

The Shopfront

YOUTH LEGAL CENTRE

The Young Offenders Act: Warnings, cautions and youth justice conferences

1 Introduction

The *Young Offenders Act* 1997 (“YOA”) has been operating in NSW since 1998. It aims to divert juvenile offenders away from the court system through the use of **warnings, cautions and youth justice conferences**.

The YOA applies to young people who are **under 18 at the time of the offence and under 21 when dealt with**.

It **does not** apply to the following types of offences:

- (a) **very serious** offences such as robbery;
- (b) **traffic** offences, if the young person is old enough to hold a licence (including Ls), which usually means 16 or over;
- (c) offences resulting in the **death** of any person;
- (d) **sexual** offences;
- (e) offences such as **stalking/intimidation** and **breaching an AVO** (but it **does** apply to most types of assaults);
- (f) **drug** offences such as supply (but it **does** apply to possession, cultivation or use of small amounts); and
- (g) offences where the “**investigating official**” is **not a police officer** (for example, railway offences dealt with by transit officers).

There are many offences excluded from the YOA which we, as advocates for young people, believe should be included. In 2017 the NSW Legislative Assembly Committee on Law and Safety conducted an Inquiry into *The adequacy of youth diversionary programs in NSW*. The Committee recommended that the NSW Government review whether the offences covered by the YOA remain appropriate and whether any additional offences should be included: <https://www.parliament.nsw.gov.au/ladocs/inquiries/2464/Report%20Adequacy%20of%20Youth%20Diversionary%20Programs%20in%20NSW.PDF>.

2 Informal warnings

Young people who commit **summary offences that do not involve violence** (eg trespassing, having custody of a knife in a public place, offensive language or conduct) may get an informal warning from the police.

However, police may *not* give an informal warning for offences under the *Graffiti Control Act*, even though a court may still deal with these offences under the YOA.

The young person does not have to admit to the offence.

The warning is usually given on the spot, and no conditions can be attached.

A warning does not form part of the young person’s criminal record or “court alternatives history”. However, the police must make a record that a warning was given.

3 Formal cautions

The next step up is a formal caution.

3.1 Decision by investigating official

The “investigating official” (police officer) must decide whether the offence requires a formal caution rather than a warning.

The police officer must take into account:

- (a) the **seriousness** of the offence;
- (b) the degree of **violence** and **harm caused**; and
- (c) the number of **prior offences** committed by the young person. **A young person is not eligible for a caution if they have already been cautioned on three separate occasions.**

Note that police may **not** give a caution for offences under the *Graffiti Control Act*, even though a court may still deal with these offences under the YOA.

If the police officer doesn’t think a caution is appropriate, they must refer the matter to a **specialist youth officer** (a police officer with special training) who will decide whether the matter should be dealt with by caution, or whether it should go to a Youth Justice Conference or to the Children’s Court.

3.2 Admission of offence and consent to caution

To receive a caution, the young person must first **admit to the offence in the presence of an appropriate adult**, who may be:

- (a) a parent or a person with parental responsibility over the young person;
- (b) an adult present with the consent of the young person’s parent;
- (c) if the young person is 14 or over, an adult present with the young person’s consent; or
- (d) a lawyer chosen by the young person.

There is no requirement in the YOA for these admissions to be electronically recorded. A few short questions and answers written down in a police **notebook** should be enough.

The young person must also **consent** to being cautioned.

3.3 Legal advice and Protected Admissions Scheme

Before admitting to an offence or consenting to a caution, a young person should try to get **legal advice** (see “Legal advice” below).

You should also be aware of the “**Protected Admissions Scheme**” (see “Protected Admissions Scheme” below).

3.4 Information that police must provide

When deciding to issue a caution, **police must explain** to the young person:

- (a) the nature of the offence;
- (b) the young person’s entitlement to legal advice, and where to get it (all police officers should be aware of the Legal Aid Hotline for Under 18s).
- (c) the purpose, nature and effect of a caution; and
- (d) the fact that the young person can choose to go to court instead.

This explanation should be given in front of a **responsible adult** if practicable.

The police must also give the young person a **written notice** that a caution will be issued. The young person will be asked to come back to receive the caution on another day.

3.5 Cooling-off period

There is then a “**cooling-off period**” (between 10 and 21 days), when the young person can get legal advice and/or change their mind about whether they wish to be cautioned.

3.6 Giving of caution

The caution will be issued by a **senior police officer** or, where appropriate, a **respected member of the young person’s community** (for example, an Aboriginal elder).

The young person must be **accompanied by an appropriate adult** when receiving the caution.

No **conditions** may be attached to a caution, except that the young person may be required to make a written apology to any victim.

