

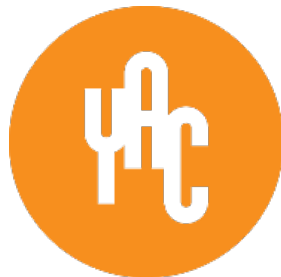
YOUTH ADVOCACY CENTRE INC

Submission in relation to

Criminal Procedure Review:

Magistrates Courts

June 2022



The Youth Advocacy Centre Inc (YAC) appreciates the opportunity to provide comment in relation to this review.

As you would be aware, YAC is a community legal and social welfare agency for children and young people aged 10-17, particularly those involved in, or at risk of involvement in the youth justice system.

Paragraph 3.95 of the Review's Consultation Paper notes that the Queensland Magistrates Courts also operate specialist alternative courts for some defendants, such as the Queensland Drug and Alcohol Court and the Murri Court. It should also be noted that the Childrens Court is a distinct jurisdiction at the Magistrates Court level. It is unfortunate that it no longer has a dedicated building following the closure of the Childrens Court building in Quay Street which supported a child-appropriate approach. Queensland is the only mainland jurisdiction not to have a separate court building or a separate entrance to the court building.

The Justices Act applies to the Childrens Court pursuant to s66 *Youth Justice Act 1992* (YJ Act). Where there is any inconsistency the YJ Act takes precedence. YAC's legal representation is limited to the Childrens Court jurisdiction, and our responses are therefore limited to those questions which are relevant to the Childrens Court. Our responses are also informed by the UN Convention on the Rights of the Child and other international instruments in relation to children in the justice system, particularly that all decisions in relation to a child should be in their best interests.

YAC is aware that it operates only in the south-east corner of Queensland and the experience of child defendants and their legal representatives may be different in regional and remote areas. Ensuring equity in the context of Queensland's geography and demography has always been challenging, but the quality of justice cannot vary dependent on where a person lives in the State.

Question 1: YAC is keen to ensure that any changes in criminal process do not negate s 66 YJ Act. The modified procedures for children should be maintained as currently in the YJ Act (noting that there is still scope to develop a more child-appropriate response to offending behaviour than the current system allows.).

Question 2: In YAC's view, the terms "contemporary and effective" should relate to the system, processes, and documentation being understandable by the participants. Children are among a range of vulnerable groups which appear before the court and the language throughout the system should be modified to plain English. For those for whom English is not their first language, other options should be developed to support their comprehension of the system and its processes.

Question 3: We note that children are a vulnerable by virtue of being children but they have additional challenges, too often being of First Nations background, or have the attributes listed at question 3. There is a weight of data and research evidencing that children in the justice system often face multiple disadvantages which are bringing them into the system. As such, court staff and judiciary must have training and ongoing professional development in effective engagement and communication with a wide variety of people and their circumstances. A system which is effectively meaningless to its participants undermines the system generally. Under the *Children's Services Act 1982*, children were "admonished and discharged". The children often had no idea what this meant and would tell people they had, for example, been "abolished and discharged" and even "admired and discharged". The words "remand" and "reprimand" currently in use sound very similar. More recently, one child refused to answer his notice to appear because the Magistrate had said to him on the last occasion he appeared "I don't want to see you in this court again". Language and clear communication are key to an effective, efficient and meaningful system.

YAC is supportive of greater resourcing for Elders in the Murri Court.

Question 4: Guiding principles could encourage a greater consistency in practice across the State. However, these should not compromise those in the YJ Act or the YJ Act generally.

Questions 6 and 7: Whilst the term “Magistrate” comes from the Latin “magister” meaning administrator, in Australia it has been understood as the judicial officer of the first level of the court system for many years. As such, YAC considers keeping the distinction of magistrate and judge assists children and young people in understanding the criminal justice system and process and the tiering of the courts. “Local Court” has a sense of being inconsequential. Using three words (Local Court Judge) to replace one word (magistrate) does not seem more efficient.

Questions 8 and 9: Allowing for electronic processes and procedures could assist in court efficiency but must be optional, not compulsory. The technology **must** be reliable and ensure that all stakeholders can participate appropriately, this being a human rights issue. This is likely to be a challenge outside south-east Queensland.

