

Independent National Security Legislation Monitor

Summary of relevant State and Territory legislation

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Context

1. While the INSLM's role is to review Commonwealth legislation, doing so in the context of the current review requires him to consider State and Territory legislation under which children accused of Commonwealth terrorism offences are dealt with. State and Territory legislation is of most acute relevance in relation to the INSLM's review of s 20C of the Crimes Act, but also has a bearing on the review of ss 15AA and 19AG.
2. As a guide to those wishing to engage with the INSLM review, this document sets out brief, preliminary summaries of potentially relevant State and Territory legislation. These summaries are intended only to provide an indication of the general structure of the juvenile justice legislation in each State and Territory, and do not consider in any detail the potential interactions between Commonwealth criminal law and the State and Territory legislation summarised.
3. For consistency, offenders within scope of the INSLM review (i.e. those aged between 10 and 17 inclusive) are referred to below collectively as 'children', though some jurisdictions themselves use different nomenclature and/or draw distinctions between different age groups within that range.

New South Wales (NSW) law relevant to review – preliminary summary

Overview

4. Children may be dealt with either ‘according to law’ or under the scheme set out in the *Children (Criminal Proceedings) Act 1987* (NSW) (the CCP Act).
5. Commonwealth terrorism offences punishable by life or 25 years imprisonment are ‘serious children’s indictable offences’ and therefore excluded from the jurisdiction of the Children’s Court.
6. Diversionary options under the *Young Offenders Act 1997* (NSW) (the YO Act) are not available where a child is charged with a Commonwealth terrorism offence.

NSW Children’s Court Jurisdiction

7. The NSW Children’s Court has jurisdiction to hear and determine proceedings in respect of any offence, other than ‘serious children’s indictable offences’ and certain State traffic offences.
8. A ‘serious children’s indictable offence’ includes various States offences and, relevantly, any an offence punishable for life or for 25 years (s 3 CCP Act). Such offences must ‘be dealt with according to law’ (s 17 CCP Act).
9. The Children’s Court is to proceed summarily except, most relevantly, in certain circumstances where a child charged with an indictable offence elects to proceed ‘according to law’ or where the Children’s Court is of the opinion that the charge may not be properly disposed of in a summary manner (s 31 CCP Act).
10. Under s 3 of the CCP Act, a ‘child’ is a means a person who is under the age of 18 years.

Exclusion of terrorism offences from Children’s Court jurisdiction

11. As noted above, those Commonwealth terrorism offences which are punishable for life or for 25 years are expressly excluded from the jurisdiction of the Children’s Court.

Sentencing options

12. For those sentenced as children, s 33 of the CCP Act gives the Children’s Court the following sentencing powers:
 - a. Dismissing the charge with or without caution;
 - b. A good behaviour bond of 2 years or less;
 - c. A fine of no more than 10 penalty units, or the maximum fine for the offence (whatever is the lesser);
 - d. A fine and a bond;
 - e. Release on condition of complying with the outcome plan of a conference under the YO Act;
 - f. A Griffiths-type remand;
 - g. A release on probation for a period not exceeding 2 years;
 - h. A community service order of up to 100 hours if the child is under 16, or up to 250 hours (depending on the maximum penalty for the offence) if the child is 16 or over;
 - i. A suspended sentence of up to 2 years; and
 - j. A detention order of up to 2 years.

13. Children who are sentenced 'according to law' for 'serious children's indictable offences', or for other indictable offences dealt with in higher courts, can be sentenced to imprisonment.
14. A child who turns 18 and is dealt with 'according to law' (that is, is sentenced like an adult) can access home detention or intensive corrective orders, whereas a child who is dealt with in the Children's Court cannot.
15. The sentencing court may make an order under s 19 of the CCP Act directing that the whole or any part of the term of a sentence of imprisonment be served as a juvenile offender (s 19(1) CCP Act). However, for 'serious children's indictable offences', the court must be satisfied that there are special circumstances justifying detention of the person as a juvenile offender (s 19(3)), and the person's youth alone is not a special circumstance (s 19(4A)). Despite any s 19 order, Juvenile Justice can also still administratively transfer a juvenile offender to an adult prison (s 28, *Children (Detention Centres) Act 1987* (NSW)).

Sentencing principles

16. Section 6 of the CCP Act sets out principles to which a person or body that has functions under that Act is to have regard in the exercise of criminal jurisdiction with respect to children:
 - a. Children have rights and freedoms before the law equal to those enjoyed by adults, and in particular a right to be heard and a right to participate in the processes that lead to decisions that affect them.
 - b. Children who commit offences bear responsibility for their actions, but because of their state of dependency and immaturity, require guidance and assistance.
 - c. It is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption.
 - d. It is desirable, wherever possible, to allow a child to reside in his or her own home.
 - e. The penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind.
 - f. That it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties.
 - g. That it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions.
 - h. That, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.
17. At general law, s 21A(3)(j) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) lists as a mitigating factor that 'the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability'.

Diversionsary options under the YO Act (NSW)

18. The YO Act establishes a diversionsary scheme available to NSW Police and courts dealing with children who commit certain offences, providing for the potential use of warnings, cautions and youth justice conferences. That scheme does not apply to Commonwealth terrorism offences (s 8(1) YO Act).

Victorian law relevant to review – preliminary summary

Overview

19. Children can be sentenced either under the general, adult system provided in the *Sentencing Act 1991* (Vic) (the Sentencing Act) or under the specialist juvenile system provided in the *Children, Youth and Families Act 2005* (Vic) (the CYF Act). The Sentencing Act does not apply to the Children's Court. However, general courts may exercise the sentencing powers of the Children's Court.
20. The Children's Court has jurisdiction to hear and determine summarily all offences, except for some State offences. However, recent amendments have been enacted in relation to offences against Div 101 of the *Criminal Code* (Cth) (the Code):
 - a. there is now a presumption that the Children's Court will not hear and determine summarily such an offence; and
 - b. absent 'exceptional circumstances', a general court must not apply a juvenile detention order in sentencing a person convicted of such an offence.
21. Diversionary options are potentially available under the CYF Act.

