Chapter 11
Youth justice

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This chapter relates to the legislation and system of youth justice operating in Queensland. If a section is cited without an Act being specified, the section refers to the *Youth Justice Act 1992* (Qld) (Youth Justice Act). The Department of Justice (Youth Justice Services) (previously the Department of Communities) will often be referred to as 'the department'.

A. Introduction to youth justice in Queensland

11-1 The principles of the *Childrens Court Act 1992* (Qld) and the Youth Justice Act

The Youth Justice Act and *Childrens Court Act 1992* (Qld) both came into effect on 1 September 1993. These Acts substantially reframed the Queensland youth justice system. The new legislation was significantly different from the welfare orientation of the previous legislation, the *Childrens Services Act 1965* (Qld).

In 1996, the Youth Justice Act was amended to:

- emphasise the role and responsibility of parents in youth justice matters
- allow for victim and community participation in some youth justice matters
- increase court and police powers to deal with young offenders
- introduce methods of dealing with young offenders (e.g. conferencing) as alternatives to formal court involvement.

In 2002, the *Juvenile Justice Amendment Act 2002* (Qld) substantially amended the Youth Justice Act. Some of the amendments dealing with publication and confidential information commenced on 16 December 2002, while the remainder commenced on 1 July 2003.

Some major amendments included:

- removing the right of election to the district court, which made the Childrens Court of Queensland the predominant higher court for youth justice matters
- encouraging the increased use of diversionary options by police and the courts, such as cautioning and conferencing, and making these options more culturally appropriate
- enshrining most of the provisions regarding bail into the Youth Justice Act from the *Bail Act 1980* (Qld) and removing the 'show cause' provisions

- creating a new sentence order called an intensive supervision order for 'at-risk' children between 10 and 13 years, and renaming other sentence orders
- consolidating all breach provisions for community-based orders
- clarifying the child/adult interface, i.e. when children are dealt with as adults under the Youth Justice Act.

In 2010, the Youth Justice Act was amended again. The most obvious amendment was that the Act's name changed from Juvenile Justice Act to Youth Justice Act.

Other major amendments included:
- ensuring that a court accounts for the eventual sentence outcome when considering bail and clarifying when a child can be remanded for their own safety
- allowing a mechanism for children to be forced to appear in court when an indefinite referral to a Youth Justice Conference has been unsuccessful and the matter must be returned to court
- allowing the childrens court to deal with breaches of a judge's supervised release orders
- allowing the court to set the date that a child will be transferred to adult custody if the court sentences the child to detention.

In 2010, the Act was again amended to remove youth justice conferencing as a sentencing outcome and to introduce boot camp orders as a sentencing option for those prescribed areas in which a boot camp program was available.

In 2014, the most extensive amendments since the introduction of the Youth Justice Act in 1992 were introduced. Amendments included:
- removing detention as a sentence of last resort
- allowing the identifying particulars of repeat offenders to be published
- opening the childrens court to the public for repeat offenders
- childhood findings of guilt became admissible in adult sentencing proceedings despite convictions having not been recorded
- automatically transferring 17-year-olds who have more than six months remaining on their sentence to adult imprisonment
- mandatory sentencing for children convicted of a second motor vehicle offence in prescribed areas (regions where a boot camp operates)
- allowing children who have absconded from boot camps to be arrested and brought to court without first being given a warning
- abolishing sentence reviews.

The Youth Justice Act provides a justice system for children who appear before the courts in relation to offending behaviour. Its basic premise is that children who commit offences should be brought to account in a way that recognises that children are prone to impulsive acts and at a vulnerable point in their development. Most youth offending is opportunistic and transitory, i.e. unplanned and not repeated.

11-2 Principles of youth justice

The principles of youth justice are now enshrined in the 'Charter of Youth Justice Principles' in Schedule 1 of the Youth Justice Act. These principles underlie the operation of the Act. Some of the main principles are as follows:

Vulnerability of children

Children are vulnerable in dealings with people in authority. Therefore, the Act provides protections over and above those of an adult. These protections should operate during an investigation or proceeding that relates to an offence. The legal practitioner's duty is to adequately guard these rights throughout the legal process.

As the duty lawyer, you must ensure that a matter is heard in the correct jurisdiction. If a young person is charged with an offence that occurred when they were 16 years old or younger, and will be dealt with in court before they are 18 years old, the childrens court must hear the matter.

Accountability of children

Children have a sense of right and wrong, and justice; they expect that illegal acts will have consequences. However, at the same time, due to a child's age, they may have a limited, though developing, understanding of the nature or consequences of their actions. The legislation accounts for this developing awareness.

Diversion

A child should be diverted from the criminal justice system wherever possible, unless the offence's nature and seriousness, and the child's criminal history, indicate that a proceeding should begin. Diversionary options under the Youth Justice Act include cautioning, conferencing and referral to drug diversion programs. A court can order a young person to be diverted from the court system.

Fair and participatory proceedings

Proceedings commenced against children should be fair and just. Further, the child should have the opportunity to participate in and understand the proceeding. Therefore, courts that deal with children need procedures and rules that children and their parents can easily understand.

Sentencing

A court's sentence should be:

- appropriate considering the young offender's age and/or maturity
- in proportion to the offence's seriousness
- specific and determinate, so the child will know what is required of them and when a sentence will end.

As well as being a consequence of an offence, punishment should have a clear preventative and rehabilitative purpose. Sentences should not be made on the basis of a child's need for care or welfare support. Meeting a child's welfare needs should be separate from the sentencing process.

Welfare assistance is more likely to be effective if is a voluntary agreement rather than a punishment. The Department of Justice and Attorney-General (Youth Justice Services) will address any inquiries about welfare issues.

Although a sentence of detention is no longer a last resort, the Act acknowledges a sentence to be served in the community is better for the child's reintegration into the community.

Impact of offending behaviour on victim

When sentencing a child, a court must consider the offence's impact on the victim, as well as the community surrounding both the victim and child offender. The Youth Justice Act allows the victim to seek restitution and compensation from the offender only if the child offender is able to pay it. The Act also allows an order to be made against a parent if the court deems their parenting (or lack therefore) contributed to the offending and subsequent loss to the victim. Duty lawyers cannot act for parents in these circumstances. Parents should be advised to seek their own independent legal advice.

11-3 The childrens court

The Childrens Court of Queensland was established by the Childrens Court Act. The forum was specifically developed to deal with child offenders. The child's general right to elect to be dealt with by a higher court other than the childrens court was abolished by the 2002 amendments to the *District Court of Queensland Act 1967* (Qld) (see s 61A of that Act).

However, the district court can still try or sentence a child on indictment if either the child is also charged as an adult for an offence or proceedings have been removed to a district court under the Act; for example, if a child is co-accused with an adult (Youth Justice Act, ss 107–113).

Therefore, if a child who is charged with an indictable offence (other than a Supreme Court offence) elects to be dealt with by a higher court, the childrens court must generally deal with the charge, constituted by a childrens court judge. However, the court can be constituted by a district court judge if no childrens court judge is available (Childrens Court Act, s 5(2)).

If the childrens court is hearing a child's charge, that child has the right to a trial by jury.

The Childrens Court Act allows the appointment of a district court judge as childrens court judge. His Honour Judge Shanahan is currently President of the Childrens Court of Queensland. The president must provide an annual report of the childrens court's administration and operation to the attorney-general. The president may also issue general directions regarding the court's procedures. These procedural directions apply specifically to the childrens court and magistrates courts sitting as childrens courts.

The Department of Justice and Attorney-General (Youth Justice Services) has a statutory role in the courts dealing with children.

A departmental officer must be present in a court whenever a child appears. Officers from this department have a right to be heard regarding particular issues (Youth Justice Act, s 74).

A childrens court will be constituted by a childrens court magistrate, a magistrate, or two justices of the peace (Childrens Court Act, s 5). However, s 29 of the *Justices of the Peace and Commissioners for Declarations Act 1991* (Qld) limits the power of two justices to dealing with a procedural action or a guilty plea on a simple offence. The justices cannot order detention or conditional release. One justice cannot comprise a childrens court and, therefore, cannot deal with a child alleged to have committed an offence.

A child who is arrested on an offence must be brought promptly before a childrens court (Youth Justice Act, s 49).

11-4 Youth Justice Act to apply to children in all courts

The Youth Justice Act provides an exclusive code for sentencing children (s 149). It ensures that all courts deal with children according to the Youth Justice Act's objectives and principles (Charter of Juvenile Justice Principles, Schedule 1, and s 3).

11-5 Who may be present at court?

Childrens court proceedings

Section 21C of the Childrens Court Act states proceedings for a child who is not a first time offender is to be held in open court.

A first time offender means a child who at any time during proceedings has not been found guilty of an offence.

Section 21D allows a relevant person, the chief executive (child protection) or the child's guardian to make an application to close the court.

Section 21E states the court must close the court when a complainant in a sexual offence is giving evidence. The section allows a list of people who do not have to be excluded.

Sections 20(1) and 20(2) of the Childrens Court Act outline who may be present at court. This section does not apply to a court constituted by a judge (i.e. the Childrens Court of Queensland) hearing a charge on indictment (s 20(5)).

For first time offenders, the following people can be present:

- the child
- the parents or another adult member of the child's family
- a witness giving evidence
- a support person to a complainant giving evidence about a sexual offence

- a person representing a party in the proceeding
- a representative of the department's chief executive
- a representative of the mass media
- other person who, in the court's opinion, will assist the court
- a person who has a proper interest in the proceedings and their presence would not be prejudicial to the child.

A childrens court will be closed to the general public to protect the child who is a first time offender. Therefore, brothers, sisters, cousins and other family members are not permitted unless the court believes they can assist the court. Where relevant, special provisions can be made for Aboriginal or Torres Strait Islander welfare organisations or community justice groups, when making submissions under Childrens Court Act to be present in addition to the child's family (s 20(1)(g)).

An investigating police officer or other person in charge of the case against the child is entitled to be present. Other people, such as other police witnesses, regardless of their interest in the matter, are generally not entitled to remain in court. In situations where several people are present in court, you, as duty lawyer, should clarify their authority to be present. The child may be intimidated by the sight of many people in court.

Supreme Court and district court proceedings (including the Childrens Court of Queensland)

Proceedings in the Supreme Court and district courts are not childrens court proceedings. While these courts are subject to the Youth Justice Act's sentencing provisions, the Childrens Court Act does not apply to the district court or Supreme Court. Therefore, Supreme Court or district court proceedings involving child offenders are open to the general public.

11-6 Who is a child?

The Youth Justice Act defines a child as 'a person who has not turned 17 years' (Youth Justice Act, Schedule 4). Section 6 gives the governor in council the power to extend the definition of a child to include people under 18 years. (This power has not been exercised to date.)

Note: It is relevant to consider the age of the person at the time of the alleged offence. If the person is alleged to have committed the offence after they turned 17 years, the law governing adult offending applies.

Over 17 years—jurisdiction

A person will be treated as a child if they committed an offence as a child (person who has not turned 17 years) and the proceedings were finalised before they turned 18 years (s 140). If the person committed an offence as a child and proceedings first began after the person turned 18 years, the offender must be dealt with as an adult (s 140(1)).

If a child offender has turned 18 years, any continuing proceeding must proceed on the basis that the offender will be sentenced as an adult (s 140(2)). However, note the effect of s 140(4)—'(a)n offender must not be treated as an adult under this section if the court is satisfied that there was undue delay on the part of the prosecution in starting or completing the proceeding'.

