

CHILDREN'S LEGAL SERVICE CONFERENCE 2015

Practical tips for Local Court practitioners picking up Children's Court matters

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ALWAYS check the date of birth – rebuttable presumption

show cause for bail

BAIL ACT 2013 - SECT 16A

16A Accused person to show cause for certain serious offences

- (1) A bail authority making a bail decision for a show cause offence must refuse bail unless the accused person shows cause why his or her detention is not justified.
- (2) If the accused person does show cause why his or her detention is not justified, the bail authority must make a bail decision in accordance with Division 2 (Unacceptable risk test-all offences).
- (3) **This section does not apply if the accused person was under the age of 18 years at the time of the offence.**

STANDARD NON-PAROLE PERIOD

CRIMES (SENTENCING PROCEDURE) ACT 1999 - SECT 54D

54D Exclusions from Division

- (1) This Division does not apply to the sentencing of an offender:

- (a) to imprisonment for life or for any other indeterminate period, or
- (b) to detention under the *Mental Health (Forensic Provisions) Act 1990* .
- (2) This Division does not apply if the offence for which the offender is sentenced is dealt with summarily.
- (3) This Division does not apply to the sentencing of an offender in respect of an offence if the offender was under the age of 18 years at the time the offence was committed.

GRAFFITI offences & the YOA – POLICE cannot but COURTS can

Police cannot caution for a graffiti offence -

YOUNG OFFENDERS ACT 1997 - SECT 18

18 Offences for which cautions may be given

A caution may be given for an offence covered by this Act, other than a graffiti offence or any other offence prescribed by the regulations for the purposes of this section.

Note : Section 8 sets out offences covered by this Act. Under section 31, a court may give a caution for a graffiti offence.

BUT – the court can

31 Cautions by courts

- (1) A child may be given a caution by a court if:
 - (a) the offence is one for which a caution may be given under Division 1 or is a graffiti offence, and
 - (b) the child admits the offence.

Police cannot refer to Youth Justice Conference for a graffiti offence -

37 Entitlement to be dealt with by conference

(1) A child who is alleged to have committed an offence (**other than a graffiti offence**) for which a conference may be held is entitled to be dealt with by holding a conference if the investigating official determines that the matter is not appropriate for a caution.

BUT – the court can

40 Referrals for conferences by DPP and courts

(1A) A court may refer a matter involving a child who is alleged to have committed an offence to a conference administrator for a conference if:

- (a) the offence is one for which a conference may be held, and
- (b) the child admits the offence, and
- (c) the court is of the opinion that a conference should be held under this Part.

And when the court does refer a graffiti offence to a YJC, any outcome plan MUST include -

YOUNG OFFENDERS REGULATION 2010 - REG 9

9 Outcome plans in respect of graffiti offences

(1) This clause applies to a child who admits to an offence covered by the Act that consists of:

- (a) an offence against section 5 or 6 of the *Graffiti Control Act 2008* or another crime involving graffiti, or
- (b) damage to property by means of any graffiti implement (within the meaning of the *Graffiti Control Act 2008*).

(2) For the purposes of section 52 (6) (e) of the Act, an outcome plan for a child to whom this clause applies must provide for at least one of the following:

- (a) the making of reparation for the offence, such as:
 - (i) the performance of graffiti removal work or, if such work is not available, community service work comparable to the performance of such work, and
 - (ii) the payment of compensation (not exceeding the amount that a court may impose on conviction for the offence),
- (b) participation in a personal development, educational or other program,
- (c) the fulfilment of any other obligation by the child:
 - (i) that is suggested by any victim of the offence who personally attends the conference, and
 - (ii) that is consistent with the objects of the Act.

(3) This clause does not limit any other matter for which an outcome plan may provide.

(4) This clause does not affect the requirements of the Act relating to the agreement of the child and victims of the offence to the outcome plan.

GRAFFITI offences in general

GRAFFITI CONTROL ACT 2008 - SECT 13B

13B Alternative and additional actions to imposing penalty for graffiti offences under sections 4 (2) and 5

(1) A court may, instead of imposing a fine on a person for **an offence under section 4 (2) or 5**, make a community service order under the *Crimes (Sentencing Procedure) Act 1999* or the *Children (Community Service Orders) Act 1987* directing the person to perform **community service work**, as the case requires.