Victorian Children's Court Jurisdiction

22. The Children's Court has jurisdiction (s 516 CYF Act):
 - a. to hear and determine all charges against children for summary offences;
 - b. to hear and determine summarily charges against children for indictable offences, excluding some state offences (eg murder, manslaughter);
 - c. to conduct committal proceedings; and
 - d. to deal with the bail of a child charged with an offence.
23. A 'child' is someone who was under 18 at the time of an offence and under 19 at the time proceedings were commenced (s 3 CYF Act). There is provision for the transfer of matters to another court where a child reaches an age of 19 or older during proceedings (s 516(5) CYF Act).

Exclusion of terrorism offences from Children's Court jurisdiction

24. No Commonwealth terrorism offences are completely excluded from the jurisdiction of the Children's Court. However, as amended in 2017, the CYF Act relevantly provides that the Children's Court must not hear and determine summarily a charge of an offence against Div 101 of the Code allegedly committed by a child when aged 16 years or over unless (s 356(6)):
 - a. the child or the Crown asks it to do so;
 - b. the Court is satisfied that the sentencing options under the CYF Act are adequate; and
 - c. it is in the interests of the victim to do so; the child is particularly vulnerable because of cognitive impairment or mental illness; or there is a substantial and compelling reason to do so.
25. In determining whether there is 'a substantial and compelling reason', the Court is required to have regard to Parliament's intention that such a charge should not normally be heard and determined summarily (s 356(7) CYF Act).

26. This provision would not apply to terrorism offences not located in Div 101 of the Code, eg foreign incursions offences in Pt 5.5. Proceedings relating to these offences could nonetheless be removed from the Children's Court under general procedures.

Sentencing options

27. As set out below, children can be sentenced either under the general system provided in the Sentencing Act or under the system provided in the CYF Act.

28. The Children's Court has available to it a cascading set of sentencing options set out in s 360(1) of the CYF Act:

- a. dismissal;
- b. non-accountable undertaking;
- c. accountable undertaking;
- d. good behaviour bond;
- e. fine;
- f. probation;
- g. youth supervision order;
- h. youth attendance order;
- i. detention in youth residential centre; and
- j. detention in youth justice centre.

29. The Court must not impose any sentence unless it is satisfied that it is not appropriate to impose any of the preceding options (s 361).

30. The Supreme Court and the Country Court may, when sentencing a child for an indictable offence, impose any sentence which could be imposed by the Children's Court (s 586 CYF Act), though the principles of the Sentencing Act which apply to custodial sentences apply to the imposition by the court of any detention order.

Sentencing principles

31. The CYF Act provides a separate set of sentencing principles which the Children's Court is to apply in sentencing children. The Sentencing Act does not apply to the Children's Court (s 4).

32. Under s 362 of the CYF Act, the Children's Court must have regard to:

- a. the need to strengthen and preserve the relationship between the child and the child's family;
- b. the desirability of allowing the child to live at home;
- c. the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance;
- d. the need to minimise the stigma to the child resulting from a court determination;
- e. the suitability of the sentence to the child;
- f. if appropriate, the need to ensure that the child is aware that he or she must bear a responsibility for any action by him or her against the law.

33. As recently amended, s 362(1)(g) of the CYF Act provides that the Children's Court must have regard to the need to protect the community, or any person, from the violent or other wrongful

acts of a child sentenced for, relevantly, an offence against Div 101 of the Code. In sentencing a child for other offences, the Court may have regard to this need if it appropriate to do so.

34. Generally, a child sentenced in a general court will be sentenced according to the principles provided by the Sentencing Act. The youth of an offender can be taken into account in sentencing under the general principles provided in the Sentencing Act.
35. The Sentencing Act makes express provision for 'young offenders': those under the age of 21 years at the time of sentencing (s 3(1)). A youth justice centre or youth residential centre order can be imposed on such offenders if the court, taking into account the age, character and history of the offender and the nature of the offence, believes there are reasonable prospects for rehabilitation or believes the young offender is particularly impressionable, immature or likely to be subjected to undesirable influences in adult prison (s 32).
36. As recently amended, a court must not make a youth justice centre or youth residential centre order in respect of a young offender convicted, relevantly, of an offence against Div 101 of the Code unless satisfied that 'exceptional circumstances' exist.

Diversion programs under the CYF Act

37. Div 3A of Part 5.2 of the CYF Act provides for diversionary options (at the discretion of the court, with prosecutorial consent). The court may refer a child to a diversion program before formal plea (s 356D): if the child completes program to the court's satisfaction, the court must discharge the child (s 356I).
38. The court also has a power to defer sentencing, including for the purpose of allowing a child to participate in a group conference (s 414).

Queensland law relevant to review – preliminary summary

Overview

39. In Queensland, offenders who commit an offence while a child must be dealt with, in any court, as a child under the *Youth Justice Act 1992* (Qld) (the YJ Act), except in certain circumstances where they have subsequently turned 19 years of age. The YJ Act provides broad sentencing powers in serious cases, including the capacity to impose a life term for particularly heinous violent offending.
40. The Children’s Court has varying jurisdiction depending on whether it is constituted by a judge or a magistrate. When constituted by a judge, the Children’s Court can sit with a jury and can hear and determine all indictable offences except for those punishable by more than 20 years imprisonment.
41. Diversionary options are potentially available under the YJ Act and, in some circumstances, must be considered.