If, after finding a child guilty, the court cannot sentence the child because the child has escaped, failed to appear without reasonable excuse or failed to return from a leave of absence during a detention sentence, and has since turned 18 years, the court must sentence the offender as an adult (s 140(3)).

Section 141 gives the court discretion in treating an offender as a child or adult if the offender has also been dealt with in the adult court system and turned 18 years. If found guilty, the court must sentence the offender as an adult.

However, note s 144(2), which indicates that, notwithstanding the person being sentenced as an adult, the sentencing court must consider that the person was a child at the time of the offence and not give a harsher sentence than the person would have received as a child.

Section 144 applies in circumstances where the person:

- is proceeded against as a child
- turns 18 years before the case is completed, and
- has been proceeded against as an adult or sentenced as an adult.

Over 17 years—the effect of orders

Under the Youth Justice Act, the court may make an order against a child even when that child will be an adult before the order's effect has ceased. The order will continue to apply as if the person was a child. Generally, any other proceedings arising from the order, including breaches of the order as an adult, must proceed as if the person was still a child (s 142).

Section 143 gives a court a discretion, when dealing with a proceeding under an order made as a child, to convert a child order to a corresponding adult order. Order conversion can occur only if the person:

- is 18 years when the proceeding arises out of the childhood order, or
- has committed an offence as an adult (over 17 years), which is being proceeded against, or a sentence order has been made regarding the offence.

A conversion will occur only in the case of probation or community service orders. They will be converted to adult probation and adult community service orders. If this occurs, the person will be subject to all the terms and conditions of that adult order. Order administration will then transfer from the Department of Justice and Attorney-General (Youth Justice Services) to the Department of Corrective Services.

You should obtain clear instructions about your client's attitude to having their order converted to an adult order. A conversion may mean that they deal with only one government agency for order administration. However, if the conversion occurs due to an order breach, the order will be converted to the adult order for the remainder of the breach proceedings.

Be aware that the *Penalties and Sentences Act 1992* (Qld) requires a conviction to be recorded upon breach of an adult order (s 143(6)). Additionally, you should advise clients that, while the breach of a child supervised order is not an offence in itself, the breach of an adult order is a separate offence.

11-7 Publication of identifying material

'A person must not publish identifying information about a child who is a first time offender (Youth Justice Act, s 301).

'Identifying information' is 'information that identifies the child, or is likely to lead to the identification of the child, as a child who is being, or has been, dealt with under this Act' (Youth Justice Act, Schedule 4). An amendment to s 20 of the Childrens Court Act now defines any representative of the mass media as a person who may be permitted to be present at a childrens court. Although they can publish details of the case and sentence, identifying the child in any manner is an offence punishable by 1000 penalty units for a body corporate, or 200 penalty units or two years' imprisonment for an individual.

Information is able to be published if the child is not a first time offender, unless an application is made under s 299A of the Youth Justice Act to prohibit publication.

In deciding an application under s 299A (a publication prohibition order), the court must consider:

- the number of the child's previous findings of guilt
- the seriousness of the offence
- the period between the proceeding and any previous offence committed by the child
- the need to protect the community
- the effect of publication on the child's safety or rehabilitation
- the effect of publication on the safety or wellbeing of the person other than the child
- any other relevant matter.

11-8 Dealing with children

Practitioner relationship with a young client

As a duty lawyer, you will have different considerations when appearing for children than when appearing for adults. However, as always, you are there to obtain the best result for the client in the circumstances.

Your personal views about what would benefit the child should not influence submissions you make to the court; for example, 'a probation order might provide an opportunity to address family problems'. Ensure that all submissions you make to the court are directed towards obtaining the best result for the client based on the Youth Justice Act's principles.

Taking instructions

You should take great care to obtain proper instructions from a child client. As well as being confused about court processes, children often have difficulties with court terminology. Carefully ensure that the client understands their options.

Under the Youth Justice Act, you are obligated to explain the plea processes and right of election where applicable. The court is likely to inquire whether you have explained these options to the child. Section 72 outlines the court's duty to ensure that the child and their parents understand the nature of the allegations and the court processes. The court may delegate this duty to the child's legal practitioner.

You should also take instructions about whether the child wants an application to close the court and/or seek a publication prohibition order made if they are not a first time offender. Failure to do so may amount to professional misconduct.

Family involvement

A child may be unduly influenced by friends or relatives. The family must understand that it is the child who is being represented.

Instructions should be sought from the child as to whether they want to have their parent or guardian present in the interview.

If a child changes instructions after consulting with a parent, you should clarify the child's instructions with them alone. If the child is overly influenced by friends or family, they may give you conflicting instructions. In such cases, it may be prudent for you to withdraw from the matter.

In contrast, sometimes the presence of a parent can help identify the difficulties involved in a child's case. Assess the benefit and appropriateness, or otherwise, of a parent's presence in the interview.

During proceedings, the court may seek the views of the parents. These may conflict with the child's instructions, so it is useful to obtain details of their views prior to court.

Parent required to be at court

A parent's presence is generally required in court when a child appears. To ensure that the parents can attend, a court may recommend that the department provide money to assist the parents (s 69(2)). The court has discretion to adjourn proceedings to allow the parents to attend court. You should be aware of this practice, as a child may be disadvantaged if extended remands occur to ensure that parents attend (s 70). Obtain clear instructions from the child about why the parents are not in court and whether the child desires them to be present.

In some cases, the court may actually order a parent to appear before it. A notice will then be issued and served on the parent. If the parent fails to comply with the order, they may be liable to prosecution for noncompliance. Be aware that the child's instructions may conflict with information provided by the parent. Accordingly, if asked to act for the parent, you should consider whether a conflict of interest will arise.

11-9 Dealing with Aboriginal children

When dealing with Aboriginal clients, you need to be aware of the communication styles of some Aboriginal people. An adversarial system is alien to Aboriginal culture. Therefore, the process of asking direct questions and expecting direct answers may not be the most effective way to obtain proper instructions from an Aboriginal client.

Some hints for duty lawyers:

- Respect your client's silence and pauses, as they do not usually indicate a lack of cooperation. Ask your question and then wait for your answer.
- Exchange reciprocal personal details to maintain a real dialogue with your client. This is standard protocol in the Aboriginal community. Letting your client see you as a real person with a personal life can breach some communication barriers.
- Be aware that, if a child is intimidated or confused about a situation, they will often respond with 'gratuitous concurrence'. This means they will give answers that they think you want to hear, generally to try to escape a stressful situation as soon as possible. Many cases of gratuitous concurrence have occurred during police interviews with Aboriginal suspects. Therefore, with Aboriginal clients, it is particularly important to obtain clear instructions from your client regarding any admissions they have made to police.
- Do not try to speak 'Aboriginal English' if you are not an Aboriginal person.
- Take your client through the police evidence, explaining clearly that this is what the police say happened. Wait for agreement or disagreement about each element of the evidence.
- Ensure that your client understands that they choose whether to plead guilty or not guilty.
- Ask one question at a time. Double-barrelled questions often confuse clients.
- Be sensitive. An Aboriginal child may not wish to discuss certain cultural issues. In some cases, it may be helpful to have a general discussion with a relative regarding background information. While this information may not be included as part of your client's instructions, it may enhance your understanding of the issues.
- Be aware that some young Aboriginal people feel that looking into the eyes of an authority figure is disrespectful. Avoiding eye contact with you may be a way of showing respect.

Recommended reading—Eades, D. *Aboriginal English and the Law*, Continuing Legal Education Department of the Queensland Law Society Inc., 1992.

There is a Youth Murri Court in some parts of Queensland that allows the sentencing of young Aboriginal and Torres Strait Islander offenders with input by community elders.

11-10 Criminal responsibility—doli incapax

This is an important defence that can be easily overlooked but has a large impact on children charged with criminal offences.

Under s 29 of the *Criminal Code Act 1899* (Qld), a child under 10 years of age cannot be held criminally responsible.

A child under 14 years of age is presumed not to be criminally responsible. (On 1 July 1997, the *Criminal Law Amendment Act 1997* (Qld) amended s 29 to reduce the age from 15 to 14 years.)

The prosecution must prove beyond reasonable doubt that, at the time of the offence, the accused child had the capacity to know that they should not do the act.

The prosecution can rebut the presumption of the lack of capacity to know they should not do the act only by calling proper admissible evidence. A Court of Appeal reference, *R v F; ex parte Attorney-General* [1998] QCA 97, discusses the issues and evidential requirements. In the initial police interview, police will often address this issue by trying to establish by admission that the child knew their conduct was 'wrong'.

You should ensure that you satisfactorily support s 29 with admissible evidence, and bear in mind both the offence for which the child was charged and the necessary capacity for the offence that must be proved. For example, if a child is charged with being a party to an offence, the court has accepted that acting as a 'lookout' requires proof that the child had the capacity to know that this, not the primary offence (i.e. 'the act done by the child'), was wrong. See the decision of His Honour Judge McGuire in *R v J* (Unreported, Childrens Court of Queensland, No 75 of 1996, 20 June 1996).

B. Prior to commencing proceedings

11-11 Police questioning

The *Police Powers and Responsibilities Act 2000* (Qld) (PPRA) regulates police conduct during questioning. Section 5 of the PPRA makes it clear that Parliament intends for police to comply with the Act's provisions.

Sections 245–268 of the PPRA govern police procedure when interviewing a person charged with an indictable offence. These provisions require the police to allow the person to:

- communicate with a friend or relative
- contact a lawyer and arrange for them to attend the interview.

Specifically, when questioning children, the police must not question a child unless:

- before questioning has started, the child has had the opportunity to speak to a support person, and
- the support person is present during questioning.

11-12 Identifying particulars when child is not arrested

The Youth Justice Act permits police to apply to a childrens court magistrate (after a child has been charged with an offence) to take identifying particulars for a particular range of offences.

'The applicant must give notice of the application to—

(a) the child; and

(b) a parent of the child, unless a parent can not be found after reasonable inquiry; and

(c) the chief executive—Department of Justice and Attorney-General (Youth Justice Services)' (s 25).

The child has a right to legal representation (s 79). However, a court can determine the application in the child's absence if it believes that the application has been served correctly (s 25(4)).

Under s 25(6), a 'court may order the identifying particulars to be taken if it is satisfied, on the balance of probabilities' that:

- someone has committed the charged offence and there is reasonable suspicion that the child is the offender
- forensic evidence of identifying particulars is available from the crime scene that are the same particulars as those sought
- the order must be made for proper investigation.

If the court does make an order, the child must submit to having the identifying particulars taken with a support person present. If they do not comply within seven days (if they are not in custody), they can be further charged under s 25(9).

If the investigation for which the identifying particulars were taken does not result in a sentence against the child, the person who applied for the particulars must destroy them (s 27(1)). If they fail to do so without reasonable excuse, they will be liable to breach of discipline action under s 27(4).

11-13 Admissibility of statements or identifying particulars

'In a proceeding for an indictable offence, a court must not admit into evidence against the defendant a statement, [usually a recorded interview], made or given to a police officer by the defendant when a child, unless the court is satisfied a support person was present with the child at the time and place the statement was made or given' (s 29).

If a support person was not present either during any statement the child made for an indictable offence or at the time identifying particulars were taken (s 26), the evidence is prima facie inadmissible unless:

(a) 'the prosecution satisfies the court there was proper and sufficient reason for the absence of a support person when the particulars were taken; [for example, their presence may have resulted in an accomplice avoiding apprehension or the support person is excluded under the PPRA,] and

(b) the court considers that, in the particular circumstances, the particulars should be admitted into evidence'.

