

# FACT SHEET



For lawyers – Police warnings and cautions under the Young Offenders Act 1997 – a summary

**IMPORTANT – This Document only provides general information.**

**It is not intended to be a substitute for a close reading of the relevant legislation and other materials to which reference is made.**

## Police Warnings and Cautions under the Young Offenders Act 1997 – A summary

**Please note:** The Young Offenders Act 1997 is currently under review. IDRS has contacted the State Government's Legislation, Policy and Criminal Law Review Division and has been informed that the reviewed act will not be passed by parliament until at least the end of 2014 or the beginning of 2015.

This summary is broken up into five headings:

1. Procedures available under the *Young Offenders Act*
2. Warnings
3. Cautions: Who is eligible?
4. Cautions: For what sorts of offences can they be given?
5. Cautions: What steps must police follow when giving them?

**Attached** to the end of this summary are relevant sections taken from the *Young Offenders Act 1997 (NSW) (YOA)*, for your reference.

One of the objects of the YOA is to provide an alternative process to court proceedings for dealing with children who commit certain offences (set out in s8 of the Act, attached). That is, the YOA promotes the exercise of discretion by police to divert children away from the courts and the criminal justice system.

The YOA defines a 'child' as a person who is 10 years of age or older, and under 18 years of age (s4).

The YOA applies in relation to a person who:

- a) Is or was a child when an offence covered by the YOA is or was committed or alleged to have been committed, and
- b) Is under the age of 21 years when being dealt with under the Act (s7A(1)).

## **1. Procedures available under the *Young Offenders Act***

When a child comes into contact with police, police may have a discretion to give the child a 'warning'. This is the least serious alternative available to them to deal with the matter. The other options are:

- a caution
- a youth justice conference
- laying charges

## **2. Warnings**

Police will consider warning a child where:

- the alleged offence is a summary offence covered by the Act (other than a graffiti offence), or where the child fails, without reasonable excuse, fails to comply with a reasonable direction given to him/her by a police officer in a public place<sup>1</sup>;
- the alleged offence does not involve violence, and
- they consider it is in the interests of justice for the matter to be dealt with by warning.

As a matter of practice, police are more likely to consider a warning where the child cooperates with them – the child does not need to admit the offence, but if the child is uncooperative or shows 'attitude' towards the police, a warning is less likely.

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<sup>1</sup> See sections 197 and 199 of the *Law Enforcement (Powers and Responsibilities) Act 2002*

Police can warn more than one person at a time – so, they could warn a group of young people. However, the more people involved, the less likely it is the police will give a warning. Usually groups suggest some level of planning or premeditation and render the conduct more serious.

Police can give warnings anywhere. It doesn't need to be at a police station. They cannot put any conditions on a warning (eg. you can't come back to this place for 30 days). They need to ensure the child understands the purpose, nature and effect of the warning.

A child who has no criminal history and has not been warned or cautioned in the past is more likely to get a warning; although a criminal record is not an automatic bar to being given a warning.

The sorts of offences for which warnings are commonly given include:

- Offensive conduct and language – eg. swearing in public
- Possessing small amounts of alcohol in public
- Trespassing

Police keep records of warnings given. They use those records only for their own future reference. Generally, the Commissioner of Police has to ensure that records of warnings are destroyed or expunged as soon as is reasonably practicable after the person to whom the record relates reaches the age of 21.

When you are assisting a child, you should consider what's been alleged, the child's criminal history and, if appropriate, raise the option of a warning with the police.

### 3. Cautions: Who is eligible?

Cautions, sometimes called 'formal cautions', are more serious than warnings and happen at police stations.

The **police** can **only** consider a caution where the person:

- is a child (defined in the YOA as a person who is 10 years of age or older, and under 18 years of age) at the time of the alleged incident;
- has committed an offence covered by the YOA, other than a graffiti offence (Note that under s31, a **court** may give a caution for a graffiti offence);
- admits the offence;
- consents to receiving a caution, and
- has not already had 3 cautions

Eligibility will also be determined by factors including the nature and seriousness of the offence(s) alleged, the degree of violence involved, the harm caused to any victim and the number and nature of any offences committed by the child.

### 4. Cautions: For what sorts of offences can they be given? (Part 4 of the YOA)

Ultimately, the police need to decide whether it is in the interests of justice to give a caution. However, they can only consider a caution for:

- summary offences (other than graffiti offences), or
- indictable offences that can be dealt with summarily.