Queensland Children’s Court Jurisdiction

42. Under s 5 of the *Children’s Court Act 1992* (Qld), the Children’s Court can be composed either by:
 - a. a Children’s Court judge or—if not available—a District Court judge; or
 - b. a Children’s Court magistrate or—if not available—any magistrate; or
 - c. if neither a Children’s Court magistrate nor any other magistrate is available, 2 justices of the peace.
43. The jurisdiction of the Children’s Court depends on its composition:
 - a. When composed by a judge, the Court has jurisdiction:
 - i. to hear and determine all indictable offences charged against a child, except ‘supreme court offences’ (s 99 YJ Act). The Court can—and where a child is unrepresented or is represented but does not elect for judge-only trial, must—conduct a jury trial (s 105 YJ Act).
 - ii. to deal summarily with certain offences in some circumstances (s 100 YJ Act; s 651 etc *Criminal Code Act 1899* (Qld) (the Queensland Code)).
 - iii. to deal with bail in relation to a child (s 59 YJ Act).
 - iv. to review sentences imposed by Children’s Court magistrates (s 118 YJ Act) and hear appeals from decisions of the Children’s Court when composed of justices of the peace (s 117 YJ Act; s 222 *Justices Act 1886* (Qld) (the Justices Act)) .
 - b. When composed by a magistrate, the Court has jurisdiction to hear and determine matters summarily or to conduct committal proceedings, under the Justices Act.
 - c. When composed by justices of the peace, the Court’s criminal jurisdiction is limited to the hearing and determination of a simple offence (effectively a summary offence — see s 3 Queensland Code) to which a child has pleaded guilty, and to procedural action/orders. The Court may not make a detention or conditional release order (s 67 YJ Act).

44. A 'child' is a person under the age of 18 (Sch 1 *Acts Interpretation Act 1954* (Qld)), but adults who committed an offence while a child may be dealt with as children in some circumstances (Div 11 YJ Act). **NB:** before the passage of the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Bill 2016* (Qld), 'child' had been separately defined in Sch 4 of the YJ Act as a person who was under the age of 17.

Exclusion of terrorism offences from Children's Court jurisdiction

45. All Commonwealth terrorism offences with a maximum penalty of more than 20 years are 'supreme court offences' (Sch 4 YJ Act; s 61 *District Court of Queensland Act 1967* (Qld)) and, as noted above, therefore excluded from the Children's Court.

Sentencing options

46. As set out below, offenders who commit an offence while a child can be sentenced either according to the YJ Act or, in some circumstances, as an adult.

47. The following non-custodial options are available to the court under the YJ Act (s 175):

- a. reprimand;
- b. good behaviour order;
- c. fine;
- d. probation (no more than 3 years in the most serious cases: ss 175(1)(d) and 176 YJ Act);
- e. participation in a restorative justice process, or if a restorative justice agreement has been made, a sentence enforcing obligations under the agreement; and
- f. community service.

48. Powers to impose a custodial sentence vary by circumstances:

- a. a magistrate may impose a sentence of detention of no longer than 1 year (s 175(1)(g)(i) YJ Act) (but may refer a matter to a judge for sentence: s 186 YJ Act);
- b. a judge may ordinarily impose a sentence of detention no longer than the shorter of:
 - i. half the maximum an adult could be sentenced to for the same offence (s 175(1)(g)(ii)(A) YJ Act); or
 - ii. 5 years (s 175(1)(g)(ii)(B) YJ Act).
- c. Special provision is made for the most serious offences (s 176 YJ Act):
 - i. where an offence is punishable by a maximum of more than 14 years imprisonment, a judge can impose a sentence of detention no longer than 7 years;
 - ii. where an offence is punishable by life imprisonment, a judge can impose a sentence of detention as long as 7 years, or—if the offence involves violence against a person and the court considers the offence 'particularly heinous'—life.

49. The YJ Act expressly provides (s 155) that a court sentencing a child is to have no regard to provisions imposing mandatory minimum sentences, though s 176(6) of the YJ Act does

make clear that mandatory non-parole periods imposed on those convicted of murder under s 305 of the Queensland Code *do* apply to children sentenced to detention for life.

Sentencing principles

50. Subject to the below, any court sentencing a child must do so according to the principles set out in the YJ Act (s 149).
51. Those principles (set out in s 150 YJ Act) provide that the court must have regard, among other things, to:
- a. the youth justice principles appended to the YJ Act;
 - b. the nature and seriousness of the offence;
 - c. the child's previous offending history;
 - d. information about the child, including a pre-sentencing report; and
 - e. special considerations set out in the YJ Act.
52. The special considerations (set out in s 150(2) YJ Act) are that:
- a. a child's age is a mitigating factor in determining whether or not to impose a penalty, and the nature of a penalty imposed; and
 - b. a non-custodial order is better than detention in promoting a child's ability to reintegrate into the community; and
 - c. the rehabilitation of a child found guilty of an offence is greatly assisted by—
 - i. the child's family; and
 - ii. opportunities to engage in educational programs and employment; and
 - d. a child who has no apparent family support, or opportunities to engage in educational programs and employment, should not receive a more severe sentence because of the lack of support or opportunity; and
 - e. a detention order should be imposed only as a last resort and for the shortest appropriate period.
53. A person who commits an offence while a child must be sentenced as an adult where the person is not sentenced until after the person has turned 19 years of age or the person is not (ss 140(1)—(3) and 141(4) YJ Act). There is also provision for sentences imposed on children to subsequently be handled as if they were corresponding sentences under the adult system where the offender is being prosecuted or has been convicted of another offence as an adult and has turned 19 years of age (s 143 YJ Act).
54. When a person is sentenced as an adult under the above provisions, the court:
- a. must have regard to the fact that the offender was a child when the offence was committed and the sentencing that might have been imposed if the offender had been sentenced as a child (s 144(2) YJ Act); and
 - b. must not impose a term of imprisonment longer than the period of detention which could have been imposed if the offender was sentenced as a child (s 144(3)(a) YJ Act).

