# QUEENSLAND MAGISTRATES' CHILDRENS COURT CONFERENCE 2022

**Judge A J Rafter SC, Acting President, Childrens Court of Queensland**[1]
**7 September 2022**

# CHILDRENS COURT ISSUES

## Introduction

[1] In 2020-21 there were 7,422 finalised appearances of child defendants in all Queensland Criminal Courts. This reflected an overall increase of 18.3 per cent (1,147 appearances) from the preceding year. In the Magistrates Court the number of finalised appearances increased by 23.8 per cent (1,323 appearances).[2] In the 2020-2021 year there were 7,454 children sentenced in the Childrens Court (Magistrates Court). The number of children sentenced in the 2021/2022 year was 6,780.[3] In each of those years there were very few sentence review applications pursuant to s 119 *Youth Justice Act 1992*.[4] Appeals filed pursuant to s 222 *Justices Act 1886* were even rarer.[5]

[2] These statistics show the enormous volume of matters disposed of in the Magistrates Court, and that overwhelmingly the outcomes are accepted by the parties.

## The 2021 amendments to the *Youth Justice Act 1992*

[3] The *Youth Justice and Other Legislation Amendment Act 2021* made a number of amendments to the *Act* aimed at dealing with serious recidivist youth offenders. The Explanatory Notes to the *Youth Justice and Other Legislation Amendment Bill 2021* referred to the *Working Together Changing the Story: Youth Justice Strategy 2019-*

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1 This paper was prepared with the assistance of my Associate, Poppy Donovan.
2 Childrens Court of Queensland Annual Report 2020-21.
3 Source: QWIC.
4 In the 2020-21 year there were 53 applications. In the 2021-22 year there were 46 applications.
5 In the 2020-21 year there were four appeals. In the 2021-22 year there was one appeal.

*2023* released in December 2018. The Youth Justice Strategy adopted "Four Pillars" as its policy position for youth justice reform: intervene early; keep children out of court; keep children out of custody; reduce reoffending.

[4] The Four Pillars were recommended in the 2018 Report on Youth Justice by former Police Commissioner, Mr Bob Atkinson, AO APM.

[5] The Explanatory Notes referred to the data in the Childrens Court of Queensland Annual Report 2019-20 which revealed that 10 per cent of all youth offenders (about 390 individuals) accounted for 48 per cent of youth crime. The Childrens Court of Queensland Annual Report 2020-21 revealed the same trend: 10 per cent of youth offenders committed 46 per cent of finalised charges in the youth justice system.

[6] The Explanatory Notes stated that the objectives of the amendments included: "to respond to the characteristics of the offending behaviours of serious recidivist youth offenders and strengthen the youth justice bail framework. These behaviours place both the community and youth offenders at risk of serious harm or death."

[7] The position created by s 48AF is that a court or police officer must refuse to release a child from custody unless the child can show cause why their detention is not justified, when the child is charged with a "prescribed indictable offence" if the offence was alleged to have been committed while the child was released into the custody of a parent, or at large with or without bail, or awaiting trial or sentencing, in relation to another indictable offence.[6]

[8] The sentencing principles in s 150 were amended to require the Court to have regard to the presence of any aggravating or mitigating factors, and to consider whether the child committed the offence while released into the custody of a parent, or at large with or without bail, for another offence, or after being committed for trial or awaiting trial or sentencing, for another offence.[7]

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6 A "prescribed indictable offence" is defined in the dictionary, Schedule 4 as (a) a life offence; or (b) an offence that, if committed by an adult would make the adult liable to imprisonment for 14 years or more, other than an offence against the *Drugs Misuse Act 1986*, s 9(1) for which the maximum penalty is 15 years imprisonment; or an offence against *Criminal Code* s 315A, s 323, s 328A, s 339, s 408A(1) if the offence involves a motor vehicle and the child charged with the offence was allegedly the driver of the motor vehicle, s 408A(1A) or (1B), or s 412.

7 *Youth Justice Act 1992*, s 150(1)(f)(g).