Even in the south-east corner, there are many in the community who do not have ready access to technology, so joining even by phone can be problematic. For those with language challenges, such as those for whom English is not their first language, electronic communication may be a barrier to appropriate participation.

Use of electronic processes is not likely to be suitable where a person is self-represented. Service of documents should not occur electronically.

Specifically with respect to children, we refer to the research on the use of video link or audio-visual link (AVL) in the Childrens Court in Queensland undertaken by Terry Hutchinson, a member of YAC’s Management Committee and the Queensland Law Society Children’s Committee. In particular, we refer to the AIC Trends and Issues Paper reporting on this¹. It notes that:

“The children who are using AVL are the small percentage of young people who are charged with an offence and find themselves in police custody or detention” - the same group with a background of social and economic disadvantage.

“Studies indicate that the young people who find themselves in detention are likely to be suffering from a raft of physical, educational, language and other health deficits that would make them poor candidates for the use of AVL technology if the purpose is for them to participate effectively in court proceedings (Anderson, Hawes & Snow 2016).” Children with cognitive impairment are also likely to be disadvantaged through the use of AVL technology.

“The legal system uses AVL for child victims with a range of protections built in around its use. However, when we use AVL for children who offend, the scaffolding is pulled away. In many cases these are the same children.”

“AVL is being used as a way for children to be spared the trauma associated with being transported to court, the watch house experience and the need for body searches.”

The Paper describes a range of concerns with the use of AVL, while acknowledging it could be useful in some circumstances. YAC supports the recommendations made by Ms Hutchinson in her report which could assist use of AVL in appropriate circumstances whilst adequately protecting the rights and interests of children.

¹ No. 631 August 2021

Question 10: YAC does not support summary hearings being conducted remotely. YAC does not consider that it is possible to ensure that all stakeholders can participate appropriately and understand the proceedings for them to be fair and just. Again, it raises human rights issues and whether the technology is good enough and reliable. Those at greatest risk in this situation are those in regional and remote areas where the technology is inconsistent.

Breach applications could be conducted remotely unless evidence is being called by either party. There is a lack of clarity in the YJ Act as to whether these applications can be dealt with electronically. The YJ Act allows for bail and sentence hearings to be conducted electronically but breach applications are distinct, not least because they are not criminal proceedings.

Question 12: YAC suggests that these matters be referred to as “offences which can be dealt with summarily”. While somewhat lengthy, it is clearer than the current situation. These offences could be listed in a Schedule for ease of reference.

Question 13: YAC supports a list of all offences which can be tried summarily in a Schedule for clarity and readability. The rights of election by children should remain as they currently stand.

Question 14: YAC proposes that the complaint and summons be retained, particularly for children who are alleged to be in breach of orders as breach proceedings are not criminal matters in the Childrens Court. However, the documentation needs a complete redraft to improve its readability and clarity.

Questions 15 - 18: The YJ Act sets out how proceedings commence for children and that must be retained. An ongoing problem is the failure of the police to advise Youth Justice and parents that proceedings have been commenced. This can impact on the efficiency of court proceedings as the Childrens Court generally requires the attendance of the parent or guardian and matters are unnecessarily adjourned if they are not aware of proceedings. If a matter is concluded without a parent present, the parent can apply for the matter to be held again for their attendance.

All information should be in plain English and readily understandable. This includes details about the offence which indicate the behaviour complained of, when and where this occurred, and any persons involved, so that the defendant can readily understand why they are being called to account.

Police must also ensure that the charges are transferred to the relevant court within 24 hours of a child being charged. Failure to do so should enable the magistrate to dismiss the matter. The police may, of course, simply re-charge the defendant but it may ensure that matters are listed on the date which the defendant is required to appear. This will support matters proceeding in a timely manner.

Questions 21 and 22: YAC’s view is that the current disclosure obligations in the Magistrates/Childrens Court are generally working. Compliance is usually achieved close to the mention date. Parties generally try to comply. There is a range of complex issues which may be involved with a child defendant, such as mental health, family dysfunction or being in care which can make it challenging to gather information in a timely fashion.