However, despite the presence of one of these people, the statement still may not be admissible. In *R v C* (Unreported, Queensland Court of Appeal, CA 437 of 1996, Fitzgerald P, McPherson JA and Helman J, 22 April 1997), the Court of Appeal ruled that, despite the presence of a justice of the peace, which satisfied the requirements of s 9E(2) (the previous equivalent to s 29(2)), the child's statement was ruled inadmissible by way of the court's discretion as legislated under s 9E(5). The justice of the peace did not understand the child interviewee's rights; was described as an unreliable witness; and was in a poor physical state.

The Court of Appeal has further ruled that s 9E (now s 29) applies to statements made to police officers, not statements made to people acting under the direction of police officers (see *R v T and M; ex parte Attorney-General* [1999] 2 Qd R 424).

Note: Section 29 does not apply to simple or regulatory offences, or any statement made by a child defendant after the child has turned 17.

11-14 The support person

Generally, children require special protection because of their immaturity and lack of understanding about their legal rights. Section 29 refers to a support person for police questioning and section 26 refers to a support person for obtaining identifying particulars.

According to Schedule 6 of the PPRA, the support person must be:

(b) 'for a child—

(i) a parent or guardian of the child; or

(ii) a lawyer acting for the child; or

(iii) a person acting for the child who is employed by an agency whose primary purpose is to provide legal services; or

(iv) an adult relative or friend of the child who is acceptable to the child; or

(v) if the child is Aboriginal or Torres Strait Islander and no-one mentioned in subparagraphs (i) to (iv) is available—a person whose name is included in the list of support persons and interpreters; or

(vi) if no-one mentioned in subparagraphs (i) to (v) is available—a justice of the peace, other than a justice of the peace who is a member of the Queensland Police Service or a justice of the peace (commissioner for declarations)'.

However, police officers are not required to permit or cause people to be present if the officers suspect them, on reasonable grounds, of being an accomplice or complainant of the offence being investigated, or being likely to become an accessory.

11-15 Diversions—pre-court proceedings and as a sentence option

The fifth principle of the 'Charter of Youth Justice Principles' in Schedule 1 indicates that, where appropriate, children who offend should be diverted from the criminal justice system, as this is an effective way of responding to youth crime. The 2002 amendments have further encouraged the use of diversion.

Therefore, you should stay vigilant for ways to use these options for clients. The legislation introduces three methods:

- cautioning
- conferencing
- drug diversion.

Police must consider whether these options would be appropriate rather than commencing proceedings in all cases, except in serious offences (s 11). However, police can still use these options for serious offences (s 11(7)).

In considering diversion, police should consider:

- the circumstances of the offence
- the child's previous history
- any previous cautions (s 11(5)).

Police may consider the options of taking no action, cautioning and conferencing more than once, or after other proceedings have started or ended. If necessary, a police officer should delay starting proceedings to consider the alternatives to proceeding against a child.

11-16 Taking no action

Police must consider taking no action. This would occur only for a first or minor offence and would amount to informally cautioning the child.

11-17 Cautioning

A caution is a warning given to a child by police regarding an offence they have committed. If police administer a caution, the child is not liable to be prosecuted for the offence. Cautions are generally applied in relatively minor offences, such as shoplifting. However, cautions have been administered for serious offences and this is specifically allowed under s 11(7).

You should advise your client of the full consequences of agreeing to be cautioned. The caution is an admission of guilt by the child. A caution is no longer part of the child's criminal history and so, generally, not admissible in court proceedings, including regarding bail.

Some courts have allowed evidence of cautions to form part of a child's criminal history. You should ensure that cautions are not presented to the court (unless an application under s 21 is occurring, as discussed below). However, you should advise the client about the full consequences of being cautioned, i.e. a court may consider a caution (and a conference agreement, as discussed below) in determining capacity (s 147).

11-18 Administering cautions

The cautioning process is outlined in ss 16–20 of the Youth Justice Act. These are the important areas to note in this process:

- the child must admit guilt to police (s 16(1)(a))
- the child must consent to being cautioned (s 16(1)(b))
- the child must be given a notice certifying that they have been cautioned (s 20)
- the process may involve an apology to the victim (s 19)
- if practical, the police must arrange for a parent, an adult chosen by the child or a person chosen by the parent to be present during the cautioning process
- if a child is a member of the Aboriginal and Islander community, police must establish whether a responsible person from that community is available and willing to administer the caution, and, if so, request that they do so.

11-19 Applications to dismiss a charge where a caution should have been administered

If you believe that a police officer should have given a child a caution rather than initiating court proceedings, you can apply to have the charge dismissed (s 21). These applications are more likely to be successful in proceedings either for minor offences or against first offenders.

The court may dismiss the charge if it is satisfied that, instead of being charged, the child should have been cautioned or no action taken. The court may then administer the caution itself or direct that a caution be administered to the child (s 21(3)).

Section 21(2) specifically allows the court to consider any other cautions administered or conference agreements made where an application has been made to dismiss a charge. The information relating to previous cautions can be released only after the s 21 application has been made. Before making a application under s 21, approach the police prosecutor for available details of previous cautions, conferences and court appearances. Presenting such information to the court may affect the application's success.

11-20 Youth justice conferences

For the police to refer a matter to a youth justice conference a child must admit to the police they committed the offence. A conference may then be arranged. The parties affected by the offending behaviour (i.e. child, victim, parents of the offending child, police officer) are called to a conference conducted by a qualified convenor. Various other support people are also entitled to be present (s 34).

During the conference, the parties can discuss how the offending behaviour affected them and attempt to agree on how the child can make amends.

A victim does not have to consent to the conference. Legal aid is available for practitioners to attend a youth justice conference with their client.

Section 37 outlines the agreement's form and content, which must be signed by the child and various other participants (s 37(2)).

Note: Section 37(7) states that 'the agreement may not provide for the child to be treated more severely for the offence than if the child were sentenced by a court or in a way contravening the sentencing principles in section 150'. This is particularly relevant in relation to:

- restitution, when the child has limited capacity to pay
- community service, where the child is ineligible or limited to a particular number of hours under s 175.

The agreement is not part of the child's criminal history but, as mentioned earlier, may be used as evidence of capacity under s 147 or when a court is considering referring the matter to conference (s 161(4)).

On police referral, if the child contravenes the agreement, police may consider options under s 24(3), i.e. taking no action, cautioning the child, referring to another conference or starting proceedings.

11-21 Drug diversion

Two methods of drug diversion are possible—through the police diversion program or through court diversion (Youth Justice Act, ss 167–174). To be eligible, a child must be charged under either:

- s 9 of the *Drugs Misuse Act 1986* (Qld) with possession of a particular drug less than a prescribed quantity(*Penalties and Sentences Regulation 2005* (Qld) s 5(b) and the relevant schedule) for their personal use
- s 10(2) of the Drugs Misuse Act with possession of a thing.

The child must both:

- admit guilt to the offence
- not have been previously convicted, or be facing charges of a sexual nature or a drug offence dealt with on indictment.

Diversion may be offered twice (including diversion through police and court). A child may still be eligible for court diversion even if they have refused police diversion or have unsuccessfully completed police diversion.

The magistrate may adjourn the hearing to enable the child to attend a drug assessment and education session. If the child attends, the order is satisfied and no conviction recorded. If not, the court must sentence the offender for the original offence.

C. Starting a proceeding

11-22 Starting a proceeding

The preferred method for starting proceedings against a child is by way of notice to appear or complaint and summons (s 12).

11-23 Notice to appear

Note that children no longer receive attendance notices but are subject to notices to appear under the PPRA. If police suspect that a child has committed or is committing an offence, they may serve a notice to appear on the child (PPRA, s 382).

The notice must contain certain information, including the particulars of the offence that the child is alleged to have committed (s 384). The police must serve this notice on the child discreetly (i.e. not at or near the child's place of employment or school (s 383). Police must also promptly advise the child's parent (unless, after reasonable enquiry, they cannot be found) and the Department of Justice and Attorney-General (Youth Justice Services) (s 392).

Note: The definition of parent includes someone who is apparently the parent of the child.

Under the *Justices Act 1886* (Qld), a notice to appear is treated as equivalent to a complaint and summons (s 388). If, after the correct service of the notice to appear, the child fails to appear in court, the court may issue a warrant for their arrest (a PPRA warrant) (s 389).

This is different to the previous position where the court adjourned for an affidavit for evidence for a warrant. However, the court has discretion to delay issuing or executing a warrant to give a child the opportunity to appear (s 389(5)). Further, the bail and custody provisions of the Youth Justice Act apply to a child arrested on a warrant under this section.

If a court is not satisfied that the child was served as required, the court must strike out the notice to appear (s 390). However, this does not prevent another proceeding being started against the child.

11-24 Complaint and summons

A complaint and summons should be discreetly served on a child to require them to appear before the court to answer the complaint of an offence (s 43). The complaint must also be served on their parent and the Department of Justice and Attorney-General (Youth Justice Services) (s 43) similar to the notice to appear.

11-25 Simple offences

A court may hear and determine a proceeding instituted by complaint and summons against a child for a simple offence in the absence of the child (Youth Justice Act, 46(1)). In this case, the court can make an order only imposing a fine on the child and only if the child has advised the court in writing of their capacity to pay a fine of the amount ordered or larger (s 46(2)).

11-26 Arrest

A child should be detained in custody (whether on arrest or sentence) only:

- as a last resort
- in a facility suitable for children, and
- for the least time that is justified (Charter of Youth Justice Principles, Schedule 1, Principles 17 and 18).

Generally, a proceeding against a child must be started by complaint and summons or notice to appear, as mentioned above. However, this does not affect the police's power to arrest a child in line with s 365 of the PPRA without a warrant if the offence is serious or for other offences, such as:

- if the police officer believes, on reasonable grounds, that it is necessary to prevent the child repeating or continuing the offence, or committing another offence
- to obtain or prevent the loss or destruction of evidence
- to prevent the fabrication of evidence
- to ensure that the child appears before the court (s 13(1)(a)).

Police also continue to have the power to arrest for questioning under s 403 of the PPRA and if there is a warrant issued under the Bail Act.

If a child is placed under arrest, the police must notify the Department of Justice and Attorney-General (Youth Justice Services) and the child's parents as mentioned above (PPRA, s 392).

D. Bail

The provisions of the Bail Act apply to children. You should make every effort in the first instance to obtain bail for your client.

11-27 Arrested child

An arrested child must be brought promptly before the childrens court (s 49) unless the child is being detained for questioning or breath testing, or has been arrested under a warrant requiring them to be brought before another body.

A child who has been arrested and is in custody must be either granted bail or released from custody unless the officer is required by the Youth Justice Act or another Act to keep the child in custody (s 48(4)).

In granting bail or considering what conditions should be attached to the bail, the following must be considered:

- whether the child will surrender into custody
- whether they will commit an offence
- whether they will endanger others' safety or welfare, or interfere with a witness or otherwise obstruct the course of justice
- the nature and seriousness of the offence
- the child's character
- the child's criminal history
- the child's home environment and other background information
- the history of previous bail grants
- the strength of evidence against the child relating to the offence among any other relevant matters (s 48(2) and (3)).

In 2010, the Youth Justice Act was amended to compel a court making a decision about bail to consider the likely sentencing outcome if the child pleads or is found guilty (s 48(3A)).

