



Juvenile Justice and the Children's Court in New South Wales

INTRODUCTORY NOTE

This bulletin outlines the functioning of the Children's Court of NSW and discusses the criminal prosecution of children.

A general description of courts and court procedures in this State is provided in "The Criminal Prosecution Process in NSW" (Crime and Justice Bulletin No. 4), published by the Bureau of Crime Statistics and Research (BCSR), which may be read in conjunction with this bulletin.

BACKGROUND

In 1987 the NSW Parliament passed a package of legislation relating to child and community welfare known collectively as the Community Welfare legislation. This package includes five Acts relating to the care and protection of children and to the administration of juvenile justice.¹ Previously, Children's Courts in NSW operated under the *Child Welfare Act 1939* and its successive amendments. A move to update the legislation, the *Community Welfare Act 1982*, was never proclaimed. The 1987 legislation repealed both this and the *Child Welfare Act*. Under the *Children's Court Act 1987* the **Children's Court of New South Wales** was created as a separate body within the court system, with specially appointed Children's Magistrates and a statement of principles based largely on the United Nations' Declaration of the Rights of the Child.²

FUNCTIONING OF THE CHILDREN'S COURT

The Children's Court has two functions, firstly to hear criminal matters involving child defendants, and secondly to adjudicate on child welfare matters (i.e. matters concerning children in need of care). The

new legislation draws a sharp line between the criminal and the welfare domains. The procedures for dealing with the criminal behaviour of children are set out in the *Children (Criminal Proceedings) Act 1987*, while the procedures for the removal of children from situations of inadequate care and those concerning custody are contained in the *Children (Care and Protection) Act 1987*.

When dealing with children in criminal matters, any court is required by the *Children (Criminal Proceedings) Act* (s.6) to have regard to a number of principles. As quoted in the Act, these are:

- a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them;
- b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance;
- c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption;
- d) that it is desirable, wherever possible, to allow a child to reside in his or her own home;
- e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind.

In NSW the age of criminal responsibility is 10 years. That is, in order to be charged

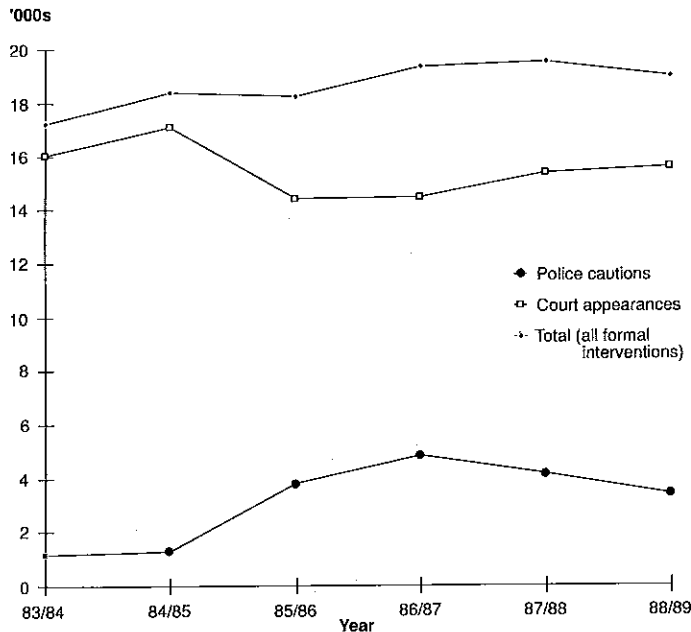
with and prosecuted for a criminal offence, a child must be 10 years old or above. The Children's Court holds jurisdiction over all defendants below the age of 21 who were under 18 at the time of the alleged offence. If the person was over 18 when the offence occurred, he or she will be prosecuted in the adult courts. The exception to this is if both an adult and child (or children) are charged for the offence. In this case the adult may also be tried before the Children's Court provided he or she is no more than 3 years older than the youngest child also charged.

The Children's Court, like the Local Court, is presided over by a magistrate who adjudicates on whether or not the defendant is guilty and determines the appropriate penalties. One important difference, however, is that the Children's Court is also empowered to deal with some more serious offences which would be heard before a jury if they were committed by an adult ("indictable" offences).

