

Children’s Criminal Law Practice Standards

This document sets out practice standards for lawyers representing children in criminal law matters in the Children’s Court, the Local Court and District Court Appeals under a grant of legal aid or appearing as a rostered duty lawyer.

Satisfactory compliance with these practice standards also includes adherence to the Representation Principles for Children’s Lawyers published by the Law Society of NSW¹.

These practice standards apply to in-house Legal Aid NSW solicitors and private lawyers acting in legally aided criminal matters.

Lawyers who are appointed to the Children’s Criminal Law Panel (the panel) are eligible to receive grants of aid and assigned work from the Grants Division, including case matters and duty work.

Legal Aid NSW may audit panel lawyers for compliance with practice standards. Continued inclusion on the panel is conditional on compliance with these practice standards.

Lawyer means a person who holds a current practising certificate issued by the Law Society of NSW, the NSW Bar Association or equivalent interstate organisation.

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¹ <http://www.lawsociety.com.au/idc/groups/public/documents/internetcontent/026517.pdf>

1. General Principles

- 1.1 Lawyers are to recognise the important principle of the *Children (Criminal Proceedings) Act 1987* that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, the right to be heard, and the right to participate in the processes that lead to decisions that affect them.
- 1.2 Lawyers are to recognise that most children appearing in the criminal jurisdiction of the Children’s Court come from disadvantaged backgrounds and/or non-English speaking backgrounds.
- 1.3 Lawyers representing children in the criminal jurisdiction of the Children’s Court must be able to communicate effectively with children. Lawyers must also have an understanding of cross-cultural issues and issues facing socially and economically disadvantaged people and people with disabilities.

2. Responsibilities to Clients

A lawyer representing a child in a legally aided children’s criminal matter will:

- 2.1 Provide representation in accordance with the Legal Profession Uniform Legal Practice (Solicitors) Rules 2015 or Legal Profession Uniform Conduct (Barristers) Rules 2015 as applicable.
- 2.2 Observe the current version of the Representation Principles for Children’s Lawyers published by the Law Society of NSW.
- 2.3 Act as the child’s direct representative in all criminal proceedings unless the lawyer determines that the child is incapable of giving instructions (see detailed commentary in the Representation Principles for Children’s Lawyers, Law Society of New South Wales, Part B “Role of Practitioner” and Part C “Capacity to give Instructions”).
- 2.4 Explain to the child the role of the practitioner as a direct representative and their and responsibilities to the client and to the court.
- 2.5 Explain the role of other parties (e.g. the prosecution and the magistrate) and the court system and general legal principles (e.g. the presumption of innocence, the onus of proof, the right to silence)
- 2.6 Explain to the child that a lawyer representing the child owes the same duty of confidentiality as would be owed to an adult client. Lawyers should particularly be aware of the provisions of section 11 of the *Children (Criminal Proceedings) Act 1987* regarding non publication of information regarding the identity of the child.
- 2.7 Advise the court of any relevant applications (e.g. *Mental Health (Criminal Procedure) Act 1990*) if the child is incapable of giving instructions or needs medical or mental health care.
- 2.8 As much as practicable, meet with the child before the court date and allow sufficient time for a conference.
- 2.9 Give preference to face to face communication with the child rather than via telephone or in writing

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- 2.10 Explain the charges, the evidence, the court proceedings, and the child's options.
- 2.11 Encourage the child to ask questions and will answer those questions appropriately.
- 2.12 Use language appropriate to the age, maturity, education, cultural background and language proficiency of the child.
- 2.13 Write to the child in plain English using appropriate language to explain the court proceedings (Precedent letters are available from the Children's Legal Service on request).
- 2.14 Use a qualified interpreter where necessary after obtaining approval from the Grants Division.
- 2.15 Consider whether a support person is appropriate when interviewing the child and first seek the child's wishes on the use of a support person.
- 2.16 Only invite a support person to participate in an interview with the consent of the child and be aware that an adult accompanying a child may not necessarily be present with the child's consent.
- 2.17 Ask to speak with the child in private when it appears that a support person is being overbearing or having a negative effect on the child.
- 2.18 Read key documents, such as police facts and juvenile justice background reports, out loud to the child unless the child is clearly competent.
- 2.19 Modify or explain obscure or inappropriate language in any documents.
- 2.20 Give children sufficient time to consider matters and make a decision.
- 2.21 Provide the child with sufficient details to allow them to contact the lawyer to ask additional questions between court appearances.
- 2.22 Provide a meaningful reply to all correspondence, reply promptly to all urgent matters and advise clients that a detailed response for advice may require more time.
- 2.23 Respond to all telephone inquiries promptly.
- 2.24 Explain the mechanics of court proceedings to the child including who will speak for the child, whether the child will be asked to speak and who will be in the court room.
- 2.25 Minimise court appearances and case delays and give the child and his or her carers a realistic assessment of the time their matter will take to be heard and completed (i.e. if it is a big list with lots of people in custody clients should be told their matter may not be heard for some hours). Inform the child that an application may be made if there is a genuine need for the matter to be dealt with urgently.
- 2.26 Explain to the child that in many list and hearing matters it may not be possible to maintain continuity of representation but the child will generally always be represented by an in-house Children's Legal Service lawyer or a panel lawyer.
- 2.27 Attend all court events in a timely manner; allowing adequate time to prepare.