There are some offences specifically excluded from coverage by the YOA. The main ones are:

- traffic offences committed by a child old enough to obtain a learner licence
- offences resulting in death
- offences under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW)
- most of the drug offences found in the *Drug Misuse and Trafficking Act 1985* (NSW)
- some of the sex offences found in the *Crimes Act 1900* (NSW)<sup>2</sup>.

In determining whether it is in the interests of justice to give a caution, police will take into account:

- the seriousness of the offence(s)
- the degree of violence (if any) involved
- the harm suffered by any victim
- the number and nature of any prior offences committed by the child
- the number of times offences have been dealt with under the YOA for the child

An investigating Police officer will make the initial decision about whether a caution should be given. If they decide that a caution is not in the interests of justice, they have to then refer the matter to a specialist youth officer (a specially appointed police officer) to determine whether the matter can be dealt with by way of youth justice conference.

If the police decide to progress the matter as a charge before the Children's Court, there is still an option for the Magistrate to deal with the charge by way of caution.

The **maximum** number of cautions a person can get is three.

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<sup>2</sup> For the more detailed list of exceptions – see section 8(2) YOA

## **5. Cautions: What steps must police follow when giving them? (Part 4 of the YOA)**

If the investigating police officer decides to proceed by way of caution, then (s)he must explain to the child:

- the nature of the allegations
- that the child is entitled to legal advice and where to obtain it
- that the child is entitled to choose to take the matter to court
- the purpose, nature and effect of the caution.

If practicable, the police should give this explanation in front of the person responsible for the child, an adult nominated by the person responsible, an adult chosen by the child if the child is 14 or older, or a legal practitioner chosen by the child. Before a caution is given, the police need to give a written notice of the caution.

After the notice is given, the police generally have been 10 and 21 days to arrange to give the official caution. This is a cooling off period, where the child can get legal advice, choose to go to court, etc.

The official caution is given by a specially authorised police officer, specialist authorised youth officer, or respected member of the community such as an Aboriginal elder. When the caution is given, the child can be accompanied by:

- A parent, guardian or other person responsible for the child
- Another family member
- An adult chosen by the child
- A respected member of the child's community chosen by the child, if the person arranging the caution thinks this is appropriate
- An interpreter
- A support person where the child has a communication or cognitive disability
- A social worker or health professional (where the child is under care)

- A supervising officer (where the child is on probation or subject to a community service order)
- The investigating police officer

The police must explain the caution to the child and give the child written notice after the caution has taken place. Police cannot attach any conditions to the caution, except that the child provides a written apology to any victim.

The **caution is not a criminal record**, but the police and courts keep a record of any caution on a 'court alternatives history' and these can be taken into account if the child comes before the police or Children's Court in the future.

If a child fails to appear for the official caution, the police can institute criminal proceedings.

## Appendix – Some relevant sections from the Young Offenders Act 1997 (NSW)

### 8 Offences covered by Act

(1) The offences covered by this Act are, except as provided by this Act:

- a. summary offences, and
- b. indictable offences that may be dealt with summarily under Chapter 5 of the Criminal Procedure Act 1986 or another prescribed law,

committed, or alleged to have been committed, by children.

(2) Despite subsection (1), an offence is not covered by this Act if:

- a. the principal person who investigates the offence is not an investigating official within the meaning of this Act, or
- b. the offence is a traffic offence committed by a child who was, when the alleged offence occurred, old enough to obtain a learner licence under the Road Transport Act 2013 to drive the motor vehicle to which the offence relates, or
- c. the offence results in the death of any person, or
- d. the offence is an offence under section 61E, 61L, 61M, 61N, 61O (1), (1A) or (2), 66C, 66D, 80, 81A or 81B of the Crimes Act 1900, or
- e. the offence is an offence under the Crimes (Domestic and Personal Violence) Act 2007, or
- f. (e1) the offence is an offence under Division 1 of Part 2 of the Drug Misuse and Trafficking Act 1985 other than an offence to which subsection (2A) applies, or
- g. the offence is an offence under Division 2 of Part 2 of the Drug Misuse and Trafficking Act 1985 other than:
  - i. an offence under section 23 (1) (a) or (c) of that Act to which subsection (3) applies, or



- ii. an offence under section 27 or 28 of that Act of aiding, abetting, counselling, procuring, soliciting or inciting the commission of an offence under section 23 (1) (a) or (c) to which subsection (3) applies,
- h. (g) the offence is prescribed by the regulations for the purposes of this section.