If the charge against the child is for an indictable offence, the magistrate has discretion under the *Children (Criminal Proceedings) Act* to hear the case in the Children's Court as a summary matter or as a "committal" (i.e. preliminary) hearing and, if a prima facie case is established, refer the case to a Higher Court.³ In the most serious cases - homicide, offences punishable by a life prison sentence, and certain sexual offences - the Children's Court is only permitted to conduct committal hearings, not determine outcomes.

Unlike adult courts, the Children's Court is closed to the general public and only parties with a legitimate interest in the case may attend. Members of the press are allowed to be present but cannot report the names of those involved. The magistrate has the discretion to permit or deny entry. All children have the right to legal represen-

Figure 1
Trends in police cautions and appearances in the Children's Court
1983/84 to 1988/89



Sources: BCSR, 1989, "Lower Criminal Courts and Children's Courts Statistics 1988", BCSR, Sydney.
BCSR, 1990, "Lower Criminal Courts and Children's Courts Statistics 1989", BCSR, Sydney.

tation arranged, if necessary, through the Legal Aid Commission.

THE PROSECUTION PROCESS AND CHILD OFFENDERS

Police apprehending a child for an alleged offence have a number of options:

(i) Warning

If a police officer decides the offence is trivial, he or she has discretion to issue a warning, in which case the child's name is recorded in the officer's official note book, but is not placed on record in the Police Service's Juvenile Offenders Index.

(ii) Cautions

If formal action is to be taken against the child then the matter is referred to a senior officer. This officer has fourteen days in which to decide whether the formal intervention should take the form of a caution or prosecution. Under certain circumstances police have discretion to issue an official caution rather than prosecute. A caution is not the same as a warning (see above).

Revised police procedures for cautioning children were introduced on 1 September

1985. Although the cautioning system was not new, the change in procedures aimed to establish a uniform approach to cautioning State-wide. The cautioning provision is designed to divert first and less serious offenders from the court system allowing limited court resources to be concentrated on the more serious and recidivist offenders. It should be noted, however, that there is no statutory right to a caution in place of a conviction even for a first offence.⁴ Furthermore, if a child has been apprehended by police for motor vehicle theft then the child cannot be cautioned but must instead be charged with the offence.

Whenever an official caution is issued the offender's name is entered on the Police Service's Juvenile Offenders Index, and the details are recorded on a Juvenile Report form. If a child is to be cautioned it must be done within twenty-eight days of arrest and a number of factors must be considered. Firstly, the offender must admit the offence and agree to be cautioned. Secondly, although it is possible to be cautioned more than once, a caution may be refused if the child has a previous conviction, fails to give his or her name and address, or if the offence is of a serious nature. Thirdly, if the offence is indictable⁵, or if it involves vehicle theft or a traffic offence then a caution cannot be issued.

When the child has agreed to be cau-

tioned, he or she is directed to attend the police station on a date specified. The child must be accompanied by a parent, guardian or other adult of the child's choosing. The actual caution is issued by a senior officer, who explains the serious nature of the offence and that further offences may result in criminal prosecution.

(iii) Prosecution

If the senior police officer at the station to which the child is brought decides to prosecute rather than caution the child, this is usually done by means of a Court Attendance Notice (C.A.N.) or a summons.⁶

The child will be prosecuted by way of charge if he or she:

- has previously failed to appear before a court when ordered;
- has failed to provide an address;
- is unlikely to appear if summonsed or ordered to attend;
- has been involved in violent behaviour and therefore should not be allowed back into the community;
- is alleged to have committed either homicide, any offence punishable by a life prison sentence, or certain sexual, drug or driving offences.