- 2.28 Ensure the child is represented at all court events and that any agents engaged are members of the panel.
- 2.29 Maintain continuity in representation in difficult and complex matters (see definition at page 10), where possible, and if continuity cannot be maintained explain who will represent the child on the next occasion. Continuity is particularly important when a long standing client/solicitor relationship exists.
- 2.30 Speak with the child as soon as reasonably practicable following a court appearance, including children who have been remanded in custody, and confirm that the child understands the result and any orders made by the court
- 2.31 Interview the child in an appropriate setting to protect their privacy.
- 2.32 Be familiar with legislation, case law and policies relevant to children in particular:
- *Children (Criminal Proceedings) Act 1987*
 - *Children (Detention Centres) Act 1987*
 - *Children (Community Service Orders) Act 1987*
 - *Children (Protection and Parental Responsibilities) Act 1997*
 - *Child Protection (Offender Registration) Act 2000*
 - *Young Offenders Act 1997*
 - Doli incapax and case law
 - Exclusionary provisions relating to children and case law including:
 - s13 *Children (Criminal Proceedings) Act*
 - *Law Enforcement (Powers and Responsibilities) Act 2002* as it relates to detention after arrest.
 - Sections 90, 138 and 139 *Evidence Act*
 - AVO and ADVO matters
 - Forensic Procedures
 - Offender registration
 - Youth Koori Court
 - Children’s Court Practice Notes
 - *Bail Act 2013* and in particular, it’s application in the Children’s Court
- 2.33 Where appropriate, refer the child to Legal Aid NSW Children’s Civil Legal Service or other relevant services.

3. Responsibilities to Legal Aid NSW

A lawyer representing a child in a children’s criminal matter subject to a grant of legal aid will:

- 3.1 Comply with these practice standards.
- 3.2 Comply with the provisions of the [Legal Aid Commission Act 1979 \(NSW\)](#) and the [policies and guidelines](#) of Legal Aid NSW (as amended).
- 3.3 Comply with the [Terms and Conditions of use of Grants Online](#) (as amended).
- 3.4 Comply with the terms and conditions of the grant of legal aid.

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- 3.5 Be responsible for that matter and accountable to Legal Aid NSW for any breach of these practice standards including for any work undertaken in the matter by another lawyer or employee of that (your) firm.
- 3.6 Ensure that any applications for legal aid, extensions of the grant of aid and requests for reconsideration and review are lodged promptly with all relevant information and supporting material to enable a decision to be made without delay.
- 3.7 Seek approval of the Grants Division for any disbursements prior to expenditure on the file by obtaining the appropriate grant or extension via Grants Online.
- 3.8 Review all files on completion of the matter to ensure all necessary steps have been taken before notifying the Grants Division that the matter is finalised. When submitting the final claim to the Grants Division the lawyer must complete the file outcome form setting out the steps involved in completion of the matter and the result in the matter.
- 3.9 Ensure prompt payment to experts, witnesses and other third parties who have undertaken work pursuant to a grant of aid for that work.
- 3.10 Reassign all pro forma invoices for Counsel's fees to the barrister who has been briefed so that the barrister can claim directly from Legal Aid NSW.
- 3.11 Provide the file in a matter to Legal Aid NSW where a written authority is received from a client to hand over the file.
- 3.12 Seek orders for costs where appropriate.
- 3.13 Notify Legal Aid NSW immediately of any circumstances that could give rise to a claim for professional negligence and provide a detailed statement in relation to the matter.
- 3.14 Where Counsel receives an offer of a direct access matter from Legal Aid NSW, Counsel may decline to accept the assignment if, the case is too complex or it is otherwise inappropriate to do the work without the involvement of an instructing solicitor.
- 3.15 Send client documents, except within the difficult and complex criteria, to in-house or panel lawyers no later than two working days prior to the next court appearance.
- 3.16 Send client documents, in difficult and complex matters where continuity cannot be maintained, to in-house or panel lawyers on completion of the current court appearance and any relevant follow-up work.
- 3.17 Refer any matters that are within the "difficult and complex" criteria to Legal Aid NSW (in order to obtain approval to continue the conduct of the matter) and, if available, maintain continuity where requested by Legal Aid NSW

