

## Periodic detention – section 6

*Periodic detention* was a sentencing option until 1 October 2010, when it was abolished and replaced with *intensive correction orders* (see below).

However, people who have already been sentenced to periodic detention will continue to serve the rest of their sentence by periodic detention.

*Periodic detention* involves going to prison for short periods (usually two nights), either on weekends or during the week.

Periodic detention is very strict – if you fail to attend three times without a good reason (eg a medical certificate) your order will be revoked and you will have to do home detention or go into prison full-time.

## Intensive correction order – section 7

An *intensive correction order* (ICO) is a new sentencing option that has replaced periodic detention from 1 October 2010. An ICO involves very strict supervision, community work, participation in programs, drug testing, and (in some cases) electronic monitoring.

An ICO is a direct alternative to full-time imprisonment. The court must first decide that a sentence of imprisonment should be imposed for no more than 2 years, and that it is not appropriate to suspend the sentence. The court then refers the offender to the Community Compliance Group (part of Corrective Services) for an assessment.

## Home detention – section 7

In certain circumstances, the court can order that you serve a prison sentence of 18 months or less by *home detention*.

To get home detention, the Probation and Parole Service must assess you as suitable for it. Home detention is not available for most violent offences or sex offences.

There is very strict supervision (including electronic monitoring) to check that you stay at home and only go out for essential things like work, grocery shopping and medical appointments.

A court may impose further conditions on top of the strict supervision, including requiring you to perform community service work if you do not otherwise have employment.

## Full-time imprisonment – section 5

The Local Court can order up to 2 years of imprisonment for any one offence, or if there is more than one offence, up to 5 years. The court can only sentence you to *full-time imprisonment* as a last resort if they have considered and rejected all other possible alternatives.

If you are sentenced to 6 months or less, it will be a fixed term – you will spend the whole 6 months in prison.

Longer sentences must be split into a non-parole period (the time you actually spend in custody) and a period out on parole. Parole means being released on certain conditions and (usually) being under the supervision of a parole officer.

The *non-parole period* is usually three-quarters of the total sentence, unless the court decides there are special circumstances why you should spend longer under parole supervision after your release. Some considerations which have been found to be *special circumstances*, include youth, expected hardship in custody and prospects of rehabilitation.

## Breach of parole, periodic detention, intensive correction order or home detention

If you breach your parole, periodic detention or home detention you will be arrested on a warrant and will have to appear before the State Parole Authority (which used to be called the Parole Board).

If the State Parole Authority decides to revoke (cancel) your order, you will usually have to do full-time imprisonment *until* the end of your sentence (or until the State Parole Authority decides to grant you parole again). See *Parole* in *After court* chapter on page 382.

## Sentencing options for juveniles guilty of traffic offences

Most 16 and 17-year-olds charged with traffic offences have to appear in the Local Court (see *Which court?* on page 266 and *Driving: rules and traffic offences* chapter).

If you plead (or are found) guilty, the Local Court can sentence you either:

- like an adult under the *Crimes (Sentencing Procedure) Act 1999* (except they cannot send you to prison), or
- as a juvenile under the *Children (Criminal Proceedings) Act 1987* (see *Outcomes in the Children's Court*).

# Outcomes in the District and Supreme Courts

## Adults

The sentencing options in the District and Supreme Courts are basically the same as in the Local Court. See *Outcomes in the Local Court* on page 331. The main difference is that the District and Supreme Courts can impose prison sentences for longer than 2 years.

Offences dealt with by the District and Supreme Courts are usually much more serious than those dealt with by the Local and Children's Courts. Therefore the chance of a prison sentence (and a lengthy one!) is higher.

## Juveniles

### Serious children's indictable offences

If you are being sentenced for a *serious children's indictable offence* (see *Which court?* on page 266) the District and Supreme Courts must use adult sentencing options.

However, there are some differences. For example, periodic detention and home detention are not available if you are under 18 at the time of sentencing.

Also, if you are sentenced to imprisonment then the court may order that all or part of your sentence be served in a juvenile detention centre instead of an adult prison.