(2) A court may, in addition to or instead of imposing a fine on a person, sentencing the person to imprisonment or imposing any other penalty on the person for an offence under section 4 (2) or 5, **make a driver licence order**.

13C Driver licence orders

(1) A court may make any of the following orders ("**driver licence orders**") under section 13B (2):

- (a) if the person is the holder of a learner licence or provisional licence-an order extending the person's learner licence period or provisional licence period, respectively, for a period of 6 months, or a lesser period specified in the order, with effect from the day on which the learner licence period or provisional licence period would otherwise end,
- (b) an order requiring the person not to incur the same or more than the threshold number of demerit points applying to the person under section 13E for a period of 6 months or a lesser period specified in the order, commencing on the day on which the order is made (the "**graffiti licence order period**").

(2) A court must not make an order under subsection (1) (b) if 10 or more demerit points have been recorded against the person in the demerit points register during the 3 year period immediately before the order is made.

BUT – its ONLY for graffiti offences under s4(2) and s5 of the *Graffiti Control Act 2008*.

GRAFFITI CONTROL ACT 2008 - SECT 4

Marking premises or property

4 Marking premises or property

(1) A person must not, without reasonable excuse (proof of which lies on the person), intentionally mark any premises or other property, unless the person has first obtained the consent of the following:

- (a) in relation to premises that are occupied-the occupier or person in charge of the premises,
- (b) in relation to premises that are unoccupied or other property-the owner or person in charge of the premises or property.

Maximum penalty: 4 penalty units.

(2) A person is guilty of an offence under this subsection if the person commits an offence under subsection (1) in circumstances of aggravation.

Maximum penalty: 20 penalty units or imprisonment for 12 months.

- (3) For the purposes of this section, a person commits an offence in "**circumstances of aggravation**" if the person intentionally marks the premises or other property:
- (a) by means of any graffiti implement, or
 - (b) in such a manner that the mark is not readily removable by wiping or by the use of water or detergent.
- (4) A court that convicts a person of an offence under subsection (2) must not sentence the person to imprisonment unless the person has previously been convicted of an offence under this section or section 5 (or under section 10A or 10B of the *Summary Offences Act 1988* as in force before their repeal by this Act) on so many occasions that the court is satisfied that the person is a serious and persistent offender and is likely to commit such an offence again.
- (5) Subsection (1) does not apply to the marking of any public footpath or public pavement with chalk, including, but not limited to, marking out a hopscotch or handball court with chalk.

5 Possession of graffiti implement

- (1) A person must not have any graffiti implement in the person's possession with the intention that it be used to commit an offence under section 4 (2).
Maximum penalty: 10 penalty units or imprisonment for 6 months.
- (2) A court that convicts a person of an offence under this section must not sentence the person to imprisonment unless the person has previously been convicted of an offence under this section or section 4 (2) (or under section 10A or 10B of the *Summary Offences Act 1988* as in force before their repeal by this Act) on so many occasions that the court is satisfied that the person is a serious and persistent offender and is likely to commit such an offence again.
- (3) If a person is convicted of an offence under this section, the court may, in addition to any other penalty it may impose, make an order that the graffiti implement be forfeited to the Crown, and the graffiti implement is forfeited accordingly.

So, if it's –

- Any of the other offences under the *Graffiti Control Act*; or
- A 'graffiti type' offence charged under the *Crimes Act 1900*

Then these 'additional actions' can't apply.

Also, if a young person has been dealt with under the s195 malicious damage provisions of the *Crimes Act*, then the YOA can be used.

ERISP admissibility

CHILDREN (CRIMINAL PROCEEDINGS) ACT 1987 - SECT 13

13 Admissibility of certain statements etc

(1) Any statement, confession, admission or information made or given to a member of the police force by a child who is a party to criminal proceedings shall not be admitted in evidence in those proceedings unless:

(a) there was present at the place where, and throughout the period of time during which, it was made or given:

(i) a person responsible for the child,

(ii) an adult (other than a member of the police force) who was present with the consent of the person responsible for the child,

(iii) in the case of a child who is of or above the age of 14 years-an adult (other than a member of the police force) who was present with the consent of the child, or

(iv) an Australian legal practitioner of the child's own choosing, or

(b) the person acting judicially in those proceedings:

(i) is satisfied that there was proper and sufficient reason for the absence of such an adult from the place where, or throughout the period of time during which, the statement, confession, admission or information was made or given, and

(ii) considers that, in the particular circumstances of the case, the statement, confession, admission or information should be admitted in evidence in those proceedings.