4. Responsibilities to Others

When dealing with other lawyers, experts, witnesses and the staff of the Tribunals or Courts or other agencies or institutions, the lawyer will:

- 4.1 Conduct all communication in a courteous, prompt and professional manner.

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- 4.2 Comply with timetables, time limitations, procedural steps, and any undertakings given to the Tribunal or Court.
- 4.3 Avoid unnecessary expense or waste of time by ensuring that:
- (i) documents are served or filed on time;
 - (ii) documents served, filed or given to the client are legible;
 - (iii) the child is aware of medical appointments, conferences and hearing dates and understands the importance of attending promptly and on time;
 - (iv) witnesses are aware of conferences and hearing dates and understand the importance of attending promptly and on time;
 - (v) court commitments are accurately diarised

5. Duty Work

Duty work encompasses:

- Taking instructions on first appearances and if appropriate entering a plea
- Mentioning matters
- Replying to a brief and confirming a plea where appropriate
- Bail applications
- Bail variations
- Sentence matters
- Breach matters
- Parole hearings

A lawyer appearing on a duty day in the Children's Court will:

- 5.1 Comply with the Children's Criminal Law Duty Guidelines for Lawyers (as amended).
- 5.2 Give priority to children in custody
- 5.3 Complete a legal aid application for each child who requires further assistance (the application must be fully completed with address, contact and charge details).
- 5.4 Explain to the child the grant of legal aid, the basis of representation and the confidential nature of the lawyer/client relationship.
- 5.5 Obtain all relevant material from the child, and where necessary the prosecutor, including the police facts, details of bail conditions and the child's criminal history.
- 5.6 Explain the allegations to the child and read the police fact sheet to the child.
- 5.7 Explain the nature of the charge(s) and any defences.
- 5.8 Explain the nature of the proceedings.
- 5.9 Explain the possible outcomes of the proceedings and the potential effect on the child including victim's compensation restitution if appropriate.
- 5.10 Take the child's instructions.
- 5.11 Check the child's bail conditions and take instructions for any variation application.

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- 5.12 Explain to the child in appropriate language how the matter will proceed in court. (E.g. I will speak on your behalf and tell the Magistrate that you want to plead guilty. I will then tell the Magistrate what you have told me to say about why this matter happened and about your life. The Magistrate may ask you some questions and it is okay for you to answer them. Etc.)
- 5.13 Explain appeal rights and processes and advise on prospects.
- 5.14 Provide the child with contact details for the lawyer if the child requires further information about the proceedings following the court appearance.
- 5.15 Represent the child in court in accordance with the child's instructions.
- 5.16 Record the outcome of the proceedings on the duty application.
- 5.17 Speak to the child as soon as reasonably practicable following the court appearance and confirm the child understands the proceedings and the outcome.
- 5.18 Advise a child remanded in custody of their rights to a bail review and to lodge a Supreme Court bail application.
- 5.19 Following a duty day appearance the lawyer will:
 - (i) Compile the child's documents incorporating:
 - a. The duty application;
 - b. A copy of the Court Attendance Notices;
 - c. A copy of the police facts;
 - d. A copy of the child's record;
 - e. Notes of the child's instructions;
 - f. Any other documents obtained from the child or the prosecutor at court.
 - (ii) Write to the child confirming the outcome of proceedings, any future court dates, appeal rights and processes and contact details for the lawyer.
 - (iii) Where a matter is adjourned for the service of a brief, write to the informant advising the address for service of the brief and the date by which the brief must be served.
 - (iv) Where approval has been given by Legal Aid NSW, maintain continuity in subsequent adjournments and appearances.