(2A) An offence under Division 1 of Part 2 of the *Drug Misuse and Trafficking Act 1985* is covered by this Act if in the opinion of the investigating official or prosecuting authority:

- a. in relation to an offence relating to a prohibited drug other than cannabis leaf within the meaning of the *Drug Misuse and Trafficking Act 1985* --the offence involves not more than the small quantity applicable to that drug under that Act, or
- b. in relation to an offence relating to cannabis leaf:
  - i. the offence involves not more than half the small quantity of cannabis leaf within the meaning of the *Drug Misuse and Trafficking Act 1985*, or
  - ii. there are exceptional circumstances in that:
    - 1. the offence involves more than half, but not more than the total, small quantity of cannabis leaf within the meaning of that Act, and
    - 2. it would be in the interests of rehabilitation, and appropriate in all the circumstances, to deal with the matter under this Act.

(3) An offence under section 23 (1) (a) or (c) of the *Drug Misuse and Trafficking Act 1985* is covered by this Act if in the opinion of the investigating official or prosecuting authority:

- a. the offence involves not more than half the small quantity applicable to the prohibited plant within the meaning of the *Drug Misuse and Trafficking Act 1985*, or
- b. there are exceptional circumstances in that:
  - i. the offence involves more than half, but not more than the total,

- small quantity applicable to the prohibited plant within the meaning of the *Drug Misuse and Trafficking Act 1985*, and
- ii. it would be in the interests of rehabilitation, and appropriate in all the circumstances, to deal with the matter under this Act.

## **Part 4 Cautions**

### **Division 1 Cautions by persons other than courts**

#### **18 Offences for which cautions may be given**

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

#### **19 Conditions required to be able to give caution**

A formal police caution against further offending may be arranged and given in relation to an offence to a child who is alleged to have committed the offence, if:

- a. the offence is one for which a caution may be given, and
- b. the child admits the offence, and
- c. the child consents to the giving of the caution, and
- d. the child is entitled to be given a caution.

#### **20 Entitlement to be dealt with by caution**

(1) A child who is alleged to have committed an offence for which a caution may be given is entitled to be dealt with by caution if the investigating official determines that the matter is not appropriate for a warning or the offence is one for which a warning may not be given.

(2) Despite subsection (1), the child is not entitled to be dealt with by caution if, in the opinion of the investigating official, it is more appropriate to deal with it by other means because it is not in the interests of justice for the matter to be dealt with by giving a caution.

(3) In considering whether it is appropriate to deal with a matter by caution, an investigating official is to consider the following:

- (a) the seriousness of the offence,
- (b) the degree of violence involved in the offence,
- (c) the harm caused to any victim,
- (d) the number and nature of any offences committed by the child and the number of times the child has been dealt with under this Act,
- (e) any other matter the official thinks appropriate in the circumstances.

(4) Despite subsection (1), an investigating official may, if of the opinion that the victim has suffered substantial harm or that the circumstances of the victim are such that it is appropriate to do so, refer the matter to a specialist youth officer to determine whether the matter should be dealt with under this Part or Part 5 even though the offence does not involve any degree of violence or is not of a serious nature.

(5) A specialist youth officer to whom a matter is referred under subsection (4) may arrange for a caution to be given under this Part or take action under Part 5 and, in determining whether to do so, may take into account the fact that the victim has suffered substantial harm or the circumstances of the victim.

(6) A child is not precluded from being given a caution merely because the child has previously committed offences or been dealt with under this Act.

(7) Despite any other provision of this section, a child is not entitled to be dealt with by caution in relation to an offence if the child has been dealt with by caution on 3 or more occasions:

- (a) whether by or at the request of a police officer or specialist youth officer under section 29 or by a court under section 31, and
- (b) whether for offences of the same or of a different kind.

## **21 Determination by investigating official**

- (1) If an investigating official determines that a child should be dealt with under this Part, the investigating official must arrange for a caution to be given.
- (2) If an investigating official is of the opinion that it is not in the interests of justice for a matter to be dealt with by way of a caution, the investigating official must refer the matter to a specialist youth officer to consider whether the child should be dealt with under Part 5.

## **22 Explanations to children**

- (1) Before an investigating official proceeds to arrange for a caution to be given under this Part, the investigating official must explain the following matters to the child concerned:
  - (a) the nature of the offence and the circumstances out of which it is alleged to arise,
  - (b) that the child is entitled to obtain legal advice and where that advice may be obtained,
  - (c) that the child is entitled to elect that the matter be dealt with by a court,
  - (d) the purpose, nature and effect of the caution.
- (2) An investigating official must, if practicable, ensure that an explanation takes place in the presence of:
  - (a) a person responsible for the child, or
  - (b) an adult (other than an investigating official) who is present with the

- consent of a person responsible for the child, or
- (c) if the child is 14 years or over, an adult chosen by the child, or
- (d) an Australian legal practitioner chosen by the child.