Further, under s 48(7), an officer must keep the child in custody if they believe that the child's safety would be endangered if they were released and there was no other reasonably practical way of ensuring their safety. The Youth Justice Act was amended to clarify the use of this discretion.

A child should be remanded only if their safety is endangered because of the offence and there is no reasonably practical way to keep them safe other than remanding them in custody. You should be careful that children are not remanded in custody for their safety merely because they are addicted to drugs or have a history of self harm. These are welfare issues distinct from the proper considerations for youth justice.

Police authorised to grant bail to a child in line with the Youth Justice Act may instead release the child into the custody of the child's parents or permit them to go at large without bail (s 51(2)).

If granted bail, it is now possible for deposits and sureties to be attached to the bail of children (s 52(3)). However, bail should be on the child's own undertaking without sureties and deposit of money or other security, unless the officer believes it would be appropriate in the circumstances (s 52(2)).

Further, police can impose other conditions to address the risk of the child re-offending, endangering the safety or welfare of others, or interfering with witnesses. However, these must not be more onerous than necessary and must be supported by written reasons apart from residential or reporting conditions (s 52(4–6)).

If the child has been released without entering into a formal undertaking, a warrant can still be issued if the child fails to attend court (ss 51(2)(f) and 57).

11-28 Court bail

The court has the power to grant or extend bail in line with the Bail Act. The court also has the same powers as the police to release the child into the custody of a parent or allow them to go at large (s 55) and must consider the same matters (s 48). Children can be released at large for indictable offences. This release is subject to the condition that the child surrender into the court's custody at the child's next court appearance and that a warrant can be issued if the child fails to appear. However, if a child is released at large without bail and fails to appear, this is not an offence against the Bail Act.

A court can now grant bail by audiovisual or audio link if the child agrees and the court is satisfied that the child has had an opportunity to obtain independent legal advice (s 53).

11-29 'Show cause'

Section 16 of the Bail Act no longer applies to children. However, the rest of the section is embodied in s 48 of the Youth Justice Act and has been mentioned above. The most important aspect is that children are no longer subject to the 'show cause' provisions of the Bail Act and that the prosecution is responsible for showing that the child poses an unacceptable risk.

11-30 Breach of bail

Under s 29(2) of the Bail Act, in effect, a child does not commit an offence if they breach a condition of their bail (other than failing to appear). A child can be charged with an offence against the Bail Act only if they fail to appear in line with a bail undertaking. However, this situation does not apply to adults who breach a condition of bail granted for childhood offences. An adult on bail for childhood offences will be dealt with as an adult under the Bail Act for both breaching bail conditions and failing to appear.

If a child has been released on bail with certain conditions and fails to comply, they may be apprehended and brought before the court under s 367 of the PPRA. Before arresting a child for breach of bail, police must first consider whether it is appropriate to apply to the court to revoke the child's bail without arresting the child. If the child is brought before the court, the court may choose to review the original conditions or revoke bail on the substantive charges, but the breach of the bail condition is not an offence and should not be reduced to a bench charge sheet.

The 2014 amendments introduced an offence for breaching bail by committing a further offence while subject to a bail undertaking (s 59A). This offence is unusual in that the offence is deemed to have occurred when the applicant pleads guilty before a court to the offences which were committed while the child was subject to another bail undertaking. The offence is proven when a copy of the bail undertaking is handed to the court by the prosecutor. The deemed offence is neither summary nor indictable. The duty lawyer must ensure any penalty for an offence under s 59(A) cannot amount to double punishment.

11-31 Bail programs

A bail application can be adjourned pending the preparation of a Conditional Bail Program. The Department of Justice and Attorney-General (Youth Justice Services) is responsible for developing a program that focuses on the child's offending risk factors. These programs are not mentioned in the Youth Justice Act—they have been created by the department.

11-32 Bail applications to the Childrens Court of Queensland and Supreme Court

A childrens court judge may grant, enlarge, vary or revoke bail for a child's offence at any time, whether or not the child has appeared before the childrens court judge previously. A childrens court judge may grant bail after a magistrate has refused bail. A childrens court judge has jurisdiction to grant bail for all indictable offences, including murder (s 59).

Youth Legal Aid offers a service that conducts 'stand-alone' bail applications in the Childrens Court of Queensland or Supreme Court on behalf of children referred to them by legal practitioners. Contact 1300 65 11 88 or laqyouth@legalaid.qld.gov.au.

11-33 Remand in custody

If remanded in custody, children must be remanded to the custody of the Department of Justice and Attorney-General (Youth Justice Services) (s 56). After being remanded, the child will be placed in a youth detention centre managed by the department, such as Brisbane Youth Detention Centre or Cleveland Youth Detention Centre. After remanding a child in custody, the court must order the police to deliver the child into the care of the department as soon as practical.

If a child is serving a period of detention and is remanded in custody for other charges, s 218 of the Youth Justice Act does not apply. A child is not entitled to credit for time spent in custody on remand while serving a detention order.

E. After proceedings have commenced

You should be aware that, under the Youth Justice Act, the category of offence determines which courts have jurisdiction to hear a matter.

The Youth Justice Act divides offences into four categories:

- Supreme Court offences
- indictable offences
- 'serious' indictable offences
- simple or regulatory offences.

11-34 Right of election—which court?

Supreme Court offences

Schedule 4 defines a Supreme Court offence as 'an offence for which the District Court does not have jurisdiction to try an adult because of the District Court of Queensland Act, section 61' (namely where the maximum term of imprisonment that can be imposed exceeds 20 years, but the offence is not one of those exempted under s 61(2)). Examples are murder, attempted murder and drug charges that are not dealt with before a magistrate.

A childrens court magistrate has no jurisdiction to deal with these matters except by way of committal proceeding.

All Supreme Court offences are committed for trial (or sentence) to the Supreme Court (s 95).

Indictable offences

From 1 July 2003, any indictable offences (other than Supreme Court offences) dealt with on indictment proceed to a childrens court (District Court of Queensland Act, s 61A). An exception may be where a child has an adult co-accused or other adult offence in the district court.

Previously, a childrens court judge could hear only charges of non-serious offences where the child was also facing trial or sentence for a serious offence. As a result of amendments in 2002, the Youth Justice Act now allows a

childrens court judge jurisdiction over all indictable offences, whether for trial or sentence, regardless of where the offences were committed (except for Supreme Court offences) (s 99).

Note: The child can elect to have a trial with or without a jury in the childrens court (as long as the child is represented).

'Serious' indictable offences

Any matter involving a serious offence must proceed to the higher court by way of either a committal hearing before a childrens court magistrate (s 81(2)) or an ex-officio indictment.

A magistrate does not have the power to determine a serious indictable offence.

Section 8 of the Youth Justice Act defines a serious offence as:
(a) 'a life offence; or
(b) an offence of a type that, if committed by an adult, would make the adult liable to imprisonment for 14 years or more'.

An offence is not serious if:
(a) 'it is a relevant offence under the Criminal Code, section 552BA; or'
(b) 'it is an offence that is the subject of a charge to which the Criminal Code, section 552A or 552B applies; or'
(c) 'under the *Drugs Misuse Act 1986*, section 13, proceedings for a charge for the offence may be taken summarily; or'
(d) 'under the *Drugs Misuse Act 1986*, section 14, proceedings for a charge for the offence may be taken summarily'.

The Youth Justice Act distinguishes between children who are legally represented and those who are not. (The relevant sections are ss 82–96.)

Children who are legally represented

Before committal proceedings commence, the child must elect one of the following:
- the proceedings will be held as a committal hearing
- the matter will proceed as a summary trial to be heard by a magistrate (s 83)
- the proceedings will be heard as a summary plea of guilty (s 90).

For indictable offences, the child has the right of election, despite the provisions of any other Act regarding any right of election that may be conferred on any person (s 78). As a result, a child still has the right to elect indictment on charges that adults no longer have due to the amendment to s 552 following the Moynihan reforms.

A court must refrain from the inappropriate summary hearing of an indictable offence; that is, the court must be 'satisfied that the charge can be adequately dealt with summarily by the court' (s 77).

If, during the proceedings, the court decides that the matter cannot be adequately dealt with summarily, the matter must continue as a committal hearing.

The court must explain the nature of the election to the child. The child must give consent before the matter can proceed as a summary hearing or summary plea of guilty. If they do not give consent, the matter must proceed as a committal hearing.

Children who are not legally represented

Sections 85–86 of the Youth Justice Act as amended deal with children who are not legally represented. If a child charged with an indictable offence other than a serious offence appears unrepresented before a court, the proceedings must be conducted as a committal proceeding.

After the prosecution has put forward all evidence, the child can elect to have the proceedings continue as a committal proceeding or have the matter heard and determined summarily.

Again, the court must explain the nature of the election to the child. The child must give consent before the matter can proceed as a summary hearing or summary plea of guilty.

Once the committal proceedings have been completed, whether for serious or non-serious indictable offences, the magistrate will ask the child to enter a plea to the charge.

If the child enters a guilty plea:

- if the offence is a serious offence, the child will be committed for sentence to a childrens court judge (s 92)
- if the offence is a non-serious offence, the child may elect to be
  - committed for sentence by a childrens court judge (including a district court judge sitting as a childrens court judge)
  - sentenced by the childrens court magistrate (s 93). The child must consent to being sentenced by the childrens court magistrate.

Note: A child can withdraw a guilty plea entered at the conclusion of a committal hearing before a childrens court judge (Youth Justice Act, s 106).

If the child does not enter a guilty plea (i.e. enters a plea of not guilty or no plea), they will be committed for trial to a court of competent jurisdiction (s 96).

Under s 98, if the child is committed for trial before a childrens court judge and is legally represented, the child may elect to be committed for trial to a childrens court judge sitting either with or without a jury.

If the child is not legally represented, the court will commit the child to trial to a childrens court judge sitting with a jury (s 98(5)).

In all relevant cases, the court must explain to the child and any parent who is present the child's right to elect whether their matter will be heard by a childrens court judge sitting with or without a jury. You must also explain to the child the nature of the election and the differences between the options, and obtain instructions outlining the child's understanding of the matter and the child's election.

When advising clients on which option to elect, you should consider who would be the appropriate arbiter of fact in the case. Trial by jury should not be put aside lightly and the child should elect to be dealt with by a judge sitting without a jury only after careful consideration.

The child will have an opportunity to change their election to be tried by jury or by judge alone once the matter is before the childrens court (Youth Justice Act, s 103). They must do this before they enter a plea.

Children must be present in the childrens court for arraignment.

Simple offences

A childrens court magistrate has jurisdiction to hear all simple offences involving children, whether for summary hearing or sentence. The procedure is similar to that in the magistrates court.

Right of child to withdraw election or change plea

In some circumstances, the Youth Justice Act allows a child (as discussed above) to withdraw their election to have their matter heard by a childrens court judge with or without a jury.

A child who appears before a childrens court judge after being committed for sentence may enter a plea of not guilty. Evidence that the child entered a plea of guilty at committal is not admissible in the trial following the change of plea (s 106).

Co-accused/joint proceedings

In a committal proceeding, a magistrate may act as both a childrens court magistrate, in relation to charges brought against a child, and a justice, in relation to charges brought against an adult co-offender. This will occur only in cases where, if the child concerned were an adult, the committal proceedings against each accused would have been conducted at the same time (s 107).

The prosecution may apply for a child to be committed to a district court or the Supreme Court so that a joint trial can be held with an adult co-accused (s 108).