However, the law says that you must be moved from a juvenile detention centre to adult prison when you turn 18 unless your non-parole period is due to expire within 6 months or you are especially vulnerable (eg you have an intellectual disability).

See *Juvenile detention centres* on page 374 and *Young adults in prison* on page 376.

### Offences that are not serious children's indictable offences

If the District or Supreme Court is dealing with you for any other offence it may:

- send you to the Children's Court for sentencing (see *Outcomes in the Children's Court* on page 325), or
- sentence you to any of the penalties that the Children's Court can sentence you to, or
- sentence you in the same way as an adult can be sentenced (see *Outcomes in the Local Court* on page 331).

# Other orders in addition to the sentence

As well as one of the penalties listed above, the court may make other orders including:

## Convictions and criminal records

If you are under 16, the Children's Court cannot *record a conviction* (cannot give you a criminal record). If you are 16 or over, the court has the option to record a conviction or not. If you don't already have a record, your lawyer should ask the magistrate not to record a conviction. See *Convictions and criminal records* on page 385.

If you are dealt with in the District or Supreme Court for an offence committed as a juvenile, the court has the discretion whether to impose a conviction or not.

If you are sentenced in an adult court, you automatically get a conviction, unless the court dismisses your charge or puts you on a bond under section 10. If you do get a conviction, this means you have a criminal record. For most offences your convictions can be spent (wiped off your record) if you do not reoffend for 3 years (if your conviction is from the Children's Court) or 10 years (if you were convicted by an adult court). For more information, see *Convictions and criminal records* in *After court* chapter on page 385.

## Licence disqualification

If you plead guilty or are found guilty of a traffic offence the court may disqualify you from driving for a certain period of time. They can't do this if they deal with the matter under section 10 (see *Outcomes in the Local Court*) or section 33(1)(a) (see *Outcomes in the Children's Court*). For more information see *Driving: rules and traffic offences* chapter.

# Apprehended violence orders

The court can make an *apprehended violence order* (AVO) to protect the victim of the crime from harassment, intimidation or violence by you. See *Apprehended violence orders* chapter.

# Non-association and place restriction orders

The court may impose an order prohibiting contact with certain people, or entry to certain areas.

An order may be made only if the court is sentencing a person for an offence carrying a maximum penalty of 6 months or more (in practice, this includes just about any offence!). An order may be made in addition to any other sentence that is imposed (eg fine, bond, community service).

## Types of orders

The court may make one or both of the following orders for up to 12 months:

- A *non-association order*, stops you from associating with certain people – either by stopping you from being in company (hanging out together) or by prohibiting all forms of contact (phone, email, etc). The order cannot stop you from associating with close family members (eg children, siblings, spouses, parents, grandparents, guardians or carers), unless there are exceptional circumstances.
- A *place restriction order*, stopping you from going to certain areas. The order cannot stop you from going to your own home, any close family member's home, or to your 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 you do not commit further offences. However, there is no requirement that the person(s) or place(s) specified in the order have anything to do with the criminal activity you are being sentenced for.

## What if you breach a non-association or place restriction order?

It is an offence to breach a non-association or place restriction order, unless you have a reasonable excuse (eg you accidentally ran into some one you were not supposed to associate with, or there was an emergency that required you to go to a certain area).

### Appeals, variations or revocations of orders

If you receive a non-association or place restriction order from the Local or Children's Court, you may appeal against it to the District Court, just like a sentence.

You may also apply to the court that imposed the order to have it varied or revoked if your circumstances change and you're having trouble complying with the order.

## Photos and prints

### If you are found not guilty or the charge is dismissed

If the Children's Court finds you *not guilty*, or *dismisses the charge* (with or without a caution), the court must order the destruction of your police photos, fingerprints and palm prints. The court can also order their destruction in other circumstances if it thinks this is justified.

An adult court cannot usually order the destruction of photos and prints, but the law says that the police must destroy them if you are found not guilty.