[9] The first principle in the Charter of youth justice principles was amended so that it now states: "The community should be protected from offences and, in particular, recidivist high-risk offenders."[8]

**The content of reasons in a summary trial**

[10] In *R v FAX* [2020] QCA 139 the Court of Appeal considered an appeal against conviction for rape following a judge alone trial held in the Childrens Court of Queensland. One of the grounds of appeal was that the trial judge had failed to apply the principles of law and procedure required by s 23 *Childrens Court Act 1992*. Boddice J (with whom Sofronoff P and Ryan J agreed) said in his reasons for judgment that:

> "The duty to give reasons operates as a safeguard to the interests of the accused and the public interest generally. As a matter of general principle, the giving of reasons should include an identification of the principles of law and the findings of fact, together with a statement of "the reasoning process linking them and justifying the [findings of fact] and, ultimately, the verdict that it reached".
>
> Whilst no particular formula is necessary, reasons given in a judge only trial should contain details of the evidence admitted at trial, an explanation as to the use made of that evidence, the inferences drawn from that evidence and the judge's approach to the evidence, with an appropriate identification of the relevant principles of law to be applied in assessing the evidence and in determining whether the prosecution had established the defendant's guilt of each offence beyond reasonable doubt."[9]

[11] The Court of Appeal held that the trial judge had failed to state that he had regard to a number of relevant principles of law including the use to which evidence called in the defence case could be considered, that no adverse inference could be drawn from the fact that the defendant did not give evidence and the relevance of a prosecution submission that there was no real motive for the complainant to lie.[10]

[12] Moreover, the Court held that the trial judge had misdirected himself by having regard to the fact that the complainant's version was uncontradicted.[11]

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8 The *Youth Justice and other Legislation Amendment Act 2021*, s 33 added the words "and, in particular, recidivist high-risk offenders".

9 [2020] QCA 139 at [107]-[108].

10 [2020] QCA 139 at [114].

11 [2020] QCA 139 at [116]-[118].

**Judge-alone trial – mandatory directions about pre-recording**

***R v AAP* [2021] QCA 162**

**[13]** The appellant was convicted of two counts of indecent treatment of a child under 16, and under 12 following a judge-alone trial in the Childrens Court of Queensland. The judge had failed to direct himself in accordance with s 21AW(2) *Evidence Act* 1977 (Qld) in relation to the pre-recorded evidence. The failure was held not to have resulted in a miscarriage of justice. The mandatory directions address the concern that a jury might engage in conjecture about the mode of pre-recorded evidence. These considerations did not arise in the case of a judge-alone trial. The appellant's counsel acknowledged that the complaint was of a technical nature.

**Appeals against sentence**

**Cases on general principles**

***R v Patrick (a pseudonym);* ex parte Attorney-General (Qld) (2020) 3 QR 578; [2020] QCA 51**

[14] The Court of Appeal considered an appeal against sentence by the Attorney-General and an application for leave to appeal against sentence by the applicant child in respect of a sentence imposed for doing grievous bodily harm with intent to prevent arrest. The applicant child was sentenced to three years detention to serve 50 percent with a conviction recorded. The Attorney-General appealed against sentence on the ground that the sentence was manifestly inadequate. The applicant child applied for leave to appeal against the recording of the conviction.

[15] The applicant child was 16 years of age at the time of the offence and 17 when sentenced. Apart from the offence of doing grievous bodily harm with intent to prevent arrest, he was also sentenced for burglary and stealing, robbery and unlawful use of a motor vehicle. The circumstances of the offence were that the police attempted to intercept a stolen car driven by the applicant child. Police officers activated the lights on their police vehicle, but the applicant drove away. In accordance with police procedures the pursuing officers stopped the chase and notified police communications. Police officers who were in the vicinity of where the vehicle was being driven placed a tyre deflation device on the road. The applicant child stopped the vehicle some distance from the police officer but accelerated to a

speed of 76km per hour over 6.5 seconds before swerving and hitting the officer. The vehicle was traveling at between 49km per hour and 56km per hour at the time that it struck the police officer. The officer was carried some distance on the hood of the vehicle before falling to the roadway where his head hit a kerb. The police officer suffered serious and permanent injuries.

[16] The Court of Appeal refused the applicant child's application for leave to appeal against sentence. The appeal against sentence by the Attorney-General was allowed and the applicant child was sentenced to five years detention with release after 50 per cent. A conviction was recorded.

