

# YOUNG OFFENDERS ACT

A chapter taken from [\*A practitioner's Guide to Criminal Law\*](#) (2<sup>nd</sup> ed) NSW Young Lawyers, 2003, ISBN 0957838271) amended on 5/12/03

The [\*Young Offenders Act 1997\*](#) (NSW) ("YOA") establishes an alternate regime of dealing with young persons who commit certain offences by diverting them from the Children's Court.

The YOA provides the legislative framework for the giving of warnings, cautions and youth justice conferences ("YJC").

All sections referred to hereunder are pursuant to the YOA unless otherwise specified.

## A. OVERVIEW OF THE YOUNG OFFENDERS ACT

### 1. Objectives of the YOA

The objectives of the YOA are outlined in section 3 as follows:-

- To establish a scheme that provides an alternative process to court proceedings for dealing with children who commit certain offences through the use of YJCs, cautions and warnings; and
- To establish a scheme for the purpose of providing an efficient and direct response to the commission by children of certain offences; and
- To establish and use YJCs to deal with alleged offenders in a way that;
  - Enables a community based negotiated response to offences involving all affected parties; and
  - Emphasises restitution by the offender and acceptance of responsibility by the offender for his or her behaviour; and
  - Meets the needs of victims and offenders.

The principles of this diversionary scheme, that are outlined in section 7, include:-

- The least restrictive form of sanction is to be applied against a young person who is alleged to have committed an offence.
- The young person is to be informed about the right to obtain legal advice.

- Criminal proceedings are not to be instituted against a young person if an alternate (and appropriate) way of dealing with the young person is available.
- Criminal proceedings are not to be instituted solely to advance the welfare of the young person or family.
- If appropriate, young persons should be dealt with in their communities to assist reintegration and to sustain family and community ties.
- Parents are to be recognised as primarily responsible for the development of the young person.
- Victims are entitled to receive information regarding potential involvement in any action in accordance with the YOA.

## 2. Offences covered by the YOA

The offences covered by the YOA are summary offences and indictable offences that may be dealt with summarily [section 8(1)].

Specific offences not covered by the YOA include [section 8(2)]:

- Those where the principal person investigating the offence is not an “investigating official” within the definition in section 4.
- Traffic offences committed by a young person of licensable age (16 years old);
- Offences that result in the death of any person;
- Sexual offences under sections 61E, 61L, 61M, 61N, 61O(1), (1A) or (2), 66C, 66D, 78Q, 80, 81A, and 81B of the [Crimes Act 1900](#) (NSW).
- An offence under Part 15A (Apprehended Violence) of the *Crimes Act 1900* (NSW).
- An offence under Division 1 of Part 2 of the [Drug Misuse and Trafficking Act 1985](#), that in the opinion of the investigation official or prosecuting authority in more than a small quantity within the meaning of the Act.
- An offence under Division 2 of Part 2 of the *Drug Misuse and Trafficking Act* other than:
  - An offence under section 23(1)(a) or (c) that involves not more than half the small quantity as defined in the Act, or, in exceptional circumstances, where the quantity is more than half the small quantity but less than the total small quantity and it would be in the interests of rehabilitation and appropriate in all the circumstances to deal with it under the YOA; or

- An offence under sections 27 or 28 of aiding, abetting, counseling, procuring, soliciting or inciting the commission of an offence under section 23(1)(a) or (c) that involves not more than half the small quantity as defined in the Act, or, in exceptional circumstances, where the quantity is more than half the small quantity but less than the total small quantity and it would be in the interests of rehabilitation and appropriate in all the circumstances to deal with it under the YOA.

It should be noted that under section 9(2A) all investigating officials must determine whether a child should be dealt with by way of a YOA warning or caution before issuing an infringement notice.

### **3. Eligibility for a YOA option**

To be dealt with under the YOA by way of caution or YJC, the young person must admit the offence (this is distinct from a plea of “guilty”), consent to the caution or YJC and be entitled to be given same [sections 19 and 36].

Any “admission” must be made in the presence of [section 10]:-

- A person responsible for the young person (or a person nominated by the person responsible) or,
- If the young person is over 16 years old - an adult chosen by the young person; or
- A legal practitioner chosen by the young person.