Ex-officio indictment power preserved

Sections 10(b) and 42(3)(c) preserve the Crown's power to present an ex-officio indictment. With this power, the Crown may add or delete offences from an indictment, or proceed against a person despite the magistrate discharging that person at committal hearing.

A request can be made to the Crown for a matter to proceed by way of an ex-officio indictment. For further information, contact the Office of the Director of Public Prosecutions.

Transmission of summary charges to a higher court

Since 1 July 1997, with the introduction of s 651 of the Criminal Code, a person charged with a criminal offence has been able to transmit a summary charge to the district court or Supreme Court for sentence. A person may use this mechanism to have a large number of 'connected' summary offences dealt with at the time of the higher court sentence. The 2002 amendments to the Youth Justice Act clarify that this mechanism is available when a child is to be sentenced by a childrens court judge (s 100).

If you intend to utilise this mechanism, note the 'Supreme Court Practice Direction No. 5' of 2002 and 'District Court Practice Direction No. 3' of 2002.

Section 651 requires the child to enter, or intend to enter, a plea of guilty in the childrens court and the Crown must consent to the court dealing with the matter in the higher court.

Indictable charges, including all offences listed in the Criminal Code, cannot be transmitted via s 651 due to the child's right of election in relation to all charges that are not summary or regulatory in nature.

If a child subsequently enters a plea of not guilty or states that they intend to enter a plea of not guilty, the court must direct that the charge be heard by a magistrates court, which includes a childrens court (s 651(6)).

11-35 *Mental Health Act 2000* (Qld)

The *Mental Health Act 2000* (Qld) applies to a child as it does an adult (s 61). Chapter 7 of this Act relates to people suffering from mental illness who are involved in criminal proceedings.

Note: If a child is charged with a simple offence, they cannot be referred to the Mental Health Court unless they are also charged with an indictable offence.

(See Chapter 14 of this handbook.)

11-36 Pre-sentence reports

When pre-sentence reports are mandatory

Pre-sentence reports are mandatory before the court can make:

- a detention order (s 207)
- a conditional release order (s 223)
- an intensive supervision order (for 10 to 13-year-old children only) (s 203).
- a boot camp order (226B).

When a report may be ordered

The court, at its discretion, may also order a pre-sentence report only after a child has pleaded or has been found guilty of an offence (s 151). To save court time, you should avoid making submissions on sentence until you have determined whether a pre-sentence report is to be ordered. Make submissions at the same time that the court considers the pre-sentence report itself.

Pre-sentence reports are prepared by the Department of Justice and Attorney-General (Youth Justice Services) and must be presented promptly to the court in document form. However, they need not be provided in fewer than 15 days.

You may consider it appropriate to argue against ordering a pre-sentence report. The court will adjourn the matter while the report is being prepared. This means that a child can be remanded in custody during the preparation. If you do not believe a period of custody is appropriate, argue vigorously either that the child be placed on bail during the preparation or that a pre-sentence report is not appropriate in the circumstances.

The court must provide a copy of the report to you and the prosecution as soon as practical (s 153(1)). This enables you to obtain instructions about the report's contents and highlight relevant matters in sentence mitigation. The court may give directions about the report's distribution and disclosure. If the disclosure of the report's details could harm the client, you may make submissions to the court to limit such disclosure (s 153(3)).

What a pre-sentence report contains

The department has guidelines about what information should be included in a pre-sentence report. The guidelines are consistent with the *Youth Justice Regulation 2003* (Qld), s 6(1).

This Regulation states that the report must contain all of the following information:

(a) 'the child's full name, address, date of birth and occupation;
(b) the source of the information on which the report is based;
(c) the circumstances of the offence to which the report relates;
(d) the child's placement between the start of the proceeding and the date of the report;
(e) details of all community based orders or detention orders made against or for the child;
(f) if the chief executive is aware of a corresponding order made against or for the child—details of the corresponding order;
(g) an assessment of factors the chief executive considers may have contributed to the child committing the offence;
(h) the child's attitude to the offence and to the victim of the offence;
(i) if the chief executive is aware of any consequences that have happened to the child as a result of the act or omission that constitutes the offence—details of the consequences;...
(j) information about sentencing options.'

In the case of conditional release or intensive supervision orders, the pre-sentence report must outline the child's suitability for the order and whether an appropriate program is available for the child.

This Regulation does not require the Department of Justice and Attorney-General (Youth Justice Services) to make a recommendation regarding sentence. However, the report will canvass a range of sentencing options and discuss their appropriateness.

Note: The department does not act as an advocate for the child. Therefore, you must not rely too heavily on the pre-sentence report's contents when making submissions on sentence.

Section 151(3) of the Youth Justice Act states that '[t]he court may request that the report contain specified information, assessments and reports relating to the child or the child's family or other matters'.

Common requests include psychiatric, psychological and/or medical assessments. Agencies other than the department prepare these reports and delays of several months usually result. Consequently, you should carefully consider the appropriateness of such reports.

Section 151(4) specifically prohibits a pre-sentence report containing the department's opinion of what impact publishing identifying information about a child under s 234 may have on the child (which allows the sentencing court to make an order allowing the publication of identifying information about a child in cases of serious offences of violence).

Arguably, other information that should also not go into the report include any matters on which the child may currently be on remand and details of previous cautions.

You should note s 151(9), which indicates that, if a pre-sentence report is required, the department may just give the court further material to consider with a report prepared for another sentencing on the same day. This avoids having to order an additional pre-sentence report about additional offences that are ready to be dealt with on the sentencing date of previously listed matters. Also note s 7 of the Youth Justice Regulation.

When a client disagrees with the content of the pre-sentence report

If your client disputes any content of the pre-sentence report, you may request an order under s 152 of the Youth Justice Act, requiring the presence of the report's author. If the court grants the order, the report's author may be required to give evidence on oath and you will require instructions accordingly.

F. Sentencing

11-37 Sentencing scheme

The Youth Justice Act is a code for all dealings with children (s 2(b)).

In particular, it is a code for sentencing (s 149). Any court that sentences a child must do so under Part 7 of the Youth Justice Act despite any other Act or law.

Section 150 contains the sentencing principles for children. Important principles include the following:

- The Youth Justice Act contains general sentencing principles for children. (Note: The Court of Appeal has ruled that this does not mean that the Penalties and Sentences Act 1992 applies to children; rather, it refers to general sentencing principles that existed prior to the Penalties and Sentences Act (*R v W; ex parte Attorney-General* [2000] 1 Qd R 460; [1998] QCA 281.
- The court must have regard for the youth justice principles outlined in the charter in Schedule 1 (s 150(1)(b)).
- The child's age is a mitigating factor (s 150(2)(a)).
- A 'non-custodial sentence is better than detention in promoting a child's ability to reintegrate into the community' (s 150(2)(b)).
- A child who lacks family support, education or employment should not receive a more severe sentence because of this (s 150(2)(d)).

- If the child is indigenous, any submissions that the local community justice group makes may be considered (s 150(1)(g)).

The court must disregard a requirement under any Act that an amount of money or imprisonment term must be the:
- minimum penalty for an offence
- only penalty for an offence (s 155).

11-38 Sentence orders

Section 175 of the Youth Justice Act outlines the sentence orders available to the court. Section 176 outlines the penalties that the court may impose on a child if found guilty of a 'serious offence'.

11-39 Reprimand (s 175(1)(a))

A reprimand has its ordinary meaning and means a 'severe reproof, especially a formal one by a person in authority'. *Macquarie Dictionary*.

A reprimand is administered by the court to the child and forms part of a child's criminal history. The Department of Justice and Attorney-General (Youth Justice Services) has no role in this order's administration.

No conviction can be recorded when a child is reprimanded.

The court generally uses this option if it is the child's first court offence or the offence is relatively minor. The court is not precluded from ordering reprimands for indictable offences as opposed to summary offences.

11-40 Good behaviour order (ss 175(1)(b), 188, 189)

A good behaviour order is an order that the child demonstrate good behaviour (i.e. abstain from further violating the law) for the order's duration (s 188). The order can be made for no longer than one year. The Department of Justice and Attorney-General (Youth Justice Services) has no role in the supervision of this type of order.

If a child re-offends during the period of the good behaviour order, the court that deals with the subsequent finding of guilt may consider the order breach when imposing a penalty for the new offence. However, the initial order cannot be disturbed (s 189).

No conviction can be recorded with this order.

11-41 Fines (ss 175(1)(c), 190–192)

A court can make a fine order only if it believes that the child (not the child's parents) has the capacity to pay a fine (s 190).

A court has discretion to impose a conviction when ordering a fine (s 183).

If the court considers a fine order and considers ordering the child to pay compensation or restitution, the court must examine the resources available to the child. If it decides that the child has insufficient funds to pay both, the court must give preference to ordering the child to pay only the compensatory order (s 156).

A court can order the child to pay the fine over a period of time. It can also specify that they pay the fine in specific instalments to a proper officer of the court (s 191).

A child can apply to a proper officer of the court to have the payment period extended. The officer can grant an extension subject to any conditions that they consider just (s 309).

If the proper officer is the registrar, sheriff, deputy sheriff, or under sheriff or clerk of the court, the powers may be delegated to a public service officer employed in the registry of the court concerned (s 313).

Any unpaid fines or restitution against a child can be recovered though civil action with the state as the plaintiff. The order can then be enforced through the civil courts (s 310). A court cannot order a default period of imprisonment for failure to pay the fine. If a child fails to pay the fine, a proper officer of the court can apply to cancel the fine order and ask the court to make a community service order against the child (s 192).

A court may convert the fine to community service hours using the formula in s 192(2)—unpaid amount of fine x 8 Ã· 1 penalty unit.)

If, after applying the formula, the court finds that the community service hours are fewer than 20 hours, it cannot convert the fine (s 192(7)).

If the hours are more than the number allowed for sentence under ss 175 or 200, the court must reduce the number of hours to the maximum hours available.

A court may make a community service order only if the:

- child is willing to comply with the order
- court considers that the child is suitable for such an order, and
- court is satisfied that suitable community service can be provided (s 195).

Although the Department of Justice and Attorney-General (Youth Justice Services) has no role in the administration or contravention of a fine order, it must present a report about the availability and suitability of a community service program.

11-42 Probation (ss 175(1)(d), 193–194)

Probation is a community-based supervision order administered by the Department of Justice and Attorney-General (Youth Justice Services). Before a probation order is made, the child must indicate that they are willing to comply with the order's terms.

Note: A probation order can be made only if the legislative penalty for the offence includes a period of imprisonment (s 175(2)). Therefore, for example, if a child is convicted of the regulatory offence of shoplifting, the court has no power to order probation.

The court has discretion to record a conviction, whether or not it is for a serious offence (s 183).

The maximum probation period varies according to the court that is making the order and the type of offence. (You should also note the maximum limits applying to combined orders.)

A magistrate can make a probation order for a period of up to one year.

After finding a child guilty of an offence, if the magistrate considers that a probation period of greater than one year would be appropriate, they may commit the matter to the childrens court judge for sentencing (s 186).

A judge can make an order for a period of up to two years if the offence is not classified as serious.

If it is a serious offence, a judge can make a probation order for a period of up to three years.

A probation order may also contain special conditions. The court can make these if it believes this will prevent the child repeating the offence or committing further offences. The court must relate these conditions to the offence for which the order was made and support the conditions with written reasons (s 193(4)). For example, a condition that a child attend drug counselling may be appropriate if the commission of the offence was directly related to the child's drug habit.