(2) In this section:

(a) a reference to a person acting judicially includes a reference to a person making a determination as to the admissibility of evidence in committal proceedings, and

(b) a reference to criminal proceedings is a reference to any criminal proceedings in which a person is alleged to have committed an offence while a child or which arise out of any other criminal proceedings in which a person is alleged to have committed an offence while a child, and

(c) a reference to a person responsible for a child does not include a member of the police force (unless he or she has parental responsibility for the child).

(3) Nothing in this section limits or affects the admissibility in evidence in any criminal proceedings against a child of any statement or information that the child is required to make or give by virtue of the provisions of any Act or law.

Was hotline called (ME & LT / Huyhn / FE) and what advice was given?

132. It is improper for police investigating the commission of a crime to persist in questioning a suspect after he or she has indicated an unwillingness to answer any more questions: *R v Ireland* [1997] HCA 21; 126 CLR 321 at 327 per Barwick CJ.

133. In *R v Plevac* (1995) 84 A Crim R 570, at 579-581, the Court of Criminal Appeal outlined the principles that apply when questioning a suspect. The first question is whether the suspect is willing to answer questions. If the suspect is willing to answer questions, the questioning must be fair and must not amount to undue insistence or pressure. The Court said:

"Police should not persist with such an interrogation after the suspect has indicated that he or she does not wish to answer further questions... although merely because a suspect says he does not wish to answer, or will not answer, any further questions does not render inadmissible answers to further questions which the suspect does answer provided the questions are fair and proper and the answers are otherwise admissible."

134. The accused declined, through Ms Hopgood, to participate in an interview and also declined to have her refusal to answer questions filmed. The unequivocal communication of her intention was disregarded. She was led to the interviewing room in utter derogation of her right to silence.

135. I regard the contravention of the accused's rights by Detective Gibson as very grave.

The weighing exercise under s 138(1) of the Evidence Act

136. I am not satisfied that the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which these admissions have been obtained. Accordingly, s 138(1) requires that the admissions not be admitted.

Section 90 of the Evidence Act

137. For substantially the same reasons as given in respect of the first interview, I am persuaded that, having regard to the circumstances in which the admissions were made, it would be unfair to the accused to use the evidence obtained in the second interview. Had I not been persuaded that s 138 prohibited its admission I would have exercised my discretion under s 90 to reject the record of the second interview.

Summary

138. For the reasons given above, I exclude the interview with the accused on 12 July 2012 and the ERISP conducted with the accused on 2 August 2012.

Charged after 18 – for an offence before 18

If an adult under 21 years of age has been charged with an offence arising when they were under 18, the matter must be listed before the Children's Court.

If an adult has been charged with an offence arising from when they were under 18 but they were not charged until they were 21, then the matter goes to the Local Court (see section 28 of the *Children (Criminal Proceedings) Act*).

If a child was convicted in their absence, the warrant is recalled before the Children's Court, regardless of the age of the accused when the warrant is executed.

RIGHT TO SILENCE – qualifications and exceptions

EVIDENCE ACT 1995 - s89A Evidence of silence in criminal proceedings for serious indictable offences

(1) In a criminal proceeding for a serious indictable offence, such unfavourable inferences may be drawn as appear proper from evidence that, during official questioning in relation to the offence, the defendant failed or refused to mention a fact:

- (a) that the defendant could reasonably have been expected to mention in the circumstances existing at the time, and
- (b) that is relied on in his or her defence in that proceeding.

(2) Subsection (1) does not apply unless:

- (a) a special caution was given to the defendant by an investigating official who, at the time the caution was given, had reasonable cause to suspect that the defendant had committed the serious indictable offence, and
- (b) the special caution was given before the failure or refusal to mention the fact, and
- (c) the special caution was given in the presence of an Australian legal practitioner who was acting for the defendant at that time, and
- (d) the defendant had, before the failure or refusal to mention the fact, been allowed a reasonable opportunity to consult with that Australian legal practitioner, in the absence of the investigating official, about the general nature and effect of special cautions.