3.7 Issue of caution by Children’s Court

The **Children’s Court may issue a caution** under the Act if appropriate (as distinct from a caution under section 33(1)(a) of the *Children (Criminal Proceedings) Act*).

This sometimes happens where the young person was not offered a caution by the police, or did not admit to the offence, or for graffiti offences where police can’t issue a caution.

3.8 Record of caution

The caution is **recorded on the young person’s “Court Alternatives History”**. It can be taken into account by the Children’s Court if the child gets into trouble again, but cannot be taken into account by any adult court.

A caution does not count as a criminal conviction and **does not form part of the young person’s criminal record**.

4 Youth justice conferences

A **youth justice conference** is a meeting involving the young offender, their family, other support people, the victim of crime (if there is one), people to support the victim, and the police.

During the conference everyone talks about the crime, how it has affected people, and ways the offender can make up for the harm they have caused.

Youth justice conferences are based on principles of **restorative justice** and allow for **victim participation**.

4.1 Decision by investigating official

If the young person is eligible to be dealt with under the YOA, but the investigating police officer believes a caution is inappropriate, the police must consider referring the young person to a conference.

The ultimate decision about whether a young person can be dealt with by conference rests with a **specialist youth officer, who** must consider the **seriousness** of the offence, the degree of **violence, harm caused** to any victim, the **number and nature of prior offences** committed by the young person, and any other relevant circumstances.

Note that the police may **not** refer a young person to a conference for an offence under the *Graffiti Control Act*, even though a court may still refer a young person to a conference for one of these offences.

4.2 Admission of offence and consent to conference

The be referred to a conference, the young person must **admit to the offence in the presence of an appropriate adult** (see “Police cautions” above for a list of appropriate adults), and **consent** to being dealt with by means of a conference.

4.3 Legal advice and Protected Admissions Scheme

Before admitting to an offence or consenting to a conference, a young person should try to get **legal advice** (see “Legal advice” below).

You should also be aware of the “**Protected Admissions Scheme**” (see “Protected Admissions Scheme” below).

4.4 Information that police must provide

As with cautioning, the specialist youth officer must explain certain things to the child (see “Police cautions” above).

4.5 Referral by court or DPP

A young person who admits to an eligible offence may also be referred to a conference by the Director of Public Prosecutions or by the Children’s Court, if they have not already been referred by the police.

4.6 Cooling-off period and preparation for conference

A conference referral is made to a **conference administrator** (an employee of Juvenile Justice), who will appoint an independent **convenor** to run the conference. Before the conference, the convenor speaks to the main participants, including the young person and the victim, to help them prepare for the conference.

The YOA says that the conference must, if possible, **take place within 21 days** of the referral. In practice, however, it usually taken much longer to organise a conference.

As with a police caution, there is a “**cooling-off period**” (between 10 and 21 days) when the young person can get legal advice and/or change their mind about whether they wish to attend the conference.

4.7 Attending the conference

The following people are entitled to attend the conference:

- (a) the conference **convenor**;
- (b) the **young person**;
- (c) a **person responsible** for the young person;
- (d) members of the young person’s **family**;
- (e) an **adult chosen by the** young person;
- (f) a **lawyer** advising the young person (the lawyer can give legal advice during the conference, but is not usually allowed to speak on behalf of the young person);
- (g) the **investigating official** (police officer);
- (h) a **specialist youth officer** (police officer);
- (i) any **victim** or person chosen by the victim to be their **representative**;
- (j) the **victim’s support people**.

If appropriate, the **conference convenor can also invite others** such as respected members of the community, an interpreter, someone who can assist the young person with a communication or cognitive disability, a social worker, the young person’s Juvenile Justice Officer, or other people requested by the young person’s family.

4.8 Outcome plan

Central to the conference is the development of an “**outcome plan**”. The aim is to impose realistic sanctions on the young person and not to impose anything more serious than a court would impose for a similar offence.

The YOA does not limit the types of outcome plans the conference can recommend. Examples of outcome plans include getting the young person to:

- (a) make oral and written **apologies**;
- (b) make amends to a victim or the community by performing **voluntary work**;
- (c) **repair** damage or **repay** the cost of property stolen;
- (d) participate in an appropriate **program**.

If agreement cannot be reached at the conference, the matter is **referred back** to the person or organisation that referred the matter (ie the police, the court or the DPP).

If the court has referred the matter, the conference convenor must **refer the outcome plan back to the court** for approval.

Conferences can be reconvened when necessary to reconsider outcome plans.

If an outcome plan is satisfactorily completed, this will be the end of the matter. If the matter has been referred by the court, a satisfactory outcome means that the **charges are dismissed**. The conference administrator has to inform everyone involved in the conference when the outcome plan is complete.