Diversion programs under the YJ Act (Qld)

55. The Charter of Youth Justice Principles scheduled to the YJ Act provides:

5. If a child commits an offence, the child should be treated in a way that diverts the child from the courts' criminal justice system, unless the nature of the offence and the child's criminal history indicate that a proceeding for the offence should be started.

56. Where a child pleads guilty or is found guilty, the court must consider referral to a restorative justice process instead of or prior to imposing a sentence, respectively (s 162 YJ Act).

Western Australian (WA) law relevant to review – preliminary summary

Overview

57. Children who commit offences must be dealt with according to the sentencing principles set out in the *Young Offenders Act 1994* (WA) (YO Act); however, a broad range of sentences are available under both the YO Act and the *Sentencing Act 1995* (WA) (the Sentencing Act), including imprisonment in an adult prison.
58. No particular offences are excluded from the jurisdiction of the Children’s Court, however indictable offences may at the election of a child be committed for trial in a higher court.
59. A diversionary scheme of ‘juvenile justice’ teams is potentially available under the YO Act.

Western Australian Children’s Court Jurisdiction

60. Under s 6 of the *Children’s Court of Western Australia Act 1988* (WA) (the CC Act), the Children’s Court can be composed by:
 - a. a judge, including a District Court or Supreme Court judge (ss 6(1)(a) and 6(3));
 - b. a magistrate; or
 - c. not less than 2 justices of the peace (JP).NB: a judge or magistrate may sit with one or more JP (s 6(2)(a)).
61. Under s 19 of the CC Act, the Children’s Court has *prima facie* exclusive jurisdiction to hear and determine a charge of an offence alleged to have been committed by a child.
62. The Children’s Court’s jurisdiction depends on its composition – when constituted without a judge it is a court of summary jurisdiction (s 19(3) CC Act); and there are limits on the sentences which can be imposed when the court is constituted by JPs or constituted by or including magistrates (s 21 CC Act).
63. A charge against a child for a summary offence (‘simple offence’ in Western Australia: see s 67 *Interpretation Act 1984* (WA)) may be heard and determined by the Children’s Court in the same manner as the Magistrates Court could in respect of an adult offender.
64. Where a child is charged with an indictable offence the child may elect (s 19B CC Act) to be tried on indictment in the District or Supreme Court where the charge is for an offence:
 - a. for which an adult must be tried on indictment; or
 - b. which is triable summarily but the court decides should be tried on indictment.
65. If such an election is made, the Children’s Court proceeds in accordance with the general criminal law to commit the matter for trial or sentence in a general court (s 19B(3) CC Act; Pt 3 Div 4 *Criminal Procedure Act 2004* (WA)).
66. If a child does not make such an election, or is charged with an indictable offence which is triable summarily in circumstances where it would not be appropriately tried on indictment, the Children’s Court may hear and determine the matter (s 19B(2) and (4) CC Act).

67. The CC Act provides generally that ‘child’ means ‘any boy or girl under the age of 18 years’ (s 3). In the context of charges of indictable offences, it is specifically provided that the CC Act applies to those who committed an offence while a child (s 19A). However, the Children’s Court may transfer proceedings for an indictable offence committed by a person who is now 18 or over to the Magistrates Court (s 19D).

Exclusion of terrorism offences from Children’s Court jurisdiction

68. No Commonwealth terrorism offences are expressly excluded from the jurisdiction of the Children’s Court.

Sentencing options

69. Different sentencing options are available depending on an offender’s age:

- a. where an offender is aged under 17 years at the time of sentence, the court may only apply a sentencing option available under Pt 7 of the YO Act (s 50 YO Act);
- b. where an offender is aged 17 at the time of sentence, a court may apply either or both of (s 50A(5) YO Act):
 - i. a sentencing option available under Pt 7 of the YO Act; and/or
 - ii. a community-based order under Pt 9 of the Sentencing Act or an intensive supervision order under Pt 10 of the Sentencing Act (see s 50A(2)(b) definition of ‘community order’ in s 4 Sentencing Act);
- c. where an offender is aged 18 or over at the time of sentence, the court must apply a sentence under the Sentencing Act (s 50B).

70. Part 7 of the YO Act provides for the following sentencing options:

- a. no conviction recorded (s 55);
- b. compensation or restitution (s 56);
- c. release on recognisance (Pt 7 Div 4);
- d. fines (Pt 7 Div 5);
- e. youth community based orders (Pt 7 Div 6);
- f. intensive supervision orders (Pt 7 Div 7);
- g. supervised release orders (Pt 8);
- h. a custodial sentence (Pt 7 Div 8).

71. A court cannot impose any custodial sentence unless satisfied there is no other appropriate option (s 120(1) YO Act) and if it does so must give written reasons why there is no other appropriate option (s 120(2)–(3) YO Act).

72. A court can impose either (see definitions of ‘detention’ and ‘imprisonment’ in s 3 YO Act):

- a. ‘detention’ in a juvenile detention centre for a period not longer than a term of imprisonment which would have been applied to an adult (s 118(1)(a)); or
- b. ‘imprisonment’ in a general prison (s 118(1)(b)), including ‘indefinite imprisonment’ as provided for in Pt 14 of the Sentencing Act (s 118(3)).