### If you are found guilty

If you have been found guilty of an offence and the police do not already have your fingerprints, the court can order you to attend a police station to have your prints taken. These orders are often made by the Local Court. The Children's Court also has this power but it would be rare for a Children's Court to make such an order.

## Sex offender registration

This is not an order of the court as such, but a consequence of being found guilty of certain offences against children (mostly sex offences). There are registration obligations, which are set out in the *Child Protection (Offenders Registration) Act 2000*.

For example, if you have been sentenced for a registrable offence in NSW, you must report your *relevant personal information* to the Commissioner of Police within 7 days after sentencing. This includes name, date of birth, address, names and ages of any children living in the same household, employment details as well as details such as membership in clubs with child participation and user names for internet chat rooms and instant messaging services.

You also have to notify the police if any of these details change or if you intend to leave NSW for more than 14 days.

These reporting obligations continue for between eight and 15 years (or four to 7 years and 6 months if you were a child at the time of the offence).

## Court costs

The court may order you to pay court costs (as at 1 July 2010, this is the standard amount of $79). Local Courts quite often impose court costs, but it would be rare for a Children's Court to do so.

## Victims compensation levy

This is not actually ordered by the court, but is automatically imposed on everybody who has pleaded guilty to (or found guilty of) an offence punishable by imprisonment. This means just about all offences, except for minor ones like offensive language, railway infringements and certain traffic offences.

The levy is $60 for offences dealt with in the Children's or Local Court, and $140 for offences dealt with by the District or Supreme Court.

If you are under 18, the court may waive the levy. Some Children's Courts automatically waive the levy but it is a good idea for your lawyer to ask the magistrate to waive it, just to be sure.

Victims compensation levies can be paid (and are enforced) in the same way as fines. See *Unpaid fines* on page 392.

## Court-ordered compensation to the victim

The court can order you to pay compensation to the victim. The amount of compensation can be up to $1100 for those under the age of 16 at the time of the order, up to $2200 for those under 18, and up to $50,000 for adults. The court must take into account your capacity to pay.

This usually only happens for property crimes like vandalism or theft. For violent offences, you may have to pay money later if the Victims Compensation Tribunal takes restitution proceedings against you (see *Victims compensation restitutions orders* on page 389).

If you do not pay the compensation, it is up to the victim (or whoever the compensation is payable to) to enforce payment through the court. It can't be enforced in the same way as a fine.

The court is not allowed to make you pay compensation as a condition of a bond or probation order.

## Victims compensation restitution orders

If you are guilty of a violent crime (eg reckless wounding or sexual assault) you may also have to pay a victims compensation restitution order at a later date. See *Victims compensation restitution orders* on page 389.

## Property forfeiture/destruction/return

The court has the power to order you to *forfeit* (hand over) property to the government or return it to the owner. For example, if you are found guilty of stealing something or having stolen goods in your custody, the court will usually order that they be returned to the owner.

The court may also order the destruction of some items like drugs and prohibited weapons.

# Background reports and pre-sentence reports

When the magistrate or judge sentences you, they take into account the circumstances of the offence and your own circumstances. See *Being sentenced – getting a favourable penalty* on page 343. The magistrate gets some of this information from the prosecutor and your lawyer, and from any witnesses or documents.

Sometimes the court also asks for a background report (for juveniles – under 18s) or a pre-sentence report (for adults – over 18s). This report usually has a great impact on the sentence you get.

## Juvenile Justice background reports in the Children's Court

The Children's Court may order a background report from the Department of Juvenile Justice to help the magistrate make a decision on sentencing. If you have been in trouble before, or have committed a serious offence, or your lawyer asks for a background report, the magistrate will usually order one.

If a Children's Court magistrate is considering a *control order* (locking you up) or a community service order, they must order a background report first.

When a magistrate orders a background report, they adjourn the case for about 3 weeks if you are in custody, and 6 weeks if you are not in custody. A juvenile justice officer contacts you (and, usually, your family) during this time.