[17] The court discussed the principle set out in the youth justice principles that the community should be protected from offences. Sofronoff P said that in this particular case there were two aspects of community interest that had relevance. First was the assumed propensity of punishments to deter others from committing similar offences. His Honour said: "A sentencing judge is obliged to take into account that purpose, when appropriate, when deciding upon a sentence."[12] The second aspect of community protection was the interest the community has in maintaining an effective police force and the protection of police officers from harm. [13]

[18] Sofronoff P said:

> "The difficult issue that has been presented by this case lies in the need to resolve the conflict between the objective circumstances of the offending, which are so grave, and (the child's) youth and personal circumstances, which, while incapable of negating the gravity of the offending, raise mitigating considerations.[14]

***R v JAB* (2020) 4 QR 588; [2020] QCA 124**

[19] The sentencing judge's failure to seek specific submissions in relation to the recording of convictions was held to have been a breach of the principle of natural justice.[15] At the sentence hearing the prosecutor submitted that the offending involved a serious example of violence, and that the child was aged 17 and a half years with a lengthy history. The prosecutor accepted that there may be some impact on the applicant's prospects of employment if a conviction was recorded. The

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12 (2020) 3 QR 578 at 587 [29].
13 (2020) 3 QR 578 at 587 [30].
14 (2020) 3 QR 578 at 589 [41].
15 (2020) 4 QR 588 at 597 [42].

prosecutor did not positively contend for the recording of a conviction. In those circumstances, it was considered unsurprising that defence counsel made no submissions in relation to the recording of a conviction.[16]

[20] The court considered that although the offence of attempted armed robbery in respect of which a conviction had been recorded was serious and occurred in the context of the applicant's previous history of non-compliance with court orders, the pre-sentence report identified tragic and distressing family circumstances as relevant factors. In the circumstances it was concluded that the sentencing discretion favoured a conclusion that a conviction not be recorded.

***R v Eric (a pseudonym)*; ex parte Attorney-General (Qld) [2021] QCA 81**

[21] The Attorney-General appealed against a sentence of detention for five months followed by 12 months probation with a conviction not being recorded for an offence of grievous bodily harm. The respondent was aged 17 years, one month at the time of the offence and was over 18 by the time the appeal was heard. The complainant was attacked by a group. The respondent struck him on the head with a metal pole. Others in the group began hitting the complainant who sustained a fractured skull with severe consequences. The unprovoked bashing had recked the complainant's life.

[22] The sentencing judge had adopted three years detention as the starting point which he notionally reduced to two years because of a referral to restorative justice. The sentencing judge said he would have reduced that to 18 months with release after 50 per cent to give effect to the principle that a sentence of detention should be for the least appropriate period. The sentencing judge decided to impose five months detention followed by probation with the rationale for the further reduction being so that the respondent did not have to serve one month in an adult prison.

[23] The Court of Appeal held that the approach adopted by the sentencing judge was forbidden by the judgment of the High Court in *Barbaro v The Queen*[17] where it was explained that sentencing is not an exercise in addition and subtraction. Sofronoff P (with whom McMurdo JA and Boddice J agreed) expressed disagreement with the

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16 (2020) 4 QR 588 at 597 [37].
17 (2014) 253 CLR 58.

sentencing judge's characterisation of the respondent as a person of a "young age". His Honour said:

> "The fact that the respondent was under 18 years of age rendered him the beneficiary of the leniency afforded by the *Youth Justice Act*. However, in the category of offenders to whom that Act applies, the respondent should have been regarded as a child on the cusp of adulthood when he committed this offence."[18]

[24] His Honour considered that although the *Youth Justice Act* required a much more lenient approach to the sentencing of children than the approach when sentencing adults, the protection of members of the community against criminal injury may, in an appropriate case, require a child to serve a lengthy period of detention.[19] Having regard to the brutality and dangerousness of the attack with a weapon the Court of Appeal substituted a sentence of two years' detention with an order that the respondent be released after serving 50 per cent. The seriousness of the offending and the consequences for the victim justified the recording of a conviction.[20]

***R v IJ* [2022] QCA 138**

[25] In this case Bond JA (with whom McMurdo and Dalton JJA agreed) referring to *R v SCU* [2017] QCA 198 and *R v MDD* [2019] QCA 197, reaffirmed the approach to sentencing children:

> "(a) The duty of the sentencing judge under the Youth Justice Act is to give consideration to all statutory factors relevant to a particular case, as well as the facts of the case itself before deciding on the appropriate sentence.
>
> (b) Section 208 requires the sentencing judge to consider all other options reasonably available before imposing a sentence of detention, including the desirability of not holding a child in detention.
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> (c) The section should be taken to prescribe a process of reasoning.
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> (d) The sentencing remarks should explain how the sentencing judge complied with the required process of reasoning, including by expressing the sentencing judge's reasons for imposing detention rather than taking some other option."

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18 [2021] QCA 81 at [20].
19 [2021] QCA 81 at [23].
20 [2021] QCA 81 at [26].