## 23 Referrals for cautions

(1) A child may be referred for a caution under this Part by the Director of Public Prosecutions if:

- (a) the offence is one for which a caution may be given under this Part, and
- (b) the child admits the offence, and
- (c) the child consents to the giving of the caution.

(2) In determining whether to refer a matter for a caution, the Director of Public Prosecutions is to take into account the following matters:

- (a) the seriousness of the offence,
- (b) the degree of violence involved in the offence,
- (c) the harm caused to any victim,
- (d) the number and nature of any offences committed by the child and the number of times the child has been dealt with under this Act,
- (e) any other matter the Director thinks appropriate in the circumstances.

(3) The referral is to be made to a person authorised in writing by the Commissioner of Police for the purposes of this section.

(4) The authorised person must arrange for a caution to be given to the child under this Part.

(5) Despite any other provision of this section, the Director of Public Prosecutions may not refer a child for a caution in relation to an offence if the child has been dealt with

by caution on 3 or more occasions:

- (a) whether by or at the request of a police officer or specialist youth officer under section 29 or by a court under section 31, and
- (b) whether for offences of the same or of a different kind.

## **24 Notice of caution**

(1) Before a caution is given to a child, the person arranging for the caution to be given must give a written notice to the child.

(2) The notice must contain the following information:

- (a) the offence in respect of which the caution is to be given,
- (b) the persons who may be present when the caution is given,
- (c) the purpose, nature and effect of the caution,
- (d) the date, time and place at which the caution is to be given,
- (e) the name of a police officer who is a contact officer concerning the caution,
- (f) the consequences of failure to attend the giving of the caution,
- (g) the right of the child to obtain legal advice and where that advice may be obtained,
- (h) the right of the child to elect that the matter be dealt with by a court if the child does not wish to proceed with the caution.

(3) The notice must be given in a form approved by the Commissioner of Police and be expressed in language readily capable of being understood by children.

## **24A Written statements from victims**

(1) Before a caution is given to a child, the person arranging for the caution to be given may:

- (a) seek a written statement from any victim of the offence concerned that describes the harm occasioned to the victim by the offence, and
- (b) give guidance to any such victim as to the kind of matters that are appropriate for inclusion in the statement, and
- (c) provide any such statement received by the person to the person giving the caution to the child.

(2) The regulations may make provision for or with respect to the content and form of written statements under subsection (1).

## **25 Right not to proceed**

(1) A child may, at any time before a caution is given to the child, decide not to proceed with the caution and elect that the matter be dealt with by a court.

(2) An investigating official who arranges for a caution to be given may, at any time before the caution is given, determine that it is not in the interests of justice for the matter to be dealt with by way of a caution and refer the matter to a specialist youth officer for consideration of whether action should be taken under Part 5.

(3) The Director of Public Prosecutions may, at any time before a caution is given in respect of an offence referred by the Director under this Part, determine that it is not in the interests of justice for the matter to be dealt with by way of a caution and refer the matter to a conference administrator under Part 5 or commence proceedings.

(4) An investigating official or the Director of Public Prosecutions must give written notice to the child concerned of any determination by the official or Director under this section.

## **26 Place and time of cautions**

(1) A caution must, if practicable, be given not less than 10 days, and not more than 21 days, after notice of the caution is given under this Part.

(2) A caution is to be given at a police station.

(3) Despite subsection (2), a caution may be given at a place other than a police station, if the person giving the caution is of the opinion that it is appropriate in the circumstances to do so.

## **27 Persons who may give cautions**

(1) A caution is to be given by a police officer or specialist youth officer authorised in writing by the Commissioner of Police to give cautions under this Act.

(2) Despite subsection (1), a caution may be given by a respected member of the community at the request of any such officer, if the officer is of the opinion that it is appropriate in the circumstances to do so. For example, a caution may be given by a respected member of the Aboriginal community if the child is a member of that community.