The report must include information about your:

- family background
- employment
- education
- friends and associates
- community ties and activities

- health issues or disabilities
- prior criminal history
- previous involvement with the Department of Juvenile Justice
- circumstances relating to the offence
- suitability for sentencing options such as a bond, probation or community service.

## Probation and Parole pre-sentence reports in the Local Court or District Court

The Local Court or District Court must have a report from the Probation and Parole Service before they make:

- a community service order, or
- a sentence of periodic detention or home detention.

The report is to advise the magistrate or judge whether any of these penalties is suitable for you. Some magistrates and judges also order a report if they are thinking about sentencing you to a bond supervised by the Probation and Parole Service – or if they just want more information about you before making a decision.

### Duty pre-sentence reports

Some Local Courts have a duty probation officer at court. The magistrate may order a *duty PSR* which means you see the duty probation officer at court, and come back before the magistrate later the same day (or sometimes on another day, usually no more than a week away). The probation officer interviews you and writes a short assessment report.

The report by the probation and parole officer includes:

- details of factors relating to the offence such as alcohol, drugs, gambling issues and/or medical and psychiatric conditions
- any previous orders you have had (eg bonds) and whether you stuck to the conditions
- additional information (eg details of your family, education and employment)
- sentencing options available.

### Full pre-sentence reports

If your case is more complicated or serious, or if there is no duty probation officer, the court may order a *full pre-sentence report*. Your case will then be adjourned for about 6 weeks (or about 2 to 4 weeks if you are in custody).

A probation officer from your local office will be allocated to do the report. It is important that you keep your appointments with your probation officer, and cooperate with them.

A full pre-sentence report usually is much more detailed than a duty officer's report. It includes the same sort of information that is in a background report prepared by a juvenile justice officer.

## What happens to the report?

When you go to court for sentencing, the magistrate and your lawyer (and usually the prosecutor) each get a copy of the background report or pre-sentence report.

You have the right to read your report. If you disagree with anything in it, tell your lawyer before you go into the courtroom. If you are representing yourself in court, tell the magistrate your own views about what's in the report.

## Youth workers can have input

Youth workers, counsellors, health practitioners, etc can have input into the report. It will be beneficial for the young person if you can have input into the report in order to make it more positive. You could have important information about the young person that the officer preparing the report doesn't know. You might also be able to suggest some programs the young person could be involved in as part of their sentence.

It is important to get your client's permission to speak to the officer preparing the report, otherwise you are breaching your confidential relationship with your client.

The young person is assigned a specific juvenile justice officer (JJO) or probation officer. You can find out who it is by calling the office of the Department of Juvenile Justice or Probation and Parole Service that covers your region.

Make a time to speak to the JJO or probation officer preparing the report. If they don't contact you, phone them and pester them! Tell them about the contact you have with the young person and that you would like to pass on what you know about him or her (especially the positive stuff).

Alternatively, invite the officer to visit your service to have a chat. The client might even be at your service at the time, mixing with other people or doing some volunteer work.

Building up relationships with these officers can make them increasingly more willing to contact you about clients you have in common.

## Other court reports and references

When you appear in court for sentencing, it can be very helpful if you have a reference, report or support letter from someone who knows you.

You can ask a youth worker, social worker, church/mosque/temple worker, teacher, doctor, sports coach or anyone else the magistrate might think is respectable. Tell your lawyer that this person will write you a reference or report.

Your lawyer might also want to get a report from a psychiatrist or psychologist.

Sometimes the sentencing is adjourned for a few weeks to give you time to get these reports or references.

For more information see *References and court reports* on page 45.

# Being sentenced – getting a favourable penalty

So how does the magistrate or judge decide what sentence to give, and how can you influence the outcome?

## What happens when I'm being sentenced?

First, the prosecutor hands up the police facts (if you pleaded guilty – if you pleaded not guilty but have been found guilty, the magistrate or judge will have heard the evidence already) and a copy of your criminal record.

Then your lawyer will hand up any reports you want the court to see (see *References and court reports* on page 45).