73. Children can be given a custodial sentence of 6 months or less, which is not available to adults (s 118(2) YO Act; s 86 Sentencing Act), but cannot be sentenced to suspended or conditional suspended imprisonment (s 118(1)(a) YO Act; cf Pts 11–12 Sentencing Act).
74. Offenders who have reached the age of 18 at the time of sentence must serve a sentence of imprisonment in a general prison (s 118A(2) YO Act; while those under 18, unless ordered otherwise (s 118(4) YO Act), are to serve a sentence of imprisonment in a juvenile detention centre until a direction is made by the Children’s Court, constituted by a judge, to authorise transfer to a general prison (ss 118A(1) and 178 YO Act).

Sentencing principles

75. ‘General principles of juvenile justice’ which are to be observed in the administration of the YO Act are set out in s 7.
76. Sentencing principles to be applied to children are set out in s 46 of the YO Act. These principles apply to any court dealing with a child (see definition of ‘court’ in s 3 YO Act) and apply to persons who were children at the time when they committed an offence (see definition of ‘young offender’ in s 3 YO Act; s 4 YO Act).
77. Those principles are that:
- a. general principles apply except as modified by the YO Act and by the general principles of juvenile justice (set out above) (s 46(1)); and
 - b. the court is to consider in particular (s 46(2)):
 - i. the nature and seriousness of the offence; and
 - ii. any history of offences previously committed by the child; and
 - iii. the cultural background of the child; and
 - iv. any ‘responsible parenting agreement’ entered into in respect of the child; and
 - v. any order previously made by a court when disposing of a charge of an offence that still applies to the child, and any further order that is liable to be imposed if the child does not comply with the terms of any such order; and
 - vi. the extent, if any, to which any person was affected as a victim of the offence; and
 - c. the court is to dispose of the matter in a way that is in proportion to the seriousness of the offence and is consistent with the treatment of other children who commit offences (s 46(3)); and
 - d. in deciding how to dispose of the matter, which includes deciding the appropriate degree of severity to be used, the court is to consider how young the offender is as a mitigating factor (s 46(4)); and
 - e. the court is to have regard to the fact that the rehabilitation of a child is facilitated by —
 - i. the participation of the child’s family; and
 - ii. giving the child opportunities to engage in educational programmes and in employment,

but the absence of such participation or opportunities is not to result in the child being dealt with more severely for the offence (s 46(5)).

78. However, where a child 'repeatedly commits serious offences' in the terms of Div 9 of the YO Act, the court is to give primary consideration to the protection of the community ahead of all the other principles and matters referred to in section 46 (ss 46(6) and 125 YO Act)

Diversion programs under the YO Act (WA)

79. Part 5 of the YO Act sets out a diversionary scheme under which a child can be dealt with by a 'juvenile justice team'.

80. Under s 24 of the YO Act, this scheme is to be administered with regard to the following principles, in addition to the general principles of juvenile justice:

- a. the treatment of a child who commits an offence that is not part of a well-established pattern of offending should seek to —
 - i. avoid exposing the child to associations or situations likely to influence the child to further offend; and
 - ii. and help the family or other group in which the child normally lives to influence the child to refrain from further offending; and
- b. the treatment of a child who commits an offence should be fair, should be in proportion to the seriousness of the offence, and should be consistent with the treatment of other children who commit offences; and
- c. a child who is dealt with for an offence should be dealt with in a time frame that is appropriate to the child's sense of time; and
- d. it is to be made clear to a child who is dealt with for an offence —
 - i. what act or omission constituted the offence; and
 - ii. what it is that the person is required to do.

81. Although certain serious offences listed in Schedule 1 or Schedule 2 to the YO Act are excluded from the juvenile justice scheme (s 25 YO Act), no Commonwealth terrorism offence is listed in either.

South Australian (SA) law relevant to review – preliminary summary

Overview

82. While the Youth Court has jurisdiction to hear all charges summarily, there is provision for certain serious charges to be laid in general courts or for the Youth Court to commit such charges for trial or sentence in the general courts.
83. Where a child is dealt with by the Youth Court, or by a general court which chooses to apply the sentencing powers of the Youth Court, available sentences are limited. A child may, however, be dealt with as an adult if tried or sentenced in a general court.
84. The Youth Court potentially has power to divert matters to be dealt with by police or by a family conference.

SA Youth Court Jurisdiction

85. The Youth Court has jurisdiction to deal with charges of all offences except those excluded by regulations (ss 4 and 16(1) YO Act; s 7 *Youth Court Act 1993* (SA)). No Commonwealth terrorism offences are excluded by regulation.
86. The Court has power to deal with any charge summarily (s 18 YO Act).
87. Alternatively, where (relevantly):
 - a. a child charged with an indictable offence, on advice, asks to be dealt with in the same way as an adult; or
 - b. the Youth Court or the Supreme Court determines, on Crown application, that the child should be dealt with in the same way as an adult because of the gravity of the offence, or because the offence is part of a pattern of repeated offending;the Court can conduct a committal for trial or sentence in a general court (s 17 YO Act).
88. The Court's jurisdiction applies to offenders who were children at the time of their offending (see definition of 'youth': s 4 YO Act),

Exclusion of terrorism offences from Youth Court jurisdiction

89. No Commonwealth terrorism offences are expressly excluded from the jurisdiction of the Youth Court.
90. However, the DPP has discretion (YO Act s 16(2)) to lay charges in the general courts for 'major indictable offences' (relevantly any indictable offence where the maximum penalty exceeds 5 years imprisonment: s 5 *Criminal Procedure Act 1921* (SA)) where the DPP is of the opinion that the child poses an appreciable risk to the safety of the community and should therefore be dealt with in the same way as an adult. Whether a child poses such a risk is to be assessed according to factors set out in s 15A of the YO Act, including the 'gravity of the offence'.
91. As noted above, if charges for Commonwealth terrorism offences were laid in the Youth Court, those charges could in some circumstances be committed for trial or sentence in a general court.