The relevant considerations as to whether a matter should be cautioned or referred to a YJC are as follows [sections 20(3) and 37(3)]: -

- Seriousness of the offence;
- Degree of violence involved in the offence;
- The harm caused to any victim;
- The number and nature of any offences committed by the child and the number of times the child has been dealt with under the YOA;
- Any other matter the official thinks appropriate in the circumstances.

If a caution is given to a child, or the child satisfactorily completes an outcome plan in accordance with a YJC referral, no further proceedings may be taken against the child for any offence in respect of which the caution or YJC was given, or for any other offence in respect of which proceedings could not be commenced if the child had been

convicted of the offence for which the caution or conference was given [sections 32 and 58].

The investigating official must keep a record of any warning, caution or YJC [sections 17, 33, and 59]. This is usually by way of a Court Alternatives History.

## **B. YOUNG OFFENDERS ACT SENTENCE OPTIONS**

### **1. Warnings**

- An “on-the-spot” warning may be given for a summary offence covered by the YOA if the circumstances of the offence do not involve violence and the investigating official considers it appropriate [section 14].
- A warning cannot have any conditions attached or impose any sanction [section 15].
- A warning may be given at any place, including the place where the child is found [section 15(1)]. Arrest should not be executed for the purpose of giving a warning.

### **2. Cautions**

- A young person is entitled to be dealt with by way of caution if the investigating official determines that a warning is not appropriate or a warning may not be given. The exception is where the investigating official is of the view that a caution is not appropriate because it is contrary to the “interests of justice” to deal with the matter by way of caution [section 20(1)& (2)].
- Notwithstanding the above, a young person is not entitled to be dealt with by caution in relation to an offence if the young person has been dealt with by caution on three (3) or more occasions. This exemption applies whether it is the police officer, youth liaison officer or court that is considering the caution and whether the caution is sought for offences of the same or of a different kind to the previously administered cautions [section 20(7)].
- The matter may be referred to a specialist youth officer to make this decision [section 20].
- The young person is to receive written notice prior to receiving the caution [section 24]. If practicable, a caution must be given not less than 10 days and not more than more 21 days after notice of the caution is given [section 26]. A caution must be given at a police station [section 26 (2)] but may be given at another place if the person giving the caution is of the opinion that it is appropriate to do so [section 26(3)].
- At any time before the caution is given the young person may decide not to proceed and to have the matter dealt with by a court [section 25(1)].

- The investigating official may determine that it is not in the interests of justice to deal with the matter by way of caution and refer the matter to a specialist youth officer to consider whether action should be taken in regard to a YJC referral [section 25(2)].
- The Children’s Court may give a caution under the YOA if the offence is one for which a caution may be given. If the court exercises this option, the Local Area Commander of the police station (closest to where the offence occurred) is given written of this decision and the reasons for the decision [section 31]. The Children’s Court regularly dispose of matters by way of YOA caution in instances where a young person has exercised a “right to silence” at the police station and/ or does not make the required “admission” to the offence.

### **3. Youth Justice Conferencing**

- The principles and purpose of conferencing are outlined in section 34. Any legal practitioner appearing in the Children’s Court should be familiar with this section.
- A young person is entitled to be dealt with by way of referral to a YJC if the investigating official determines that the matter could not appropriately be cautioned [section 37]. The matter must be referred to a specialist youth officer to make this decision.
- The Director of Public Prosecutions (“DPP”) or court may refer a matter to a YJC [section 40].

At any time before a YJC is held:

- The young person may decide not to proceed and elect to have the matter dealt with by a court [section 44(1)].
- A specialist youth officer who refers a matter to a YJC may determine that it is not in the interests of justice for a matter to be dealt with by way of YJC and refer the matter for the commencement of proceedings or for a caution [section 44(2)].
- The DPP or court (if either was the referring body) may determine that the matter should not be dealt with by way of conference [section 44(3)].
- A child referred to a YJC is entitled to be advised (but not represented) by a legal practitioner [section 50(1)] unless the conference convenor permits the child to be represented either generally or subject to conditions [section 50(2)].