There might also be a background report or pre-sentence report (see *Background reports and pre-sentence reports* on page 340). If a probation or juvenile justice officer has been supervising you and he or she is with you in court, the magistrate or judge may ask them to be available to answer questions.

Then your lawyer (or you, if you don't have a lawyer) can speak to the magistrate or judge. This is the opportunity to explain the circumstances which led you to commit the offence and mention any factors that might be taken into account to reduce the penalty. This is often called a *plea in mitigation*.

## What does the court take into account?

There are many things that the court takes into account. It is important for you to be aware of these things so that:

- you tell your lawyer all the relevant information, and
- you are aware of the things you can do before court that may increase your chances of a favourable penalty.

The first thing the court considers in deciding the penalty is the *maximum penalty* for the offence. This is usually set out in an Act (eg *Crimes Act 1900*). You only get

the maximum penalty in cases of the worst kind for the kind of offence you have committed. Local and Children's Courts have limits on the penalties they can impose, and for more serious offences they cannot impose the maximum penalty.

In the District and Supreme Courts, the judge also has to consider whether or not there is a *guideline judgment* or a *standard minimum non-parole period* for the offence you committed.

The court then considers many factors about you and the particular offence. In particular the court tries to ensure that your sentence will:

- punish you and make you accountable for the crime you committed
- denounce your behaviour (send a message to you and the community that it is not acceptable)
- discourage you and other people from committing similar offences in the future (often referred to as specific and general deterrence)
- rehabilitate you (help you to not commit offences in the future) – the younger you are, the more important this is thought to be, and
- protect the community.

## Mitigating factors

Courts tend to reduce your sentence when there are *mitigating factors*. This means you can get a less severe penalty if:

- the injury, emotional harm, loss or damage caused by the offence you committed was not substantial
- you were provoked by the victim to harm them
- you committed the crime because someone was threatening to hurt you or someone you cared about (this is called *duress*. In extreme cases, if the duress was so strong that you were forced to commit the offence, you may be entitled to a finding of not guilty)
- you do not have any significant criminal record
- you are of good character
- you are unlikely to reoffend
- you have good prospects of rehabilitation (eg because you are young or for some other reason)
- you express remorse – this might mean, for example, that you write a letter or speak in court saying how sorry you are that you committed an offence and why you will never do it again. Welfare workers should include their observations about expressions of remorse in their court report
- you voluntarily tried to make up for any damage or loss caused by you (eg you repaid money or apologised to the victim)

- you were not fully aware of the consequences of your actions because of your young age or any disability (eg a mental illness or intellectual disability). If you have any sort of mental illness or intellectual disability it is extremely important to tell your lawyer. Often it is a good idea to obtain a report from a psychiatrist or psychologist so the court can have an expert's opinion about how your condition may have affected your behaviour. See *If you have an intellectual disability or a mental illness* on page 347.
- you were under emotional stress (but you have to be specific and say exactly what was making you feel so stressed) when you committed the offence
- you plead guilty, especially at an early stage
- you assist or cooperate with the police and the prosecution (eg by giving evidence against co-offenders)
- you or other people may suffer significant hardship due to the penalty. For example, where prison may have serious effects on your health because of a medical condition the court takes this into account. In extreme circumstances the court also takes into account hardship to others. For example, if you are a sole parent, and there is nobody who can look after your child if you are locked up, the court may take this into account
- you have already spent some time in custody for the offence
- you have already been punished in some other way. For example, if a young person has already been punished by their parents, or suspended from school for the offence, the court can take this into account and reduce the sentence (bring to court a letter from your parents or a letter from the school).