Sentencing options

92. As set out below, children may be dealt with either in the Youth Court or in a general court.

93. When sentenced by a general court, the court may (s 29(1) *Young Offenders Act 1993* (SA) (the YO Act)):
- a. deal with the child as an adult;
 - b. exercise the sentencing powers of the Youth Court; or
 - c. remand the child to the Youth Court for sentencing.
94. When the Youth Court is sentencing a child for an indictable offence, that court has, subject to the YO Act, the same powers as the District Court (YO Act s 22(1)).
95. A sentence of detention must not be imposed unless the child is a recidivist, a serious firearm offender, or if the Youth Court is satisfied a non-custodial sentence would be inadequate because of the gravity of the offence or because the offence forms part of a pattern of repeated offending (YO Act s23(4)).
96. If the offence of which the child is convicted would be punishable by imprisonment if committed by an adult, Youth Court may sentence the child to:
- a. detention for a period not exceeding three years,
 - b. home detention for a period not exceeding 12 months, or for periods not exceeding 12 months over 2 years or less,
 - c. detention for a period not exceeding 2 years, followed by a period of home detention not exceeding 12 months (YO Act s 23(2))
97. The Youth Court cannot sentence a child to imprisonment (YO Act s 23(1)), except where (YO Act s 23(6)):
- a. the child is already in prison;
 - b. the child has previously served a sentence in prison; or
 - c. where a sentence of detention would extend past the child's 21st birthday (in which case the Court must direct that any portion of a period of detention after that date be served in prison).

Sentencing principles

98. The YO Act sets out 'objects and statutory policies' which guide the exercise of powers under the Act, including in the sentencing of children (s 3 YO Act).
99. These 'objects and statutory policies' do not apply where the offender is committed for trial or sentencing in District Court or the Supreme Court, and that court deals with an offender as an adult (s 3(4)).

Diversionsary options under the YO Act (SA)

100. If the matter is being heard in the Youth Court, that court may refer the charge (if guilt is already established) to be dealt with by a police officer or by a family conference (YO Act s 17(2)).

Tasmanian law relevant to review – preliminary summary

Overview

101. The Youth Justice Division of the Magistrates Court (the Youth Justice Division) has jurisdiction to hear and determine charges of all offences other than prescribed State offences.
102. Whether the Youth Justice Division, in dealing with an indictable offence, proceeds summarily or by way of committal to a general court depends on the election of the child (and, if relevant, any guardian).
103. The Youth Justice Division can impose a sentence of detention no longer than 2 years; or, if an offender is 18 years of age or older at the time of sentence, a sentence of imprisonment no longer than 1 year in the case of a first offence or 5 years in the case of a subsequent offence.
104. Diversionary options may potentially be available, where appropriate.

Youth Justice Division Jurisdiction

105. The Youth Justice Division has jurisdiction (s 161 *Youth Justice Act 1997* (Tas) (the YJ Act)):
 - a. to hear and determine all offences except a prescribed list of State offences, which vary by the age of the child (ss 3 and 161(1)(a) YJ Act); and
 - b. to conduct committal proceedings in respect of all indictable offences (s 161(1)(b) YJ Act and Pt VII *Justices Act 1959* (Tas)).
106. Where a child 15 years of age or older is charged with an indictable offence (other than a prescribed State offence), the Youth Justice Division must ask the child for their consent to be tried by the Youth Justice Division. If the offender (or, if relevant, any guardian) objects to the Youth Justice Division dealing with the matter, the Youth Justice Division must proceed by way of committal to a general court (s 161 YJ Act).
107. The Youth Justice Division's jurisdiction applies to offenders who were children at the time of their offending must be commenced in the Youth Justice Division (s 103 YJ Act).

Exclusion of terrorism offences from Youth Justice Division jurisdiction

108. No Commonwealth terrorism offences are expressly excluded from the jurisdiction of the Youth Justice Division.

Sentencing options

109. The YJ Act sets out a specific sentencing regime for children:
 - a. Under that scheme, the Youth Justice Division has, relevantly, the following sentencing options (s 47(1) YJ Act):
 - i. dismissal;
 - ii. dismissal and reprimand;
 - iii. dismissal and good behaviour undertaking;
 - iv. release and conditional adjournment;
 - v. fine;
 - vi. probation order; and

- vii. detention for no longer than 2 years.
 - b. In addition to one of the above sentencing options, the Youth Justice Division may impose a suspended detention, restitution or compensation order (s 47(2) YJ Act).
 - c. The Youth Justice Division may also defer sentencing for up to 12 months from the date of a finding of guilt (s 47(1)(j) and (1A), Pt 4 Div 7A YJ Act).
110. Where an offender is no longer a child, the Youth Justice Division may also exercise the sentencing powers of a court of petty sessions (s 161A YJ Act) under the general law set out in the *Sentencing Act 1997* (Tas) (the Sentencing Act). Relevantly, the maximum term of imprisonment that a court of petty sessions can impose under that legislation is 12 months for a first offence or 5 years for any subsequent offence (s 13 Sentencing Act).
111. In determining its sentence under s 161A YJ Act, the Youth Justice Division must take into account the age of the child at the time of offending. The Youth Justice Division's discretion prevails over rules set out in s 103 of the YJ Act relating to how offenders of particular ages at the time proceedings commence are to be dealt with (s 161A(8) YJ Act).
112. Where an offender who was a child at the time of their offending is before a general court, that court may exercise either its sentencing powers under the general law or the sentencing powers of the Youth Justice Division under the YJ Act (s 107 YJ Act).