## **28 Persons who may accompany child**

The following persons, but no other persons, may be present when a caution is given to a child:

- (a) the child and the person giving the caution,
- (b) a person responsible for the child,
- (c) members of the child's family or extended family,



- (d) an adult chosen by the child,
- (e) a respected member of the community chosen by the child, if the person arranging the caution is of the opinion that it is appropriate in the circumstances to do so,
- (f) an interpreter,
- (g) if the child has a communication or cognitive disability, an appropriately skilled person,
- (h) if the child is under care, a social worker or other health professional,
- (i) if the child is subject to probation or a community service order, the child's supervising officer,
- (j) if the investigating official is not giving the caution, the investigating official,
- (k) if the child and (if present) a person of the kind referred to in paragraph (b)-(d) who is an adult consent, one student or probationary police officer for the purpose of training the officer.

## **29 Giving of cautions**

(1) A person who gives a caution to a child must take steps to ensure that the child understands the purpose, nature and effect of the caution.

(2) If a child who is to be cautioned has a communication or cognitive disability, it is the duty of the person giving the caution, so far as practicable, to give the caution in the presence of an interpreter or other appropriately skilled person and, if necessary, to obtain the assistance of such a person in giving the caution.

(2A) A person proposing to give a caution to a child may defer giving the caution:

- (a) if a person responsible for the child or the adult chosen by the child is not present--until a person responsible for the child or an adult chosen by the child is present, or
- (b) if it appears to the person that the child is so affected by alcohol or another drug (or a combination of drugs) that the child's capacity to

understand the purpose, nature or effect of the caution is impaired--until the person considers that the child has regained that capacity.

(2B) A person who gives a caution to a child may, if the person considers it appropriate, read out some or all of a written statement from a victim that is provided to the person under section 24A when giving the caution.

(3) It is the duty of the person giving the caution to ensure, so far as practicable, that a person responsible for the child or an adult chosen by the child is present when the caution is given.

(4) A person who gives a caution to a child may request the child being cautioned to provide a written apology to any victim of the alleged offence.

(5) A person who gives a caution to a child must not:

- (a) attach any conditions to the giving of the caution, or
- (b) impose any additional sanctions on the child, other than a request of the kind referred to in subsection (4).

(6) A caution may be given to more than one child at the same time and in respect of more than one offence alleged to have been committed by a child.

### **30 Caution notice**

(1) A caution notice containing the following information must be given to a child after the child is cautioned and must be signed by the child:

- (a) the child's name,
- (b) the name and rank (if any) of the person who gave the caution,
- (c) details of the offence concerned,
- (d) the place, date and time of the caution,
- (e) the persons present when the caution was given,

(f) the purpose, nature and effect of the caution.

(2) The caution notice must be expressed in language readily capable of being understood by children.

### **31 Cautions by courts**

(1) A child may be given a caution by a court if:

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

(1A) If a court gives a caution under this section, the court must dismiss the proceedings for the offence in respect of which the caution is given.

(1B) A court giving a caution may:

- (a) allow any victim of the offence concerned to prepare a written statement that describes the harm occasioned to the victim by the offence, and
- (b) if it considers it appropriate to do so, may permit all or part of the statement to be read to the child when giving the caution.

(1C) The regulations may make provision for or with respect to the content and form of written statements under subsection (1B).

(2) This Part (other than this section and sections 32 and 33) does not apply to a caution given by a court.

(3) Nothing in this Part affects the power of a court to give a caution under section 33 of the *Children (Criminal Proceedings) Act 1987*.

(4) A court that gives a caution under this section must notify, in writing, the Area Commander of the local police area in which the offence occurred of its decision to give the caution and must include the reasons why the caution was given.

(5) Despite any other provision of this section, a court may not give a caution to a child in relation to an offence if the child has been dealt with by caution on 3 or more occasions:

- (a) whether by or at the request of a police officer or specialist youth officer under section 29 or by a court under this section, and
- (b) whether for offences of the same or of a different kind.

## **Division 3 Cautions generally**

### **32 Further proceedings**

If a caution is given to a child under this Part, no further proceedings may be taken against the child for the offence in respect of which the caution is given or for any other offence in respect of which proceedings could not be commenced if the child had been convicted of the offence for which the caution was given.

### **33 Records of cautions**

(1) A police officer, specialist youth officer or a court must make a record of any cautions given by the officer or court under this Part.

(2) The record is to contain the matters prescribed by the regulations for the purposes of this section.

### **33A Destruction of finger prints, palm prints and photographs**

(1) If a child is given a caution under this Part, the Commissioner of Police is to ensure that any finger prints or palm prints obtained from, or photographs taken of, the child in connection with the offence for which the caution is given (and any copies of them) are destroyed.

(2) This section applies despite anything to the contrary in the *State Records Act 1998* or any other law.