**Recording or not recording convictions**

[26] Many of the judgments of the Court of Appeal relate to the issue of recording convictions. The relevant provisions of the *Youth Justice Act* are:

> "**183 Recording of conviction**
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> (1) Other than under this section, a conviction is not to be recorded against a child who is found guilty of an offence.
>
> (2) If a court makes an order under section 175(1)(a) or (b), a conviction must not be recorded.
>
> (3) If a court makes an order under section 175(1)(c) to (g) or 176 or 176A, the court may order that a conviction be recorded or decide that a conviction not be recorded."
>
> "**184 Considerations whether or not to record conviction**
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> (1) In considering whether or not to record a conviction, a court must have regard to all the circumstances of the case, including—
>
> (a) the nature of the offence; and
>
> (b) the child's age and any previous convictions; and
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> (c) the impact the recording of a conviction will have on the child's chances of—
>
> (i) rehabilitation generally; or
>
> (ii) finding or retaining employment.
>
> (2) Except as otherwise provided by this or another Act, a finding of guilt without the recording of a conviction is not taken to be a conviction for any purpose.
>
> (3) A finding of guilt against a child for an offence without the recording of a conviction stops a subsequent proceeding against the child for the same offence as if a conviction had been recorded."

[27] The effect of s 148 is that in a proceeding against an adult, evidence that the adult was found guilty of an offence as a child is not admissible if a conviction was not recorded. However, by s 148(3) a court sentencing an adult can receive information about any other sentence to which the adult is subject if that is necessary to mitigate the sentence.

[28] A court sentencing a child must have regard to the child's previous offending history.[21] A finding of guilt against a child whether or not a conviction is recorded is part of the child's criminal history to which a court may have regard when subsequently sentencing the child.[22]

**Illustrations of the approach to recording or not recording convictions**

***R v TAO* [2020] QCA 4**

[29] The applicant was sentenced to 18 months detention suspended immediately and released on a conditional release order for three months in respect of two counts of robbery in company with personal violence and placed on probation for 18 months in respect of one count of assault occasioning bodily harm in company. Convictions were recorded. The applicant was 15 years of age at the time of the offending and 16 at the time of sentence. He had a history which included similar offending although convictions had not previously been recorded. The court held that the sentencing judge had impermissibly constrained the exercise of discretion whether or not to record convictions by placing weight on the leniency previously afforded to the applicant where convictions had not been recorded: (at para [20]).

[30] Boddice J (with whom Sofronoff P and McMurdo JA agreed) discussed the discretion as to the recording of convictions:

> "As to the recording of convictions, whilst the Act provides that a conviction, generally, is not to be recorded, the Act specifically gives a discretion in respect of the recording of a conviction. That discretion, although to be exercised having regard to the purposes of the Act and consistently with its principles, is a wide discretion. Relevant factors include a child's previous offences. That factor cannot be overshadowed, in an appropriate case, by the considerations of the consequences of a conviction on the child's future rehabilitation and employment. Otherwise there would be no purpose in the existence of a discretion to record a conviction."[23]

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21 *Youth Justice Act 1992* s 150(1)(e).
22 *Youth Justice Act 1992* s 154.
23 [2020] QCA 4 at [17].

***R v Lovett* (a pseudonym) [2021] QCA 46**

[31] The applicant was convicted after a trial of armed robbery in company. The circumstances of the offending involved the applicant accosting a boy on the street, brandishing a knife and stealing his bicycle. The applicant had a lengthy criminal history. He was sentenced to 15 months detention to serve 70 per cent and a conviction was recorded. The Court of Appeal held that the sentencing judge had taken into account the applicant child's poor criminal history and poor prospects of rehabilitation as relevant factors and there was no error in the exercise of discretion to record a conviction. Sofronoff P (with whom Morrison JA and Davis J agreed) said:

> "The recording of a conviction can, of course, stand in the way of rehabilitation because it may have to be disclosed to a prospective employer or a government authority. On the other hand, the fact that a person has committed a very serious offence is something that may be necessary or legitimate for an employer or a government authority to know. The community may be better served by such knowledge. When the prospects of rehabilitation are poor, as they are in this case, the risk that the recording of a conviction might prejudice future employment or career prospects diminishes and correspondingly, the balance turns in favour of recording of a conviction."[24]

***R v Michael* (a pseudonym) [2021] QCA 140**

[32] The applicant was sentenced for a number of robbery offences. In respect of each offence, he was sentenced to a period of detention. In respect of one offence, he was sentenced to six months detention and placed on probation for 12 months with a conviction recorded. In respect of another offence he was sentenced to three months detention and placed on 12 months probation with a conviction not being recorded. In respect of the final offence, he was sentenced to three months detention with a conviction recorded. The applicant had no previous criminal history. He had been deeply affected by the loss of his mother when he was aged 10 or 11 and faced considerable challenges. The Court of Appeal described the applicant's offending as being the aberrant behaviour of a temporarily disturbed boy and that he should not have the added burden of recorded convictions. Accordingly, the orders recording convictions were set aside and it was ordered that convictions not be recorded.