Sentencing principles

113. A range of general objectives and principles are set out in ss 4 and 5 of the YJ Act. When applying the sentence options available under the YJ Act, the Youth Justice Division (or general court exercising its powers) must have regard to all the circumstances of the case, including (s 47(4) YJ Act):
- a. the nature of the offence;
 - b. the child's age and any sentences or sanctions previously imposed on the child by any court or a community conference;
 - c. the impact any orders made will have on the child's chances of finding or retaining employment or attending education and training.
114. The Youth Justice Division (or general court exercising its powers) must also:
- a. ensure that the matter of the rehabilitation of the child is given more weight than is given to any other individual matter (s 47(3A) YJ Act);
 - b. not make a detention order unless satisfied that no other sentence is appropriate (s 80(b) YJ Act); and
 - c. not impose a sentence that is more severe than would be imposed on an adult who committed the same offence (s 48 YJ Act).
115. Where a child is before the Supreme Court, the Sentencing Act applies (cf s 5 Sentencing Act).

Diversions options under the YJ Act (Tas)

116. Under Pt 2 of the YJ Act, cautions and family conferences are available as diversionary options, 'where appropriate', for children who admit to committing an offence.

Australian Capital Territory (ACT) law relevant to review – preliminary summary

Overview

117. The Children’s Court has jurisdiction over all offences except those which are punishable by life imprisonment, though the Court may proceed by way of committal to a general court where the Children’s Court lacks power or decides not to hear an indictable offence summarily.
118. General sentencing principles and sentencing options are altered in cases where an offender was under the age of 18 at the time of offending, no matter in which court the offender is sentenced. Sentences of imprisonment imposed on such offenders must be for the shortest appropriate term and cannot be for life.
119. Diversion to a restorative justice scheme is available only in cases of Territory offences.

ACT Children’s Court Jurisdiction

120. The ACT Magistrates Court sits as the Children’s Court when exercising jurisdiction under s 288 of the *Magistrates Court Act 1930* (ACT) (the MC Act), and may be constituted by a Children’s Court Magistrate, Acting Children’s Court Magistrate or other magistrate assigned by the Chief Magistrate (Pt 4A of the MC Act).
121. The Children’s Court has jurisdiction over all indictable offences other than an offence punishable by life imprisonment (s 288 MC Act). However, the Children’s Court must proceed by way of committal (in the same manner as the Magistrates Court) when dealing with a charge of an indictable offence which (s 291E MC Act):
 - a. the Court has no power to hear and decide summarily; or
 - b. the Court has power to hear and decide summarily, but decides not to.
122. The Children’s Court can deal with any offence summarily, except an offence punishable by life imprisonment, where the child consents and the court considers the case can properly be disposed of summarily (ss 375(4) and (10)–(11) of the Crimes Act). In deciding whether a case can properly be disposed of summarily, the Children’s Court must consider (s 375(13)):
 - a. relevant representations made by the offender;
 - b. relevant representations made by the prosecutor in the offender's presence;
 - c. the facts of the case;
 - d. the seriousness of the alleged offence;
 - e. the circumstances in which the offence is alleged to have been committed;
 - f. the child's age;
 - g. the child’s apparent maturity;
 - h. the child's apparent mental capacity;
 - i. the suitability of the penalties that the court is empowered to impose;
 - j. the difficulty of any question of law that is likely to arise.

123. As noted above, the Children's Court cannot impose a term of imprisonment longer than 2 years. However, where the Children's Court convicts a child of an indictable offence, it may commit them for sentencing in the Supreme Court if satisfied that sentence should be passed by the Supreme Court because of the character or history of the child or that the Children's Court does not have power to impose a sentence that is likely to be appropriate (s 291G MC Act).
124. The jurisdiction of the Children's Court extends to any offender who was a child at the time of offending, and the Court can hear proceedings against an adult who is jointly charged with a child (s 288 MC Act).

Exclusion of terrorism offences from Children's Court jurisdiction

125. Those Commonwealth terrorism offences which are punishable by life imprisonment are excluded from the jurisdiction of the Children's Court (s 288(1)(b) MC Act).

Sentencing options

126. Chapter 8A of the *Crimes (Sentencing) Act 2005 (ACT)* (CS Act) deals with the sentencing options available for an offender who was a child at the time of offending, no matter in which court they are sentenced (see s 133B, definition of 'court' in dictionary to CS Act).
127. Sentences of imprisonment must, if the offender is under the age of 21 at the time of sentencing, be served in juvenile detention (s 133H).
- a. Imprisonment must be 'a last resort and for the shortest appropriate term' (s 133G(2)).
 - b. The court must consider making a combination sentencing including a sentence of imprisonment and a supervised good behaviour bond (s 133G(3)).
 - c. The Children's Court cannot impose a term of imprisonment longer than 2 years (s 375(16) *Crimes Act 1900 (ACT)* (Crimes Act)) and no court can impose a life sentence (s 133G(4) CS Act).
128. The range of non-custodial orders available generally under the CS Act apply, however:
- a. special provision is made for the application of good behaviour bonds to children, including allowing for the imposition of supervision and education and training conditions (Ch 8A Pt 8A.2); and
 - b. 'accommodation orders' may also be imposed (Ch 8A Pt 8A.3).

Sentencing principles

129. Specific provision is made in Chapter 8A of the CS Act for the sentencing of children in any court (s 133B).
130. When sentencing a child, the general purposes of sentencing stated in s 7 of the CS Act apply, except that (s 133C):
- a. a court must consider the purpose of promoting the rehabilitation of the child and may give more weight to that purpose than it gives to any of the other purposes stated in s 7; and
 - b. a court must have particular regard to the common law principle of individualised justice.