## Aggravating factors

Courts tend to give you a harsher sentence when there are *aggravating factors*. This means you can get a more severe penalty if:

- the victim of the crime was a police officer, emergency services worker, correctional officer, judicial officer, health worker, teacher, community worker, or other public official, exercising public or community functions and you committed the offence because of the victim's occupation
- the offence involved the actual or threatened use of violence
- the offence involved the actual or threatened use of a weapon
- you have a record of previous convictions (especially if it is for similar offences as the one you are being sentenced for)
- you committed the offence with someone else

- the offence was part of a planned or organised criminal activity (eg you committed the offence as part of a gang)
- you were very cruel/sadistic to the victim when you committed the offence
- the injury, emotional harm, loss or damage caused to the victim by the offence was substantial
- the offence was motivated by hatred for a particular group to which the victim belonged (eg committing an offence against someone because you know they practise a certain religion, are of a particular racial or ethnic origin, speak a foreign language, are gay or lesbian, are younger or older than you or because they have a particular disability)
- the offence was committed without regard for public safety
- the offence was committed while you were on bail, a bond, probation or parole
- you abused a position of trust or authority in relation to the victim (eg a youth worker sexually abuses a young person or an employee steals from their employer)
- the victim was vulnerable (eg because the victim was very young or very old or had a disability, or because of the victim's occupation – such as a taxi driver, bank teller or service station attendant)
- the offence involved multiple victims or a series of criminal acts.

## Other things that affect the penalty

### *Reasons for committing the offence*

There are many reasons people commit crimes and sometimes the court considers that these reasons justify a reduction or an increase in penalty.

The court will also consider whether you intended to cause the harm you are convicted of causing.

### *Your background*

If you had a harsh childhood and this led to a very unstable lifestyle which contributed to the offence, the court is likely to reduce the penalty to take this into account. It can be very helpful for a youth worker or other person who knows you to include this information in a court report or reference.

This will often reduce the sentence, but not if the court thinks your instability might make you more likely to reoffend, so it's also important to have some evidence of rehabilitation.

### *Influence of alcohol or other drugs*

Sometimes this can have the effect of reducing the penalty and sometimes it can increase it.

For example, if it is out of character for you to get drunk, and as a result of getting drunk you did something that you wouldn't normally do and that you certainly didn't plan to do, a court is likely to reduce the penalty.

On the other hand, if you know that getting drunk makes you aggressive, and you decide to get drunk anyway, the court might treat you more harshly.

In drink-driving offences, the more alcohol you consume the heavier the penalty.

If you have a serious drug or alcohol problem and this induces your criminal behaviour, the court may take this into account and reduce the penalty, but only if you are doing something about the problem. If possible, book into a rehabilitation program before court, so that the court is sure that you are taking steps to fix the problem.

### THINGS TO DO

There are many things that a court takes into account to decide the penalty. Some things you can do before court to improve your chances of a favourable penalty are:

- Make sure your lawyer has all the relevant information about the offence and about your life.
- Help your lawyer to organise references, medical or psychological reports and any other relevant letters to use in court.
- If the court has ordered a background or pre-sentence report, make sure you cooperate with your Juvenile Justice or Parole and Probation Officer
- Book into any appropriate course or rehabilitation program.
- Bring a parent, youth worker or other support person to court with you.

Remember, if you don't have enough time before court to organise things like reports or rehabilitation, ask your lawyer to ask for an adjournment to give you a few extra weeks.

## If you have an intellectual disability or a mental illness

There is a special law for people with intellectual disabilities or mental illnesses who appear in the Children's or Local Court charged with an offence. This section explains how this law works. If you think this might apply to you, talk to a lawyer or a welfare worker, who might be able to help you use this law.

# Diversionary procedures in Local or Children's Court (section 32 and 33 applications)

Part 3 of the *Mental Health (Forensic Provisions) Act 1990* allows a magistrate to dismiss a charge against a person with an intellectual or developmental disability or a mental illness. The purpose of this is to divert the person away from the criminal justice system and to allow them to get some more appropriate support or treatment.

There are two key sections of the Act, sections 32 and 33. Each section applies to different people.

This law applies to all offences finalised in the Local Court and Children's Court. (There are other rules for mental illness and disability in the District and Supreme Courts. These are not covered here.)

## Section 32 of the Act

Section 32 of the *Mental Health (Forensic Provisions) Act 1990* can apply to you if you have a mental illness or condition, or a developmental disability (either at the time of your court appearance or at the time of the alleged offence).