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24 [2021] QCA 46 at [17].

[33] The applicant was sentenced to 20 months detention with release after 10 months and a conviction recorded for attempted robbery with wounding. The applicant was 16 years seven months at the time of the offence. He had an extensive criminal history. The present offending was committed in breach of two probation orders, one of which had been made ten days earlier. In considering whether or not to record a conviction the sentencing judge focused on the serious nature of the offence. The complainants were females aged 16 and 21. They were sitting in a stairwell at a shopping centre. The applicant and another boy asked them for cigarettes and when the request was declined, they walked away. However, they returned five minutes later. The applicant was wearing a bandana over his face and concealed a kitchen knife under his jumper. One of the complainants refused a demand for their phones. The applicant brandished the knife. He stabbed one of the girls in the right thigh and a little later stabbed her in the left thigh.

[34] The sentencing judge was found to have erred by not considering the impact of a conviction on the child's chances of finding or retaining employment as required by s 184(1)(c). McMurdo JA (with whom Fraser JA agreed) considered that the sentencing judge had wrongly placed weight on the fact that as the applicant would in any event be disadvantaged in any labour market by reason of his intellectual disability and poor education, he would not suffer any further disadvantage if an actual or potential employer knew of the conviction. Henry J (dissenting) considered that the combination of factors including the infliction of violence by twice wounding a victim who would not submit to him involved an escalation in the level of violence used by the applicant in his past robberies, strongly favoured the recording of a conviction. Accordingly, although the sentencing judge had erred by not having regard to the specific factors in s 184(1)(c), it was nevertheless appropriate to record a conviction so no purpose would be served by allowing the appeal: (at [67]).

***R v GBJ* [2022] QCA 52**

[35] The applicant was sentenced to 12 months detention to be released after serving 70 per cent and a restorative justice order for armed robbery in company with personal violence. A period of 285 days of pre-sentence custody was declared. A conviction was recorded. The applicant was 14 at the time of the offending and 15 at the time of sentence. The offence was committed during the currency of a conditional release order and good behaviour order, as well as an earlier 12 month probation order. The applicant had a six-page criminal history, which commenced when the applicant was 12 years of age, although convictions had not been previously recorded.

[36] The court allowed the appeal, and set aside the sentence to the extent that no conviction be recorded. The court held that the recording of a conviction involved a misapplication of sentencing principles because: the applicant only recently turned 14 years of age, had not previously had a conviction recorded (despite reoffending whilst subject to court orders), the nature of the offence did not warrant a conviction being recorded, none of the co-offenders had convictions recorded, the recording of a conviction would have had an impact on the applicant's chance of finding/retaining employment, and there was no finding that the applicant had poor prospects of rehabilitation. Consequently, the recording of a conviction was held to have rendered the sentence manifestly excessive.

***R v HCJ* [2022] QCA 130**

[37] The applicant child was found guilty of the penile rape of a 13-year-old girl. The applicant child was aged 14 at the time of the offending. The child was sentenced to three years' probation with a conviction recorded. In recording a conviction, the sentencing judge had taken into account that the offending involved penile rape, that the complainant protested and asked the applicant to stop but he nevertheless persisted. The applicant had not accepted personal responsibility or fault in the offending. The sentencing judge was found not to have erred in the exercise of discretion to record a conviction and the application for leave to appeal against sentence was refused.

**Conclusions**

[38] In exercising the discretion to record or not record a conviction, the court **must** have regard to all the circumstances of the case, including the specific matters in s 184(1): the nature of the offence, the child's age and any previous convictions; and the impact of recording a conviction on the child's chances of rehabilitation, or finding or retaining employment.

[39] The well established starting point is that a conviction should not be recorded against a child: *R v TX*;[25] *R v SCU*.[26]

[40] Although a child's previous offences are relevant, that cannot be allowed to overwhelm other important factors of rehabilitation and employment prospects: *R v TAO*.[27]

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25 [2011] 2 Qd R 247; [2011] QCA 68.
26 [2017] QCA 198.
27 [2020] QCA 4 at [17].