You should ensure that there is sufficient nexus with the offence and special conditions imposed. For example, if de facto parenting conditions are included, such as a requirement to do household chores, you may advocate against that inclusion. Conditions such as drug and alcohol rehabilitation, family counselling or curfews may also not satisfy the requirements of the Youth Justice Act if there is insufficient nexus with the offence before the court.

You should ensure that any special conditions directed at addressing re-offending behaviour are realistic, and work with departmental officers to provide realistic and workable options.

The department monitors most special conditions. The court can now order a child to perform a probation condition in another state.

11-43 Graffiti removal orders (ss 176A and 194A–194L)

The Youth Justice Act includes mandatory graffiti removal orders for children who commit a graffiti offence.

The court must make an order unless the court is satisfied the child is not capable of complying with the order because of the child's mental or physical capacity.

When deciding on the number of hours the court must take into account the age, maturity and abilities of the child against who an order is being made.

The child must be at least 12 before an order can be made.

The maximum number of hours are:
- if the child has not yet attained 13 years – 5 hours
- if the child is 13 years or older but has not attained 15 years – 10 hours
- if the child is 15 years or older – 20 hours.

A child who is found guilty of two or more graffiti offences may be sentenced to multiple graffiti removal orders however, the total number of hours cannot be more than the maximum allowed for a single graffiti removal order (s 194F).

The orders are to be performed cumulatively unless otherwise ordered. If a child is subject to community service and graffiti removal orders, and the total number of unpaid hours exceeds the maximum allowable (100 hours if the child has not attained 15 years, 200 hours in all other cases), the order for the hours in excess of the maximum will have no effect.

11-44 Community service orders (ss 175(1)(e), 195–202)

The court can order a child to perform unpaid community service in certain circumstances.

However, the court cannot order a child who has not reached the age of 13 at the time of sentencing to perform community service (s 175(1)(e)).

A community service order can be made only if the legislative penalty for the offence includes a period of imprisonment (175(2)).

Before making such an order, the court must be satisfied that the child is suitable for, and willing to perform, community service and that the department can provide community service that is suitable for the child (s 195).

When making a community service order, the court has discretion to record or not record a conviction (s 183).

The court may make two or more community service orders if the child has two or more offences, and may also make a community service order against a child who is already subject to an existing community service order (s 199).

The number of hours the court can order depends on both the child's age at the time of sentencing (s 175(1)(e)) and whether there are outstanding community service orders (s 200). The result is that:
- if the child is 13 or 14 years, the total maximum number of hours (including any outstanding hours) that the child can be ordered to perform is 100
- if the child is 15 years or over, the total maximum number of hours (including any outstanding hours) is 200
- in both cases, the minimum number of total hours must not be fewer than 20 (s 200).

These maximums are the maximum number of hours a child can be subject to at any one time. Any hours ordered in excess of the maximum are of no effect (s 200(4)).

The child must perform the community service within 12 months of the order date (s 198(a)).

During the order period, the child must perform community service as directed by the department in a satisfactory way and must not violate the law (s 196). The child must complete the community service within one year of the order being made unless the court or proper officer of the court extends the order (s 198).

The community service order ends when:
- the child performs the number of hours specified in the order
- the order is discharged upon contravention action, or
- the period within which the order must be performed expires.

11-45 Intensive supervision orders (s 175(1)(f) and division 9, ss 203–206)

An intensive supervision order addresses the offending behaviour of a child who is at risk of progressing further into the criminal justice system through an early intervention framework. If a child has not reached 13 years at the time of sentencing, the court may make an intensive supervision order for a period of up to six months. This additional sentence order was introduced by the 2002 amendments (s 175(1)(f)).

'A court may make an intensive supervision order for a child only if—
(a) the child expresses willingness to comply with the order; and
(b) the court has ordered a pre-sentence report and considered the report; and
(c) the court considers the child, unless subject to an intensive period of supervision and support in the community, is likely to commit further offences having regard to the following—
(i) the number of offences committed by the child, including the child's criminal history;
(ii) the circumstances of the offences;
(iii) the circumstances of the child;
(iv) whether other sentence orders have not or are unlikely to stop the child from committing further offences' (s 203(1)).

The pre-sentence report provided by the department and considered by a court before it makes an intensive supervision order 'must include comments—
(a) outlining the potential suitability of the child for an intensive supervision order; and
(b) advising whether an appropriate intensive supervision program is available for the child' (s 203(2)).

The legislation's intention suggests that this order would be appropriate only if the child has failed to respond to a probation order and continued to offend. Unless the circumstances are exceptional, a child should be given the opportunity to comply with the probation conditions before this intensive sentencing option is undertaken.

An intensive supervision order must require the child to participate in an 'intensive supervision program' for the 'program period' as directed by the department and, during the period of the order:
- abstain from violating the law
- comply with every reasonable direction of the department
- report and receive visits as directed by the department (s 204).

The court can impose any further conditions in the intensive supervision order that it considers necessary to prevent the child re-offending. However, the requirement to comply with the condition must relate to the offence for which the order was made and be supported by written reasons.

11-46 Conditional release orders (s 175(3), s 221)

A conditional release order (which replaces the previous immediate release order or IRO) is similar to an adult intensive correction order. The court makes a detention order against a child, and then immediately suspends the order and makes an order that the child be released from custody immediately (s 220).

The conditional release order requires the child to participate in an intensive, structured program (the 'conditional release program') for up to three months (s 221). This program is organised by the department. Once the child has completed the program period, they are no longer liable to serve any of the detention period (s 224).

The court cannot order a conditional release order without ordering a pre-sentence report (s 207).

A conditional release order is an order of detention and, for that reason, may be imposed only as a last resort (*R v C & M* [2000] 1 Qd R 636; [1998] QCA 252).

The pre-sentence report provided by the Department of Justice and Attorney-General (Youth Justice Services) and 'considered by a court before making the relevant detention order must include comments—

(a) outlining the potential suitability of the child for release from detention under a conditional release order; and

(b) advising whether an appropriate conditional release program is available on the child's release under the order' (s 223).

The pre-sentence report should provide detail about the program, as discussed by the Court of Appeal in *R v F & P* [1997] QCA 98.

The conditions of a conditional release order include that the child must participate in a program as directed by the Department of Justice and Attorney-General (Youth Justice Services) and abstain from violating the law (s 201). The court may also specify conditions and requirements that it considers necessary to prevent further offending behaviour of any kind. Again, these conditions must relate to the offence for which the order was made and be supported by written reasons (s 221(4)).

The child must indicate that they are willing to comply with the order's terms (s 222). If the child does not abide by the terms of the conditional release order, they may be liable to serve the detention period for which the conditional release order was made. The child must fully understand the gravity of contravening the conditional release order before they indicate their willingness to participate.

A conditional release order can be varied or revoked in the interests of justice.

Any fresh offences that the child commits during a conditional release order are a breach of the conditional release order.

11-47 Boot camp orders (ss 175(3)(b) and 226A–226D)

The purpose of a boot camp is to provide an alternative to the detention of a child by allowing a court to immediately release a child to a boot camp.

To be eligible, the child must consent to the order, be at least 13 years and usually reside in an area prescribed by regulation.

A child is ineligible if the child:

- is being sentenced for a disqualifying offence
- has previously been found guilty of a disqualifying offence
- has a charge pending for a disqualifying offence
- is serving a period of detention in a detention centre for another offence.

The court must also consider whether the child is an unacceptable risk of causing harm to other children residing at the boot camp or the boot camp provider's employees.

The boot camp order must be for at least three months and no more than six months.

11-48 Mandatory Boot camp orders (ss 175(3)(b), 206A and 206B)

In certain circumstances, a court must order that a child be sentenced to a boot camp order for a second motor vehicle offence. This section only applies to children who reside in an area prescribed by regulation (currently Townsville). The child must be at least 13 years at the time of sentence.

A recidivist vehicle offender is a child who has previously been convicted of an offence against s 408A of the Criminal Code or an attempt to commit an offence under s 408A.

The ineligibility criteria for standard boot camp orders apply. A child does not necessarily need to consent to the order before they are sentenced as the court has no discretion to impose another sentence unless a term of actual detention is appropriate.

11-49 Detention (s 175(1)(g), s 176)

A fundamental principle of youth justice is that a child should be detained in custody only as a last resort and for the least amount of time justified in the circumstances (s 150(2)(a) and Article 17, Charter of Youth Justice Principles, Schedule 1). A court may make a detention order only if it believes that detention is the only appropriate order after considering all other available sentences and the desirability of not holding a child in detention (s 208). Further, a court that imposes detention must give written reasons for making the detention order (s 209).

A court can make a detention order in relation to an offence only after requesting and considering a pre-sentence report (s 207).

Unless the court orders otherwise, a child will not be released until they have served 70 per cent of the detention sentence. The court may order that the child be released from detention after serving 50 per cent or more but less than 70 per cent of the detention ordered under special circumstances. This is an order, not a recommendation. After they have served the relevant portion of the sentence, the child must be released on a supervised release order (s 227).Æ'

The maximum period of detention depends on the sentencing court's jurisdiction and the offence's classification. If the court is not constituted by a judge, the maximum detention period that can be ordered is one year (s 175(1)(g)(i)). Note also that a magistrate can request a delegation of sentencing power or refer a case for sentencing to a childrens court judge (s 186)

A child must serve a sentence of detention concurrently with any other sentence unless the court orders otherwise under s 213 (s 212). Note also the limitations on cumulative orders in s 214.

Further, due to the 2003 amendments, a detention order imposed on a child for failing to appear under the Bail Act is not automatically cumulative (as it is for adults) because s 33(4) of the Bail Act no longer applies to children (s 33(5)).

11-50 Remand time to be treated as detention on sentence

Section 218 requires that any time a child spends in custody on remand be counted as part of any detention period ordered in relation to the offence. This includes any detention ordered due to a re-sentencing arising from a contravention. However, if a child is simultaneously being held in custody serving a sentence, the child will not be entitled to remand credit.

Section 218 does not require the court to state or record the remand period to be taken into account on sentence. The department automatically accounts for such time when determining the child's release date under a supervised release order.

When a child offender is dealt with for multiple offences in the same sentencing exercise, the child is not to be deprived of the total credit for pre-sentence detention for any of the offences that the court deals with on that day. The Court of Appeal has determined that, when a child is to be sentenced for multiple offences and has undergone pre-sentence detention for one or more of the offences, s 218 entitles the child to credit for that detention for all offences (*R v CDR* (No. 2) [1996] 1 Qd R 69).

Note: The time spent in custody must be time spent 'pending the proceeding' for the offence or offences that are for sentence. For example, any pre-sentence custody before a community-based order is made cannot be credited towards new offences that breach that order (*R v GT* [1997] 2 Qd R 183).

11-51 Combination of orders

A court may make more than one type of order for an offence (s 177). The combination is at the discretion of the sentencing court but there are guidelines for certain combinations.

Section 178 refers to the combination of probation and community service orders for one single offence. The court must make these as separate orders and cannot make one conditional on another. If the child contravenes either order and re-sentencing for the original offence occurs, both orders will be discharged.

Section 179 indicates that the combination of an intensive supervision order with detention or probation is prohibited for a single offence.

Section 180 allows for the combination of probation and detention for a single offence. In this case, the maximum detention period allowed is six months. No conditional release order can be made if the court wishes to combine these orders. The probation order can be effected only after release from detention and cannot operate for longer than one year after that time.