Section 32 does not apply if you need care, treatment or control to protect yourself or others from serious harm (see *Section 33 of the Act* below).

### *How to apply*

Usually the magistrate does not simply decide to apply section 32 – you or your lawyer must apply to the magistrate. (You can apply at any time during your court case, including after you have pleaded or have been found guilty.) You do not have to enter a plea in order to apply.

You must give the magistrate some medical, psychiatric or psychological evidence that you have an intellectual disability or mental illness, for example, a report. Legal Aid generally pays for these reports. Other evidence which might help your application are reports or tests from your school, from the Department of Aging, Disability and Home Care, or from social workers.

### *How does the magistrate decide?*

If you ask the magistrate to use section 32, the magistrate must decide two things:

- Do you (or did you at the time of the alleged offence) have a mental illness, mental condition or intellectual disability (but do not need care, treatment or control to protect yourself or others from serious harm)?
- Is it more appropriate to deal with your case under section 32 than according to the normal criminal law?

It is not simply a matter of whether you understand the difference between right and wrong, or guilty and not guilty. The magistrate usually takes a few things into account, including:

- the seriousness of the charge
- the likely outcome if you were dealt with *according to law* instead of under section 32
- whether you have a criminal record or have been dealt with under section 32 before, and
- whether you are getting treatment or counselling and have a good case plan.

***What can the magistrate do under section 32?***

If a magistrate decides to deal with you under section 32, they can make various *procedural orders* or *final orders*.

Procedural orders include:

- adjourning the proceedings (putting off the case), or
- letting you out on bail.

Final orders mean dismissing the charge and:

- discharging you (letting you go) unconditionally, or
- discharging you into the care of a responsible person (such as a your treating doctor or case worker), unconditionally or subject to conditions, or
- discharging you on the condition that you go to a specific place (such as a community health centre) for assessment and/or treatment.

If you are discharged on conditions, and you break the conditions in the next 6 months, you can be brought back to court and dealt with again.

You don't have to enter a plea or admit to the offence to make a section 32 application. A section 32 order doesn't mean you are found guilty or not guilty. It doesn't count as a criminal conviction, but it is recorded by the court, and a magistrate may take it into account if you get into trouble again.

## Section 33 of the Act

Section 33 is similar to section 32, but it applies to you if you have a mental illness and you are a *mentally ill person* – that is, you need care, treatment or control to protect yourself or others from serious harm.

A magistrate can make an order:

- that you are taken to hospital and detained there for assessment. If the hospital staff agree you are a mentally ill person they may admit you as an involuntary patient. This may include the additional condition that if the hospital staff decide that you are not a *mentally ill* or *mentally disordered person*, the police must bring you back to court, or

- to discharge you into the care of a responsible person, unconditionally or subject to conditions.

You can be brought back to court, within 6 months of the order, to be further dealt with in relation to the charge. This might happen if you breached the conditions or got charged with another offence.

## Welfare workers

Often lawyers have only a short time to interview each client and they may not pick up that a person has a disability or mental illness. This is where the welfare worker's role is crucial. If you know that a person has special needs, you may sit in on the interview with the lawyer or arrange for them to be represented by a lawyer with special skills. If you can't do this, send a letter to the lawyer outlining your understanding of the person's disability or illness.

### JACOB AND THE WELFARE WORKER

Seventeen-year-old Jacob had three court cases coming up for different criminal offences. His youth worker, Mick, was concerned about all the cases and thought it would be a good idea to arrange for one lawyer to deal with all of them, rather than have three separate lawyers representing Jacob. So he arranged an appointment with Kate, a lawyer at a Community Legal Centre.

Kate sat down with Mick and Jacob and discussed all the cases with them. Because Mick was there and he had arranged the appointment, it was easier for Jacob to trust Kate. Jacob was more comfortable and so he gave much more detailed and honest information than many young people give their lawyers. Mick was also able to provide additional information about Jacob's history and fill in the gaps Jacob left.