(3) It is not necessary that a particular form of words be used in giving a special caution.

(4) An investigating official must not give a special caution to a person being questioned in relation to an offence unless satisfied that the offence is a serious indictable offence.

(5) This section does not apply:

- (a) to a defendant who, at the time of the official questioning, is under 18 years of age or is incapable of understanding the general nature and effect of a special caution, or
- (b) if evidence of the failure or refusal to mention the fact is the only evidence that the defendant is guilty of the serious indictable offence.

(6) The provisions of this section are in addition to any other provisions relating to a person being cautioned before being investigated for an offence that the person does not have to say or do anything. The special caution may be given after or in conjunction with that caution.

(7) Nothing in this section precludes the drawing of any inference from evidence of silence that could properly be drawn apart from this section.

(8) The giving of a special caution in accordance with this section in relation to a serious indictable offence does not of itself make evidence obtained after the giving of the special caution inadmissible in proceedings for any other offence (whether or not a serious indictable offence).

(9) In this section:

"official questioning" of a defendant in relation to a serious indictable offence means questions put to the defendant by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of the serious indictable offence.

"special caution" means a caution given to a person that is to the effect that:

- (a) the person does not have to say or do anything, but it may harm the person's defence if the person does not mention when questioned something the person later relies on in court, and
- (b) anything the person does say or do may be used in evidence.

Note : The Commonwealth Act does not include this section.

Traffic matters for <18 in Local Court

Section 28(2)

Notwithstanding subsection (1), the Children's Court does not have jurisdiction to hear or determine proceedings in respect of a traffic offence that is alleged to have been committed by a person unless:

- (a) the offence arose out of the same circumstances as another offence that is alleged to have been committed by the person and in respect of which the person is charged before the Children's Court, or
- (b) the person was not, when the offence was allegedly committed, old enough to obtain a licence or permit under the *Road Transport Act 2013* or any other applicable Act authorising the person to drive the motor vehicle to which the offence relates.

This is 16 years for car licence and 16 years and 9 months for motor cycle.

Paper included in your bundle about Children's Traffic matters. Where they are dealt with in the Local Court - section 210 is very important.

CRIMINAL PROCEDURE ACT 1986 - SECT 210

Penalties applying to traffic offences committed by children

210 Penalties applying to traffic offences committed by children

(1) The Local Court may deal with a child found guilty of a traffic offence in accordance with Division 4 of Part 3 of the *Children (Criminal Proceedings) Act 1987* .

(2) In so dealing with a child, the Local Court has and may exercise the functions of the Children's Court under that Division as if the Local Court were the Children's Court and the offence were an offence to which the Division applies.

(3) The Local Court must not impose a sentence of imprisonment on a child found guilty of a traffic offence.

(4) In this section:

"child" means a person who was under 18 years when the traffic offence was committed and under 21 years when summary proceedings for the offence were commenced,

"traffic offence" means an offence arising under a provision of:

- (a) the road transport legislation (within the meaning of the *Road Transport Act 2013*) or the former road transport legislation (within the meaning of Part 2 of Schedule 4 to that Act), or
- (b) the *Roads Act 1993* , or

(c) the *Motor Vehicles (Third Party Insurance) Act 1942* , or

(d) the *Recreation Vehicles Act 1983* , or

(e) the *Motor Accidents Compensation Act 1999* ,

in respect of the use, standing or parking of a motor vehicle within the meaning of that provision.

Note : Division 4 of Part 3 of the *Children (Criminal Proceedings) Act 1987* sets out the penalties which the Children's Court may impose on a child who has been found guilty of a summary offence.

Children & Contributions

Where legal aid is sought by a child (under 18 years) for any criminal proceedings to be held outside the Children's Court (Children's Court matters not being subject to the Means Test) including appeals to the District Court from a decision of a Children's Court magistrate, the Means Test is applied to the income and assets of the child only and **not** to the income and assets of parents or financially associated persons.

In assessing means for a child for a DC severity appeal, it is ONLY the income and assets of the child that count, and NOT the income and assets of parents or financially associated persons. It is this same means test that is used to decide on contribution, and so that takes child appellants straight into the category of exceptions or exceptional or whatever the term is.

The policy of not going past the child and onto any parent or financially associated person has NOT changed, and everyone seems to be getting confused about this somehow.