Question 23: Flexibility is needed in the Childrens Court due to the complexity of children’s matters as noted above. YAC therefore does not support Criminal Code disclosure obligations applying to all offences in Queensland for children. For example, letters of support for child defendants are often not available until 48 hours before the court date. It is difficult to organise such documentation to tight timelines when working with children.

Question 24: As for the previous two questions, due to the complexity of working with children, YAC would not support disclosure obligations for summary matters in the Childrens Court.

Question 25: Case conferencing is more difficult in the Childrens Court. Rather than employing police prosecutors to seek review of bail decisions, the objectives of the YJ Act would be better achieved by enabling expedient resolution of matters. We refer to the time when the Childrens Court had its own building in Quay Street. The prosecutor and Youth Justice had offices on site which enabled discussions to be had and resolved with decision makers on the morning of court if necessary, supporting efficiency of court time. YAC reiterates its long-held view that the perceived need to consult with the arresting officer causes unnecessary delays when there are professionally qualified and experienced prosecutors who can make decisions on the disposal of a case on the evidence they hold.

Questions 26 - 28: YAC is not in favour of case management in the Childrens Court unless it had the flexibility needed when dealing with child defendants.

Questions 29 - 31: The provisions in the YJ Act in relation to in court diversion should be preserved for children. YAC notes that some judicial officers do not appreciate that all matters can be diverted and it would be appropriate for attention to be drawn to this discretion.

Question 32: Mediation without a plea does not currently exist for children and this would be an opportunity to consider whether it would be suitable for use in the Childrens Court jurisdiction.

Questions 33-38: YAC advocates that if such a procedure is made available to adults, consideration should be given as to whether it would be suitable in the Childrens Court jurisdiction. In general, children should not be afforded less opportunity to avoid criminalisation than adults.

Questions 39 - 42: As noted, the YJ Act allows for the Childrens Court to determine that a child should have been cautioned rather than brought to court. Cautions should not be recorded as it undermines the decision. YAC suggests that a Magistrates/Childrens Court be able to strike out any simple offence it considers is not in the interests of justice or in the public interest. YAC also recommends that court-issued warrants for offences not designated as serious offences under s 8 YJ Act be reviewed after 6 months and 12 months and if the child has been to court in the intervening period and the warrant not acted on, that it be withdrawn. YAC has experience of police bringing on matters which could have been dealt with when the child had appeared on other matters in situations where the child has their life on track. Activating the warrant at this time only serves to derail the child again. This is not an effective use of court time or in the public interest, undermining the objectives of the youth justice system.

Question 43: Written pleas are rare in the Childrens Court. The court has very limited powers in terms of sentencing a child in this situation and it would be appropriate to enable the court to issue a reprimand or good behaviour order rather than only a fine.

Questions 44 and 45: The child defendant should not need to attend if the charge is to be dismissed. YAC suggests that a Magistrates/Childrens Court be able to strike out any simple offence in the absence of the defendant where it considers is not in the interests of justice or in the public interest.

Question 46: Section 104(2)(b) Justices Act requires the magistrate "to address to the defendant the following words or words to like effect" which in practice means that the magistrates quote it verbatim. The wording reflects the age of the Justices Act and is unnecessarily complex. As a result, some magistrates repeat the information in more understandable language. This would be best addressed by a redrafting of the section as to the information which needs to be advised, but not the precise wording. This can then be adjusted as required to ensure particular defendants understand what they are being advised.

Question 47: YAC does not support a compulsory directions' hearing before a committal in the Childrens Court unless it has the flexibility needed when dealing with child defendants.

Question 50: YAC's view is that costs should generally not be awarded in the criminal jurisdiction but there should be an ability to do so where it can be shown that there has been significant fault on behalf of the prosecution to finalise a matter in an appropriate manner. Publicly funded bodies such as community legal centres and ATSILS should be able to seek costs in the same circumstances. These organisations have limited and tight funding and they should be recompensed to enable them to provide access to justice to others who may miss out as a result of legal resources having been taken up unnecessarily.

Question 51: Cost orders could drive efficiency so this could be a useful mechanism.