6. Defended Matters

6.1. Hearings

A lawyer appearing for a child in a defended hearing will:

- 6.1.1 Open and retain a file for the child with copies of the court attendance notices, police facts, bail conditions, criminal history and the brief. If any of these documents are not available when the file is opened, they should be put on the file as soon as they are obtained.
- 6.1.2 Read the brief.

- 6.1.3 Advise the child of the hearing date. Legal Aid NSW will advise the child in the grant letter that the matter has been assigned and the terms of the grant of aid.
- 6.1.4 Meet with the child, and any appropriate support person, at a place convenient for the child and the lawyer.
- 6.1.5 Explain the role of the solicitor, the nature of the proceedings and how the matter will proceed in court.
- 6.1.6 Advise the child on the evidence in the brief and whether there is sufficient evidence to prove a prima facie case.
- 6.1.7 Advise the child of any relevant defences available to the charges faced by the child. If the child wishes to enter a plea of guilty despite a possible defence, the lawyer should obtain signed instructions where practical and appropriate.
- 6.1.8 Take the child's instructions before presenting their case in court. If there is insufficient time, the lawyer should adjourn the matter for such time as is necessary for the child to give proper instructions.
- 6.1.9 Explain appeal rights and process to the child.
- 6.1.10 Prepare the matter for hearing.
- 6.1.11 Issue appropriate subpoenas.
- 6.1.12 Check the child's bail conditions and take instructions on any bail variations.
- 6.1.13 Represent the child at the hearing.
- 6.1.14 Record the outcome of the proceedings on the file.
- 6.1.15 Speak to the client immediately following the court appearance and confirm the client understands the proceedings and the outcomes.
- 6.1.16 Write to the child confirming the outcome of proceedings at each stage, any future court dates, appeal rights and processes and contact details for the lawyer.
- 6.1.17 Appear for the child in any subsequent sentence proceedings.

6.2. Sentences

A lawyer appearing for a child in a sentence matter following conviction after hearing or a plea of guilty will:

- 6.2.1 Open and retain a file for the client with copies of the charge sheet, police facts and criminal history.
- 6.2.2 Obtain instructions from the client in relation to the matter.
- 6.2.3 Advise the client on the law, procedure and practice that applies to their case, including the charges and the potential penalties.

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- 6.2.4 In pleas of guilty, consider whether it is appropriate to enter into negotiations with the prosecutor in relation to different or lesser charges or amendments to the police facts.
- 6.2.5 In pleas of guilty, read to, or have the client read, the agreed police facts. It is recommended that the client sign these facts and confirm in writing the instructions to enter a plea of guilty. The signed facts should not be provided to the prosecution, but the lawyer should ensure that the facts tendered by the prosecution contain any amendments agreed upon.
- 6.2.6 Obtain a personal history from the client, including medical history, psychiatric diagnoses, psychological assessments, drug and alcohol history, attempts at rehabilitation, family background, and immigration status.
- 6.2.7 Determine whether it is appropriate in the circumstances to request a Juvenile Justice Report or pre-sentence report.
- 6.2.8 Advise the child about any diversionary options such as the Young Offenders Act and the Youth Koori Court
- 6.2.9 Advise the child about any relevant ancillary orders of consequences of sentencing, including:
- convictions and criminal records
 - AVOs
 - Child protection registration
 - Victim's compensation
- 6.2.10 Determine what material should be tendered on sentence and obtain the material, after obtaining an appropriate grant of aid where expenditure is required. Where a psychiatric, psychological or other medical report is appropriate, past reports should be obtained and other cost effective methods of obtaining material should be considered, such as a report from a court-based clinical liaison nurse, a report from a treating doctor or a report prepared for another purpose e.g. for DADHC purposes.
- 6.2.11 Advise the client about the appeal process, appeal prospects and time limits for appeal. Explain the Legal Aid NSW policy in respect to obtaining legal aid for an appeal against severity of sentence.

6.3. Appeals

Once the child's sentence or defended matter is completed the lawyer will:

- 6.3.1 Speak to the child immediately following the court appearance and confirm the child understands the proceedings and the outcome.
- 6.3.2 Advise on appeal prospects and, if appropriate, take instructions on an appeal.
- 6.3.3 Assist the child in lodging the appeal.
- 6.3.4 Advise the child whether legal aid is likely to be available for the appeal.
- 6.3.5 Assist the child to complete a legal aid application.
- 6.3.6 Take the child's instructions on a bail application.
- 6.3.7 If instructed, apply for appeal bail.