11-52 Restitution and compensation

The Youth Justice Act contains no provision that allows a court to make a condition of a community-based order that the child must pay restitution or compensation.

Rather, the court may make an additional (but separate) order that the child pay either:

- compensation for property loss to an amount no greater than that equal to 20 penalty units
- restitution or compensation for injury suffered by any other person to any amount (s 235(2)).

Note: The court should make the order only if satisfied that the child has the capacity to pay the amount (s 235(5)). If a child indicates that they have a capacity to pay and becomes the subject of such an order, the order remains in force until the child complies with it, even if they are unable to pay.

A court has no power to order a default imprisonment period for non-payment of restitution or compensation. The restitution or compensation amount can be recovered through civil action. The plaintiff is the person to whom the compensation is payable (s 310).

11-53 Recording convictions

Section 183 clearly indicates that a court cannot record a conviction against a child except where the penalty is a fine, community-based order or detention (s 183(2) and (3)).

Before recording a conviction, the court must consider the matters included in s 184—the nature of the offence, the child's age and previous criminal history, and the impact that a conviction will have on the child's rehabilitation generally, or finding or retaining employment.

Defence practitioners should always make submissions resisting the recording of a conviction against a client, as it may significantly harm the child's current or future employment and rehabilitation prospects. This is one of the most important principles in the Youth Justice Act.

For a discussion of the principles to be applied when determining whether or not to record a conviction, see the judgement of Robertson DCJ in the matters of DRH, BES and TKL (Unreported, Childrens Court of Queensland, CSM No 16 of 2000, Robertson J, 13 April 2000). See also *R v SEEM* [2011] QChC 032.

If a court makes an order under s 176(1), (2) and (3) (penalties for serious offences), the court has discretion in deciding whether or not to record a conviction (s 183(3)).

Note: The recording of a conviction falls within the definition of sentence order and, as such, can be subject to an appeal to a childrens court judge.

11-54 Criminal history

Practitioners should be aware of the effect of any findings of guilt in a client's criminal history, both in the childrens court and adult court proceedings.

A court's finding of guilt against a child is part of that child's criminal history, whether or not a conviction was recorded (s 154). This includes where a child was sentenced to an indefinite referral to a Youth Justice Conference (*R v BBX* [2011] QCA 008).

All findings of guilty, whether convictions are recorded or not, are now disclosable on a sentencing proceeding for an adult offender. Further, 'if a person is found guilty as a child of an offence, the person is not taken to have been found guilty as an adult of the offence merely because of the making of a declaration under s 143(4)' (s 148(4)). That section allows a court to declare a childhood sentence order to be a corresponding adult order and make all necessary changes to make it a corresponding adult order.

A court that subsequently sentences a child for any offence as a child may consider the child's previous offending history (ss 150 and 154). Any person with a duty to consider whether a child should be remanded in custody pending court proceedings may consider the child's criminal history.

If a child has been acquitted of a charge or the Crown has chosen not to prosecute a matter, the child may apply to the Commissioner of Police to have all identifying particulars (defined in s 4), destroyed (s 27).

11-55 Variation and contraventions of orders

The Youth Justice Act allows contravention action and variation upon application of community-based orders, such as probation, community service, intensive supervision and conditional release orders. The relevant sections of the Youth Justice Act that apply are given under Division 12 for contraventions and variations (ss 236–252). Breaches are not defined as separate offences for a child.

11-56 Breach of a good behaviour order

A court that deals with a person for an offence committed during the period of a good behaviour order may consider the breach when determining sentence (s 189(1)). However, a court must not take any action in relation to a breach of a good behaviour order (s 189(2)).

11-57 Commencing proceedings for breach of community-based orders

If a child is subject to a current community-based order and the department believes that the child has contravened the order, the department must warn the child of the consequences of further contravention, including possible breach proceedings (s 237). This warning is not required if the department does not know where the child is and cannot reasonably find out (s 237(3)).

If the department believes that a child has continued to contravene the community-based order, it may apply to the childrens court magistrate for a finding that a breach has occurred (s 238). 'The application may only be made during the period of the order' (s 238(3)).

The application is generally commenced by serving a complaint and summons on the child (s 238(2)). If the child's whereabouts are unknown or there is reason to believe the child would not comply with a complaint and summons, an application can be made for a justice to issue a warrant for the child's arrest (s 238(6)).

11-58 General options available to magistrate on the breach application

Generally, all breach applications commence before a magistrate.

Section 240 indicates that the magistrate may take action and make orders in line with s 245 (for breaches of probation, community service and intensive supervision orders) or s 246 (for breaches of a conditional release order). This applies even if a higher court made the community-based order s 240(3)(b) for breaches of probation, community service and intensive supervision orders or subs(c) for breaches of a conditional release order.

The magistrate may order the child to appear before the higher court if, considering the circumstances, they believe that the order should be discharged (s 240(3)(a)).

Section 241 applies if a higher court is to deal with a breach matter, and the same action can be taken and orders made under ss 245 or 246.

11-59 Breach by re-offending

If a child is found guilty of an indictable offence they committed while subject to a community-based order, s 242 allows any court to deal with a breach in the same way as if the breach was commenced by a complaint and summons as above.

A higher court can re-sentence on any community-based order made by a childrens court magistrate in dealing with the breach (s 243).

11-60 A court's power to act on breaches of probation, community service and intensive supervision order

Section 245 applies here and indicates that a court must consider any period of compliance (s 245(4)). Section 249 also indicates that, if a court discharges a community-based order of probation, community service or intensive supervision order and re-sentences a child, the court must consider the reasons that the original community-based order was made and anything the child has done to comply with that order (s 249).

For breach matters, a court may make an order under s 245 even though, at the time it is made, the community-based order is no longer in force because its duration period has ended (s 245(5)). Therefore, for this purpose, the community-based order is taken to be continuing in force until a proceeding on the breach is determined (s 245(6)).

Section 245 allows a court to take action on any breach as follows:

- probation

  - extend the period of the order, as long as the extended period is longer than the period for which the order could have originally been made under s 175 or s 176
  - vary the requirements of the order
  - discharge the order and re-sentence the child for the original offence
  - take no further action on the undertaking of the child to comply with the order
- community service
  - increase the number of hours, as long as the total is more than the number allowed under s 175
  - extend the community service period for up to one year more
  - vary the requirements of the order
  - discharge the order and re-sentence the child for the original offence
  - take no further action on the undertaking of the child to comply with the order
- intensive supervision order
  - extend the period for up to six months
  - vary the requirements of the order
  - discharge the order and re-sentence the child for the original offence
  - take no further action on the undertaking of the child to comply with the order.

11-61 A court's power to act on breach of conditional release order and supervised release orders

Section 246 applies here and indicates that a court must consider any period of compliance (s 246(4)) when deciding to extend the program period (see below).

The court may make an order for the breach under s 246 even though, at the time it is made, the conditional release order is no longer in force because its duration period has ended (s 246(5)).

Therefore, for this purpose, the conditional release order is taken to be continuing in force until a proceeding on the breach is determined (s 246(6)).

Section 246 allows a court to take action on any breach as follows:
- conditional release order
  - revoke the conditional release order and order the child to serve the sentenced period of detention. (The court must reduce the detention period by a period that the court considers just after considering everything the child has done to conform with the conditional release order (s 248))
  - give the child further opportunity to satisfy the order requirements by either
- varying the order
- extending the program period for up to three months.

Division 12A indicates that, if the unexpired portion of a supervised released order is under 12 months, the matter can be brought before the magistrate, notwithstanding that the original sentence was made by a judge. The magistrate can give the child further opportunity to comply with the order or return them to detention.

If the period is more than 12 months, the magistrate may order the child to appear before the original sentencing court.

G. Variation of community-based orders

11-62 Variation in the interests of justice

Either the child or Department of Justice and Attorney-General (Youth Justice Services) may apply to the court to vary the order in the interests of justice. They must apply to a court of the same jurisdiction as the court that made the original order (s 247).

The court may grant the application if the court considers it in the interests of justice, after considering the circumstances that have arisen or become known since the order was made.

Evidence by affidavit is admissible in proceedings for applications for variation (s 250). The court can determine the application on evidence by affidavit alone. If a court varies the order in this way, it must provide written notice to the child, department and any other lower or higher court that made the original order.

11-63 Variation by consent

Either the child or Department of Justice and Attorney-General (Youth Justice Services) can apply to a proper officer of the court to vary any community-based order but not a conditional release order. The child or department must send the application to the officer of the court with a supporting affidavit deposing to the fact that both child and department consent to varying the order's terms (s 252).

Schedule 4 defines the 'proper officer' as:

(a) 'for the Supreme Court, a District Court or a Childrens Court judge—the registrar or a sheriff, deputy sheriff [or under sheriff] of the court; and

(b) for a Magistrates Court or a Childrens Court magistrate—the clerk of the court'.

Section 252 prohibits the following amendments:

- the requirement that the child abstain from violating the law
- the period of the order (except for a community service order)
- an increase in the number of community service hours
- a reduction in the period that community service must be performed
- an amendment prohibited by the community-based order.

H. Miscellaneous court powers

11-64 Delegation of sentencing power

This power enables childrens court magistrates who believe that they do not have sufficient scope in the sentencing options available to them to informally request a delegation of sentencing power from a childrens court judge (s 185).

If the child is not represented by a legal practitioner, a magistrate must make this request for delegation before any evidence is heard, plea entered or election made by the child (s 185(4)).

If the child is legally represented, they must still consent to such a delegation being made at a later time. If they do not consent, the magistrate may refer the case to a childrens court judge for sentencing (s 186).

A sentence ordered through this power would still be reviewable in line with the sentence review procedure discussed below.

11-65 Reference of case to a childrens court judge for sentence

Under s 186, a magistrate may commit simple offences, or indictable offences that can be dealt with summarily before the childrens court magistrate, for sentence to the childrens court judge if they consider 'that the circumstances require the making of a sentence order—

(a) beyond the jurisdiction of a Childrens Court magistrate; but

(b) within the jurisdiction of a Childrens Court judge' (s 186).

If the above prerequisites to s 186 apply, you may submit to the childrens court magistrate that the s 186 procedure be used to allow all matters to come before a childrens court judge.

If a simple offence is committed for sentence to the childrens court judge, a child cannot change their plea to not guilty. A child's right to change a plea on a committal for sentence to the childrens court judge is limited to indictable offences (s 106).

11-66 Correction of errors—childrens court magistrate

Under s 128, a court may reopen a proceeding if 'a court has—

(a) made a finding or order in relation to a child that is not in accordance with the law; or

(b) failed to make a finding or order in relation to a child that the court legally should have made; or

(c) made a finding or order in relation to a child decided on a clear factual error of substance'.

The court may amend any relevant finding or order as necessary to take into account (a), (b) and (c) above.

An application can be made to the court (within 28 days or by leave allowed by the court (s128(4)(b)), whether or not differently constituted, to reopen the proceeding or the court may reopen proceedings on its own initiative at any time.

A 'proceeding' is defined as 'a proceeding for the hearing and determination of a charge of an offence' (s127).

The court has the power to reopen proceedings regarding an original finding and order. 'Finding or order' is defined as 'a finding of guilt, conviction, sentence or other finding or order that may be made in relation to a person charged with or found guilty of an offence' (s128(7)).