If the young person doesn't complete the outcome plan, the matter will be referred to the conference convenor and **further court proceedings may be brought** against the young person.

4.9 Record of conference

Like a formal caution, a conference is **recorded on the young person's "Court Alternatives History"**, which can be taken into account by the Children's Court but not an adult court. A conference does not count as a criminal conviction and **does not form part of the young person's criminal record**.

5 Legal advice

A young person has a right to get legal advice at any stage. **It is best to get advice as early as possible, preferably before making admissions.**

In some cases, lack of legal advice could mean that a young person admits to an offence and accepts a caution or conference when they are actually not guilty. The young person may be dealt with as if they were guilty, when they could have beaten the charge at court.

Without legal advice a young person may also inadvertently admit to other offences which are not eligible for a caution or conference. If this were to happen during a protected admission (see below), the interview may be suspended, and what the young person says during the interview would not be used in criminal proceedings against them.

- Young people can get free legal advice from the **Legal Aid Youth Hotline on 1800 10 18 10**. The hotline operates from 9am to midnight on weekdays, and 24 hours on weekends and public holidays. Police must give a young person an opportunity to call the Hotline before any interview.
- The **Aboriginal Legal Service** also offers after-hours telephone advice via its **Custody Notification Service**. This number is not publicly available, but the police must call the hotline for any Aboriginal or Torres Strait Islander person in their custody.
- The **Shopfront Youth Legal Centre** also provides legal advice for its clients, but cannot offer a 24-hour hotline service.

6 Protected Admissions Scheme

Under the **Protected Admissions Scheme**, a young person can admit to an offence, knowing that anything they say cannot be used against them in court proceedings.

This protects young people who admit to an offence in the hope that they will be offered a caution or conference, and then find out that the police are taking them to court instead.

The police may offer a young person a protected admission only if they believe that the offence can be dealt with by caution or youth justice conference.

Before making a protected admission, the young person will be asked to sign a document saying that they will make a protected admission. The young person will also receive a written undertaking by the police that the admission will not be used as evidence in any criminal proceedings.

The police will then interview the young person.

For more information see

https://www.police.nsw.gov.au/_data/assets/pdf_file/0007/531718/YouthInfo_Brochure.pdf

7 Information for adult support people

Acting as a support person during a police interview, or at a caution or conference, is a very important role.

For more information and tips, please see our fact sheet on *Acting as a support person at the police station*.

8 Court proceedings

There are still a variety of situations when a young person may have to go to court:

- (a) if the **YOA doesn't apply** to the offence;
 - (b) if it's a **graffiti** offence where the police cannot deal with a young person under the YOA;
 - (c) if the **young person does not admit guilt** in the presence of an adult (there will, of course, be many situations when the young person wishes to plead not guilty and defend the charge in court);
 - (d) if the **young person chooses to go to court** instead of taking up the offer of a caution or conference;
 - (e) if the **police consider that a warning, caution or conference is inappropriate** (eg because of the seriousness or violence of the offence, or the young person's record);
 - (f) if the **young person fails to attend** a caution or conference;
 - (g) if a **conference can't agree on an outcome plan**;
 - (h) if the **young person fails to complete the outcome plan**.
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9 Records and privacy issues

9.1 Things said during a caution or conference

Any **statement, confession, or admission** made by a young person during a caution or conference is not admissible against them in subsequent criminal or civil proceedings.

However, if there is information disclosed during a conference that relates to other offences, the police can use this information to investigate these other offences.

9.2 Records of conferences

Conference administrators must keep **records of conferences**, but these must not be disclosed, except to the young person (or the person responsible or their legal representative), the referring body (police, court or DPP) and the Children's Court (for the purpose of making a decision concerning sentencing on a subsequent matter).

9.3 Publication of names and identifying details

As with proceedings in the Children's Court, **it is an offence to publish or broadcast the name of a young person** (or anything that tends to identify a young person) dealt with under the YOA. A young person aged 16 or over can consent to being identified or having their name published.

9.4 Criminal records

Although conferences and cautions do not give a young person a criminal record, they are part of the young person's "**Court Alternatives History**" and the Children's Court may take them into account when dealing with the child for a subsequent offence.

As YOA outcomes are not part of a young person's **criminal record**, this generally means that they don't have to be disclosed when applying for jobs or similar situations. However, there are some exceptions to this (for example, if you have been dealt with under the YOA for an arson offence and you are applying to be a firefighter).

For more information, see our fact sheet on *Convictions and criminal records*.

The Shopfront Youth Legal Centre Updated February 2020

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The Shopfront Youth Legal Centre is a service provided by Herbert Smith Freehills, in association with Mission Australia and The Salvation Army.

This document was last updated in February 2020 and to the best of our knowledge is an accurate summary of the law in New South Wales at that time.

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