TRENDS IN CAUTIONS AND PROSECUTIONS

The revised police cautioning guidelines introduced in 1985 resulted in a marked increase in the percentage of children dealt with in this manner. Figure 1 shows the trends in court appearances and cautions between 1983/84 and 1988/89. The numbers of court appearances and cautions together produce the total number of 'formal interventions', that is, the number of occasions when law enforcement procedures are initiated against a child. As illustrated in Figure 1, the number of cautions issued annually rose sharply after the 1985 revision. In 1986/87 cautions accounted for 25% of all formal interventions, but by 1988/89 the figure had fallen to 18%. In contrast, in Queensland, where a cautioning procedure also operates, the percentage of juvenile offenders apprehended by police who are dealt with in this manner has been

over 65% for some years.⁷ In Victoria the proportion was 61% in the year 1985/86 - the last year for which statistics were available at the time of writing.⁸

As is clear from Figure 1, although there was a decline in court appearances which coincided with the revised cautioning practices (referred to above), in subsequent years the proportion of cases dealt with in court has gradually increased while cautions have decreased. The overall number of formal interventions, however, did not increase greatly between 1985/86 and 1988/89, and has actually declined slightly between 1986/87 and 1988/89. It would seem, therefore, that cautions have in general fulfilled their primary aim of keeping children out of unnecessary court proceedings, and have not simply generated more formal interventions than would have been the case without cautioning.

The effect of cautioning is not constant across all offence categories. The largest category of offences, accounting for 4,243 formal interventions in 1988/89 (22.4% of the total), was theft (not including car theft). Since the 1985 revision of procedures, cautioning has been used extensively in this category, particularly for shop-lifters and, in 1988/89, 39.5% of all formal interventions for theft took the form of police cautions. In comparison the percentage of thefts dealt with by way of caution in 1983/84 was 17.1%.

Other offence categories where an increase in cautioning has coincided with a decrease in court appearances, at least initially, include break and enter offences, property damage offences and drug offences. In contrast, the number of court appearances for offences against the person (e.g. assault) has increased year by year. This only levelled off in the first year of revised cautioning procedures then continued to rise at its previous rate. The total number of formal interventions for offences against the person has increased at a remarkably steady rate between 1983/84 and the present.

BAIL

When charged with a criminal offence a child will either be held in custody or granted bail. Bail is release from custody based on an undertaking to attend court when required. Certain conditions may have to be complied with while on release and a

monetary deposit may be required which is forfeited if the bailee fails to appear in court. Sometimes bail is "unconditional", in that only an undertaking to attend court is required, or is "dispensed with", in which case even this requirement is waived.

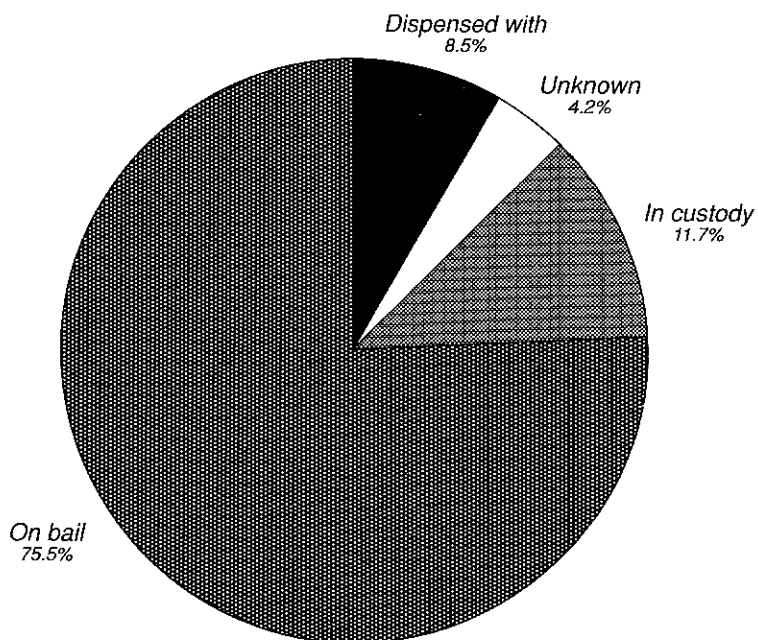
If bail is refused, the child is held on remand in a detention centre, or in a police station if there is no practical alternative. A child will only be held at a police station for as long as it takes to arrange for accommodation in a detention centre. Whether held at a detention centre or a police station, the child must be brought before the Children's Court as soon as possible. Children who are over the age of 16 may be held in prison if charged with a serious offence, but only on application from the prosecutor (usually the police) or the Director-General of the Department of Family and Community Services and with the consent of the Minister for Corrective Services, and then only if the court considers the child to be unsuitable for detention in a detention centre. If the case is not finalised at the first hearing, the magistrate decides whether or not to continue bail or change the previous decision. This process is repeated with each subsequent adjournment.⁹ In 1988/89 the proportion of children held in custody pending the court outcome was 11.7% (see Figure 2).