11-67 Court may order identifying particulars taken in addition to sentence

A court has the power, on application by the prosecution, to order that a child's fingerprints and palm prints be taken after finding them guilty for any indictable offence or under the prescribed legislation listed below where the offence is an 'arrest offence' (s255)—

(a) 'the *Criminal Code*;

(b) the *Drugs Misuse Act 1986*;

(c) the *Police Service Administration Act 1990*;

(d) the *Regulatory Offences Act 1985*;

(e) *Summary Offences Act 2005*;

(f) the *Weapons Act 1990*'.

If the child is not placed into detention under the sentence order, the order must require the child to report at a stated police station between stated hours within seven days so police can obtain identifying particulars (s 255(3)).

If a child contravenes the order, a maximum penalty of 10 penalty units applies (s 255(4)).

A practitioner should argue the appropriateness of the order's use, particularly in light of the availability of s 25 of the Youth Justice Act or the powers available in the Police Powers and Responsibilities Act for children in custody.

11-68 Orders under the *Transport Operations (Road Use Management) Act 1995* (Qld)

In addition to general sentencing powers under ss 175–180 of the Youth Justice Act, a childrens court magistrate has discretion under s 181 to make an order under division 13 of the Youth Justice Act (s 253).

This discretion includes disqualifying a child from holding or obtaining a driver licence.

Under s 254(2), if a child is found guilty of an offence under the Criminal Code, *Transport Operations (Road Use Management) Act 1995* (Qld) or other Act, and they would be liable to be disqualified on conviction if they were an adult, the child is also liable to be disqualified on conviction to the same extent.

Further, under s 254(3) if a child is found guilty of an offence as above and a conviction is recorded, and the child would be subject to mandatory disqualification if they were an adult, the child is also disqualified to the same extent.

Basically, if the court finds the child guilty, the court has discretion under s 181 to order the child to be disqualified from holding or obtaining a driver licence for the same period as prescribed for adults.

11-69 Orders against parents

Apart from ordering a parent to attend the hearing of a matter (s 70), the court can make certain orders against the parents of a child who has been found guilty of an offence (Division 16, ss 257–260).

If a court believes any of the following, it may ask the parent to 'show cause' why that parent should not pay the compensation:

- compensation should be paid to any person for loss or injury
- the parent may have contributed to the offence by not adequately supervising the child
- the parent should be ordered to pay.

Section 259 sets out the characteristics and requirements of the 'show cause' hearing.

You should not act for the parent as well as the child in case a conflict of interest arises. Instead, advise the parent to seek independent legal advice.

11-70 Transfers from detention centre to prison

There is no longer any discretion for a court to set a date on which the child is eligible to be transferred to adult detention. Any child who is, or will turn 17 and has, or will have six months remaining on their sentence will be transferred to adult custody. Any remaining period of detention will convert into a period of imprisonment and be administered under the Corrective Services Act.

I. Appeals and sentence reviews

11-71 Appeals

If a child is dealt with summarily and a sentence order made, the aggrieved person may appeal to a childrens court judge using the mechanism provided by Part 9, division 1 of the Justices Act (s 117(2)).

In Division 1, all relevant references to a district court judge are taken to be references to a childrens court judge (Justices Act, s 117(3)).

A district court judge does not have jurisdiction to hear and decide an appeal (Justices Act, s 117(4)).

Section 222(1) of the Justices Act allows for appeals to a single judge of orders made by any justices or justice in a summary manner, whether upon conviction or sentence.

A complainant can appeal indictable offences dealt with summarily to the childrens court judge only on the basis of appealing the sentence order (Justices Act, s 222(1)).

A complainant can appeal the conviction of indictable matters dealt with summarily only to the Court of Appeal (Criminal Code, s 668D).

A decision of the childrens court judge is appealable to the Court of Appeal (Justices Act, s 116).

Indictable offences dealt with in higher courts

All appeals from the childrens court, Supreme Court and district court go to the Court of Appeal. Appeals can be made against conviction and sentence (Criminal Code, Chapter 67).

As with appeals against sentences involving adults, children who are appealing against a sentence must show that the sentence was manifestly excessive.

Legal Aid Queensland's Youth Legal Aid team conducts appeals assessed as having merit on behalf of children referred by practitioners. Please contact 1300 65 11 88 or ylalaq@legalaid.qld.gov.au if you wish to make a referral or an inquiry.

J. The Department of Justice and Attorney-General (Youth Justice Services)

11-72 Responsibility of the Department of Justice and Attorney-General (Youth Justice Services)

The Department of Justice and Attorney-General (Youth Justice Services) is responsible for administering any community-based or detention orders made under the Youth Justice Act (s 302). In this role, the department:

- provides programs and support for young offenders to reduce the likelihood of their re-offending
- provides programs to help young offenders reintegrate into their communities
- ensures that sufficient agencies are available to provide appropriate activities for community service orders in all areas of Queensland
- helps young people and their families understand the youth justice system
- reduces the level of over-representation of Aboriginal and Torres Strait Islander young people in the youth justice system.

The department has a legislative right to appear in the childrens court and other specific functions (such as preparing pre-sentence reports) in relation to sentencing (s 74). Further, the department is responsible for supervising a child released from detention on a supervised release order.

When bringing applications for breach of community-based orders, the department acts in the role of prosecutor. The department is also responsible for providing and administering detention centres.

11-73 Role of the Department of Justice and Attorney-General (Youth Justice Services) at court

The departmental officer attending court is responsible for gathering and collating information about the child for presentation in court. The officer liaises with the youth justice system, the child and their family.

If a matter is to proceed as a sentence, the departmental officer seeks to conduct a pre-court interview with the child. This enables the officer to assess the child and identify factors that contribute to the child's offending behaviour. The

officer also has information about the child's previous contact with the department (including both youth justice and child protection matters).

The officer will make submissions to the court regarding the charge(s), the child's suitability for various orders and future departmental involvement with the child. The department's policy is not to interview a child regarding the details of an offence until the child indicates, through their legal representative, that they are pleading guilty.

11-74 The departmental officer at court as prosecutor

The department is required to act as prosecutor in the following circumstances:

- breaches of probation, community service, intensive supervision and conditional release orders
- applications in the interests of justice to vary, discharge or re-sentence concerning probation, community service and intensive supervision orders
- applications in the interests of justice to vary or revoke conditional release orders
- applications to revoke supervised release orders
- applications to vary by consent probation, community service and intensive supervision orders.

11-75 Bail programs

When applying for bail, you should be aware of assistance that the department provides.

Various bail accommodation services exist across the state. These services provide short-term, supervised accommodation and support to children charged with an offence. They target children who may otherwise be refused bail because of a lack of supervised accommodation. They aim to reduce the number of children held in detention on remand. You should approach the relevant departmental area office or court officer to access these services.

The department can assist further by preparing a conditional bail program. Conditional bail programs focus on children who would not otherwise be granted bail, or are highly likely to fail to comply with bail conditions or re-offend without substantial intervention.

While such a program places more onerous conditions on the child, this program may be the only avenue that enables the child to be granted bail. A conditional bail program should be tailored to suit the child and address the issues underlying their offending behaviour (such as personal development activities to help the child reintegrate into their community). It may include involvement in an existing group project or activity (such as a job skills development course).

You should discuss the child's circumstances with the departmental court officer prior to court. The availability of a conditional bail program will generally depend on the child's suitability for such a program and the resources available to the departmental area office that will supervise the child.

The conditional bail program must be included as a condition of the child's bail. If it is not, the child will not be obligated to comply with the program. The program maximises a child's opportunities for bail and effectively supervises the child in the community while they are on bail. Conditional bail does not provide secure custody of the child.

If a child has no permanent accommodation when applying for bail, approach the departmental court officer prior to court to ascertain whether the department can help find alternative accommodation. In certain cases, it may be appropriate to request that the child reside 'as directed by the Department of Justice and Attorney-General (Youth Justice Services)' for bail purposes if it appears that the child will be highly mobile and reliant on short-term accommodation facilities. Higher courts will generally require more specific residential information before granting bail.

11-76 Other programs available

The Youth Justice Conferencing sector of the Department of Justice and Attorney-General (Youth Justice Services) coordinates and administers police-referred conferences and compliance with the agreement terms.

To find out more about the specific programs offered to children, contact the Department of Justice and Attorney-General (Youth Justice Services). Each region has its own network of community agencies and programs available.

K. Legal aid

11-77 Legal aid for children

Legal aid is automatically available to children charged with indictable offences.

A 'merit test' is applied to applications involving summary and regulatory offences, as well as for bail in the childrens court and appeals under s 222 of the Justices Act, to determine whether to approve a grant of aid. When processing an application for aid for a child, Legal Aid Queensland has a policy of not taking their parents' assets into account.

As a duty lawyer, you should always ascertain whether a child has representation. If a child is not legally represented, they should apply for legal aid. If the child is remanded in detention, they should apply for legal aid so they can receive continuous representation. You should follow up the matter and confirm that the application has been processed.

Appendix A—Table of court sentence options

Order	Section	Max (magistrate)	Max (judge)	Recording of convictions
Caution	s 20 application	–	–	No
Youth justice conference	s 161 in general s 163 indefinite referral s 165 pre-sentence	–	–	No
Reprimand	s 175(1)(a)	–	–	No; s 183
Good behaviour order	ss 175(1)(b), 188 & 189	12 months	12 months	No; s 183
Fine	ss 175(1)(c), 190, 191 & 309	Only if child has capacity to pay	Only if child has capacity to pay	Discretionary; s 183
Probation	s 175(1)(d) & s 176 for serious offences; ss 178, 179 & 180 for combination orders; Division 12 for contraventions & variations (ss 236–252)	12 months; offence must be one that has a maximum penalty of imprisonment if offender an adult: s 175(2)	Two years unless serious offence, then three years under s 176; offence must be one that has a maximum penalty of imprisonment if offender an adult: s 175(2)	Discretionary; s 183 ***Note*** the previous provision that a conviction 'is taken to be recorded' for a three-year probation order has been removed by the amendments
Community service (for 13 years and over only)	s 175(1)(e); s 178 combination with probation; Division 12 for contraventions & variations (ss 236–252)	If 13-15 years old, 100 hours; if over 15 years, 200 hours; offence must be one that has a maximum penalty of imprisonment if offender an adult: s 175(2)	If 13-15 years old, 100 hours; if over 15 years, 200 hours; offence must be one that has a maximum penalty of imprisonment if offender an adult: s 175(2)	Discretionary; s 183
Intensive supervision order (for under 13 years only)	s 175(1)(f); s 176 cannot combine for single offence; Division 12 for contraventions & variations (ss 236–252)	Period of six months	Period of six months	Discretionary; s 183
Boot camp order (for 13 years and over only)	s 175(3)(b) & ss 226A–226D	Period of three to six months	Period of three to six months	Discretionary; s 183
Conditional release order	ss 175(3) & 220	Period of detention limited to one year; Division 12 for contraventions & variations (ss 236–252)	Period of detention limited to five years or half the statutory maximum; OR, if sentenced under s 176 serious offence, seven years, ten years or life; Division 12 for contraventions & variations (ss 236–252)	Discretionary; s 183
Detention	ss 175(g) & 176; ss 179 & 180 combinations	One year	Five years of half statutory max, whichever is less; OR, if under s 176 serious offence, seven years, ten years or life	Discretionary; s 183
Compensation, restitution	ss 181 & 235	20 penalty units for property compensation; child must have capacity to pay	20 penalty units for property compensation; child must have capacity to pay	Not applicable