The following persons are entitled to attend a YJC:

- The young person;
- The conference convenor;

- A person responsible for the young person;
- A member of the child's family or extended family;
- An adult chosen by the child;
- A legal practitioner *advising* the child;
- The investigating official;
- A specialist youth officer;
- Any victim or person chosen by the victim as a representative;
- A support person [section 47(1)];
- Other persons (such as a respected member of the community, interpreter, social worker) may be "invited" to attend the conference [section 47(2)].

The aim of the conference is to reach agreement on an outcome plan that the young person can complete. The following principles apply to outcome plans:

- The outcome plan may provide for an oral or written apology, reparation to the victim, participation by the child in a program or action towards the reintegration of the child into the community [section 52(2)].
- The outcome plan must contain outcomes that are realistic and appropriate and sanctions that are not more severe than those that a court may impose.
- The outcome plan must set a timeframe for implementation and cannot impose an obligation to do community service work that exceeds the maximum amount that may be imposed according to the [Children \(Community Service Orders\) Act 1987](#) (previously outlined in this chapter) [section 52, r. 19].
- The Act and regulations may make provision regarding what must be included in an outcome for a particular type of offence. An example of such a provision is that which related to juvenile arson or bushfire offenders.

## **D. PRACTICAL TIPS ON THE YOA**

Following are some practical tips for dealing with matters under the YOA:-

- If a legal representative is seeking to have a matter finalised under the YOA by way of a caution or YJC, an "admission" (not a plea of guilty) to the offence is indicated to the court. If the Magistrate does not accede to the request to deal

with the matter under the YOA, the young person may then enter a plea of “guilty” and the matter will be dealt with under the CCPA.

- If possible, it is preferable to have a matter finalised by way of a YOA caution rather than a caution under section 33(1)(a) CCPA, because a YOA caution is an entry on a “Court Alternative History” as opposed to an entry on the Criminal History.
- Note that any statement, confession, admission or information made or given by a child during the giving of a caution or conference is not to be admitted in evidence in any subsequent criminal or civil proceedings [section 67 YOA].
- It is well recognised in case law that deprivation of liberty following arrest is the most restrictive form of sanction. In light of the principles of the YOA, more particularly, “that the least restrictive form of sanction is to be applied against a child who is alleged to have committed an offence, having regard to matters required to be considered under this Act”, it is inappropriate and unsatisfactory for a child to be arrested for the purpose of delivery of a YOA option, or to be arrested when the application of a YOA option would have been an appropriate penalty. Arrest, when a YOA option would have been appropriate, may be relevant to sentence and (in appropriate matters) form the basis for submissions that a child be extended the benefit of more lenient YOA option than otherwise appropriate in the absence of arrest.
- It is often thought that any offence involving domestic violence is excluded from the Act. This is not correct. The only domestic violence offence specifically excluded from the Act is the charge of “Contravention Apprehended Domestic Violence Order” (“ADVO”). An assault or malicious damage offence, which arises in a domestic situation, is not specifically excluded from the Act. If appearing for a client charged with an assault and Contravene ADVO (if otherwise eligible for a YOA option) it may be appropriate to make representations that the Contravene ADVO charge be withdrawn or alternatively, seek to have the assault referred under the YOA and adjourn the sentence of the contravene ADVO charge until completion of the outcome plan for the assault matter.
- The [Young Offenders Regulation](#) [Regulation 19A] makes particular provision for the referral of juvenile arson and bushfire offenders to a YJC. Regulation 19A applies to a child that commits an offence that consists of the lighting of a bushfire or the destruction or damage of property by means of fire. An outcome plan for one of these offences must include:
  - Viewing a video on the effects of fire
  - A meeting between the child and any victim of the offence who is willing to meet the child;
  - The making of reparation for the offence, such as:

- Assistance in clean-up operations and in treatment of injured animals; and
- The payment of compensation (not exceeding the amount that a court may impose on conviction for the offence).

In addition, the Department of Juvenile Justice released a Supplementary Guideline for dealing with these offences that makes provision for the psychological assessment of a child prior to participating in the youth justice conference and for the participation in the youth justice conference by various Rural Fire Services and Bushfire Squads. Regulation 19A is a particularly useful tool for dealing with the more serious arson and bushfire offences as the onerous nature of the requirements of the outcome plan rebut any notion that a referral to a YJC is a “soft option”.