In Jacob's second appointment with Kate, he revealed that he was taking an anti-psychotic drug because he was 'stressing out too much'. This came out in general conversation – Jacob didn't think it was relevant to his court cases. But as a result of this information Kate thought it may be appropriate to ask the court to dismiss the charges against Jacob because of his mental condition. To do this she had to get a psychiatrist's report. She arranged an appointment for Jacob to see a psychiatrist. Because of Jacob's fear of authority figures, and his lack of organisation, he would not go on his own. Mick was able to take him to the appointment. Mick was also able to provide the psychiatrist with a detailed report of his work with Jacob, his observations of Jacob's behaviour and the work he had done with Jacob. He was also there to answer any questions the psychiatrist had. This enabled the psychiatrist to write a very good and thorough report.

Mick also wrote his own court report which provided an excellent history as well as giving the court an assurance that youth workers were continuing to work with Jacob on a regular basis, addressing many of the concerns the court had.

Mick drove Jacob and his mother to court on the day. He sat beside Jacob during court to ease his anxiety. He explained the proceedings to Jacob. Part of Jacob's worries was that his mother couldn't speak English, didn't know what was going

on and questioned Jacob about his court cases constantly. This resulted in a lot of tension between Jacob and his mother. Through an interpreter, Mick explained to Jacob's mum what was going on, and this relieved the tension between Jacob and her.

The charges against Jacob were dismissed because of his mental condition. If he did not have a youth worker assisting him, chances are that his lawyer (and the court) would not have recognised his mental health problems. He probably would have been dealt with by a normal criminal hearing, and, due to a lack of witnesses, could have been found guilty of these offences.

## District and Supreme Courts

Sections 32 and 33 do not apply to charges being dealt with by the District and Supreme Courts. In these courts, the proceedings are more complicated and take much longer.

First, the court might have to decide whether you are fit to be tried. This involves looking at whether you are capable of understanding the charge and the court process, and whether you have capacity to participate in the court process and defend the charge. The court would usually hear evidence from psychiatrists and/or psychologists.

If you are found unfit to plead, you may be held in custody or hospital until the mental health review tribunal assesses you as fit to plead. If you are still unfit to plead (eg because you have a moderate or severe intellectual disability) the court will need to have a special hearing to decide whether, on the limited evidence available, you committed the offence. After a special hearing you may be either released or required to serve a *limiting term* (similar to a sentence) in custody.

If you were seriously affected by mental illness or disability at the time of the offence, you may be found *not guilty by reason of mental illness*. In this case you may be detained in custody until the mental health review tribunal decides that it is safe to release you. People found not guilty by reason of mental impairment often spend much longer in custody than people who are found guilty. There have been recommendations made for changes to the system to improve fairness for people with mental illnesses and intellectual disabilities.

## Sentencing

Not everyone with a mental illness or intellectual disability will be dealt with using special procedures. Their illness or disability may be relatively mild, or they may prefer to be dealt with according to ordinary court procedures.

In this situation, mental illness or intellectual disability is still very relevant.

A person with a mental illness or intellectual disability may be considered *less culpable* (criminally responsible) and an inappropriate person to make an example

of. This could lead to a lesser sentence. On the other hand, if a person's illness or disability makes them potentially dangerous to the public, the need for community protection may deprive the person of a lenient sentence.

## POINT OF VIEW

Some people suggest that people with a disability or mental illness are treated more favourably than others in the criminal system. There is a view that they get off scot-free. Some people also feel that defendants don't learn their lesson if they are dealt with under this law.

Remember, the aim of the law is to recognise that certain people are not always aware of the consequences of their actions or find it hard to comply with traditional penalties handed out by courts (eg fines, bonds, community service).

Section 32 of the *Mental Health (Forensic Provisions) Act 1990* attempts to divert people with a disability or mental illness towards more appropriate services (there is, however, a lack of alternative services). This law also recognises that people with a disability or mental illness are already significantly disadvantaged by the time they get to court – something that should be taken into consideration.