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- 6.3.8 Forward the notice of appeal and legal aid application to Legal Aid NSW.
- 6.3.9 Write to the child and confirm the date of the appeal and that an application for legal aid has been lodged. Legal Aid NSW will contact the child when the application is received

7. District Court Appeals

A lawyer appearing in a District Court Appeal will:

- 7.1 Open and retain a file for the child with copies of the police facts, bail conditions, criminal history, the brief and Notice of appeal.
- 7.2 Determine whether the appeal lodged is a conviction or sentence appeal and whether any other Appeal or leave to appeal document needs to be lodged.
- 7.3 Consider whether a bail application or bail variation is necessary and obtain full instructions in respect of the factors necessary for bail or bail variation.
- 7.4 Obtain instructions from the child and give advice about the law, the likelihood of the appeal succeeding and the possibility of the sentence being increased in sentence appeal proceedings (“Parker Warning”).
- 7.5 Obtain instructions from the child about whether they are on any medications and/or whether they have been or are being treated for any psychiatric, psychological or medical issues.
- 7.6 In Sentence Appeals advise the child about, and obtain, full subjective materials for use in the Sentence Appeal.
- 7.7 In Conviction Appeals obtain all transcripts and exhibits of the Children’s Court proceedings before a merit determination is made and before the Appeal is listed for hearing.
- 7.8 In Conviction Appeals provide advice on and determine whether any fresh evidence is to be called or whether an application will be made for evidence to be given.
- 7.9 Upon finalisation of the Appeal fully advise the child in writing of the result of the Appeal.

8. File Management

A lawyer appearing for a child in a children’s criminal matter subject to a grant of legal aid must ensure that:

- 8.1 Files must be maintained in an orderly manner so that Legal Aid NSW may effectively audit the file if required, and to ensure that another lawyer assuming conduct of the matter may quickly and easily understand its factual basis, the child’s instructions, the stage the matter has reached and all further action required to run the matter in line with the practice standards.
- 8.2 All documents including:

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- (i) correspondence from the Grants Division in relation to the grant of legal aid; and
- (ii) correspondence received and sent in relation to the matter

are kept on the file in date order.

8.3 Court documents filed, served or issued in the proceedings are kept in a separate bundle on the file in date order.

8.4 Clear and legible file notes are kept of all telephone conversations, conferences, interviews, meetings with children, meetings with witnesses and experts and include:

- (i) date;
- (ii) name of person spoken to; and
- (iii) relevant details of the conversation.

8.5 Clear and legible file notes are kept of information and advice given to the client that is not confirmed in writing.

8.6 All court attendances are noted on the file in date order with:

- (i) Coram;
- (ii) date and venue of court appearance;
- (iii) the name of the lawyer attending on behalf of the legally assisted person;
- (iv) details of other parties' representative/s;
- (v) summary of any negotiations and orders or directions made;
- (vi) start and finish time/s of the court attendance; and
- (vii) the date proceedings have been adjourned to or the outcome of the matter.

8.7 All Conferences, Views, Juvenile Justice Centre Visits and any other specific attendances must be noted on file including at a minimum, details of the length and type of attendance and the date on each occasion.

8.8 Receipts or other verifying evidence for all disbursements claimed for payment from Legal Aid NSW are retained in a separate section of the file.

9. Training

A lawyer who is a member of the panel will:

9.1 Undertake training as required by Legal Aid NSW.

9.2 Complete at least five CPD units each year specifically relevant to the practice of representing children and/or advocacy.

10. Definitions

10.1. Duty

For private lawyers, a “duty” matter is presently defined as Local Court matters including first appearances, adjournments, mentions, bail applications and pleas. “Duty” matters do not include defended hearings, matters requiring expenditure and adult committal hearings.

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10.2. Difficult & Complex Matters

A matter is difficult and complex if:

- The child has significant difficulty dealing with the legal system because of a serious
 - psychiatric condition
 - developmental disability
 - intellectual disability
 - physical disability
 - drug problem
- The child is homeless
- The child is alleged to have committed a serious children's' indictable offence
- The child may be sentenced in the District Court
- It involves multiple co accused
- The hearing is expected to take more than two days
- There is a real possibility of a control order being imposed