131. Likewise, in addition to the general sentencing considerations stated in s 133D, the court must also consider:

- a. the child's culpability for the offence having regard to his or her maturity;
- b. the child's state of development;
- c. the past and present family circumstances of the child.

132. A suite of 'youth justice principles' to be applied in the administration of sentences applied to children are set out in s 94 of the *Children and Young People Act 2008* (ACT). These principles are intended to be interpreted consistently with human rights instruments and jurisprudence, including the Convention on the Rights of the Child.

Diversionary options under the *Crimes (Restorative Justice) Act 2004* (ACT)

133. The *Crimes (Restorative Justice) Act 2004* (ACT) sets out a restorative justice process which is available to both children and adults. However, this scheme applies only to Territory offences (s 12).

Northern Territory (NT) law relevant to review – preliminary summary

Overview

134. The Youth Justice Court has jurisdiction under the *Youth Justice Act* (NT) (YJ Act) over all charges against offenders who were children at the time of their offending.
135. The Youth Justice Court must apply sentencing principles set out in the YJ Act and cannot impose a custodial sentence longer than 2 years. The Supreme Court may impose sentences under the general law or exercise the powers of the Youth Justice Court.
136. Diversionary options under the YJ Act may not be available in relation to at least some Commonwealth terrorism offences.

NT Youth Justice Court Jurisdiction

137. The Youth Justice Court is constituted by Local Court judges (ss 45–46 YJ Act).
138. All charges against children must be dealt with by the Youth Justice Court (s 52 YJ Act), except where an ex officio indictment is presented to the Supreme Court (s 52(3) YJ Act).
139. The Youth Justice Court must deal with all offences summarily except where:
 - a. an offender is charged with an offence which would be punishable by life imprisonment if committed by an adult (s 54A YJ Act);
 - b. an offender charged with an indictable offence not punishable by life imprisonment if committed by an adult does not consent to the proceeding being dealt with summarily (s 55 YJ Act); or
 - c. where the Court considers it is not appropriate to hear and determine an indictable offence summarily (s 56 YJ Act).
140. In these cases, the matter will be dealt with by way of committal to a general court under the process set out in the *Local Court (Criminal Procedure) Act* (NT).
141. The jurisdiction of the Youth Justice Court applies to those who were children at the time of offending (s 52(2) YJ Act).

Exclusion of terrorism offences from Youth Justice Court jurisdiction

142. No Commonwealth terrorism offences are expressly excluded from the jurisdiction of the Youth Justice Court.

Sentencing options

143. The Youth Justice Court has power to impose the following sentences (s 83 YJ Act):
 - a. dismiss the charge;
 - b. discharge the child without penalty;
 - c. adjourn the proceedings for 6 months and, if the child commits no further offences in that time, discharge the offender without penalty;
 - d. adjourn the proceedings for not more than 12 months, and grant bail for the purpose of assessing the child's capacity and prospects for rehabilitation, allowing the child to

demonstrate that they have been rehabilitated, or for any other purpose that the Court considers appropriate in the circumstances;

- e. adjourn the matter and order the child to participate in a specified program approved by the Minister;
- f. release the child on security;
- g. fine;
- h. community work order not exceeding 480 hours;
- i. periodic or wholly or partly suspended term of detention or imprisonment;
- j. detention or, if the child is at least 15 years of age, imprisonment for a period not exceeding:
 - i. where the child is less than 15 years of age—12 months; or
 - ii. where the child is 15 years of age or more—2 years.
- k. any other sentence which could be imposed on an adult, other than a community based order or community custody order.

144. The Supreme Court has power to:

- a. impose sentences available under the general law (s 83(5) YJ Act), including custodial sentences as long as would be available for an adult (s 82 YJ Act);
- b. exercise the sentencing powers of the Youth Justice Court (s 82(1)(a) YJ Act); or
- c. remit the matter to the Youth Justice Court for sentencing (s 82(1)(c) YJ Act).

Sentencing principles

145. The general sentencing principles under the *Sentencing Act* (NT) (Sentencing Act) which apply to the Supreme Court do not apply, of their own force, to the Youth Justice Court (s 4). Division 5 Part 6A of the Sentencing Act sets out a scheme of mandatory imprisonment where a person is convicted or has been convicted of certain offences, potentially including Commonwealth terrorism offences (see definition of 'violent offence' in s 78C Sentencing Act; Territory terrorism offences listed in Sch 2 Sentencing Act).

146. A range of general principles of for handling children under the YJ Act are set out in s 4. In sentencing a child, the Youth Justice Court must have regard to those principles, the general principles of sentencing, and must in particular consider (s 81 YJ Act):

- a. the nature and seriousness of the offence;
- b. any history of offending;
- c. the child's cultural background;
- d. the child's age and maturity; and
- e. the extent to which anyone was affected as a victim of the offence.

147. The Youth Justice Court must also have regard to the fact that the rehabilitation of a child may be facilitated by the participation of their family and opportunities to engage in education and employment (s 81(4) YJ Act).

148. The Youth Justice Court must dispose of the matter in a way that is in proportion to the seriousness of the offence (s 81(3) YJ Act). It may only impose any custodial sentence as a last resort, and a sentence of imprisonment only if there is no appropriate alternative (s 81(6) YJ Act).

Diversionary options under the YJ Act (NT)

149. Part 3 of the YJ Act provides for diversionary options, including warnings, youth justice conferences and diversion programs.

150. However, these options are not available in relation to 'serious offences', which includes certain terrorism offences under NT law and 'substantially corresponding' offences under Commonwealth law (s 39(2) and (7) YJ Act; s 3 Youth Justice Regulations (NT); ss 54 and 55 *Criminal Code* (NT)).