SENTENCING

For offences dealt with by a magistrate in the Children's Court, the Children (Criminal Proceedings) Act allows a number of sentencing options if a verdict of guilty is reached:

- a) Dismissal or dismissal with a caution (i.e. by the magistrate).
- b) Release on recognizance for a period no longer than 2 years.¹⁰
- c) A fine not exceeding the maximum provided for the offence, with an absolute maximum of \$500.
- d) Release on recognizance plus a fine.
- e) Release on probation for a period no longer than 2 years.¹¹
- f) An order under the Children's (Community Service Orders) Act.¹²
- g) Committal to the control of the Minister for a period no greater than 2 years, with the provision that, in certain circumstances, additional sentences for other offences may be accumulated to a maximum period not exceeding 3 years.¹³

Figure 2
Appearances in the Children's Court 1988/89
Bail status at final appearance (n = 10,393)*



* Summons matters and C.A.N.'s are not included in this figure (5,160 cases)
Source: BCSR, 1990, "Lower Criminal Courts and Children's Courts Statistics 1989". BCSR, Sydney.

The magistrate has discretion to choose the appropriate penalty. However, the Act stipulates that option (g) is to be used only as a last resort.

For a child under 16 the Children's Court can impose any relevant sanctions, but cannot record a conviction against the child. This means that there is no "criminal record" for a child under 16. The same may apply to children 16 years and over if the offence is dealt with summarily. Furthermore, any records of previous offences or official police cautions are not admissible as evidence in any but the Children's Court if no conviction was recorded against the child and if 2 years have elapsed since punishment for an offence. Essentially, this provision of the Act is to prevent minor offences committed as a child having undue influence in a court appearance in later life.

If a person is being sentenced for an offence committed when he or she was a child, the court is permitted to take into account any occasions where the person may have been cautioned by the police for previous offences.

PRISON

The Children's Court can only sentence a child to prison if the child is 16 or older, is

already serving a period of detention and has been found guilty of escaping or attempting to escape from lawful custody. It must be done through an application by either the Director-General of the Department of Family and Community Services or the person prosecuting the case (i.e. the police) and with the consent of the Minister for Corrective Services. If the child is tried before a Higher Court the trial is "according to law". This means that judgment and penalties - including prison - apply as with an adult. Theoretically anyone above the age of criminal responsibility may be sentenced to prison in these circumstances. In practice, however, the court will usually order that the sentence be served in a detention centre.¹⁴ In 1988/89, 19 children were sentenced to prison in the Children's Court.

TRENDS IN SENTENCING

In 1988/89 there were 14,223 children who pleaded guilty or were found guilty in the Children's Court. If this figure is taken in conjunction with the number of children being given official police cautions (and therefore admitting guilt) in the same period, the total number of guilty findings is 17,599. Figure 3 presents the types of penalties (including police cautions) incurred by children found guilty in 1988/89.

The percentages are based on the most serious penalty imposed. Nearly 6% of those dealt with in the Children's Court received custodial sentences.

Figure 4 compares the trend over the last six years in the percentage of children found guilty (including police cautions) who received custodial sentences with that for adults found guilty in the Local Courts.¹⁵ From Figure 4 it can be seen that children have, in the past, been more likely to receive custodial sentences than adults. Furthermore, while the percentage of adults has remained nearly constant, there was an increase in the proportion of children receiving custodial sentences in 1985/86, the time at which revised cautioning procedures were introduced. It would seem that, with an increased proportion of trivial offences being dealt with by way of cautioning, the children who were brought before the Children's Court and found guilty were more likely to receive custodial sentences in 1985/86. This effect does not, however, appear to have persisted. In 1988/89, 5.8% of children found guilty received custodial sentences, a figure comparable to that for adults sentenced in the Local Courts.¹⁶

DESTRUCTION OF RECORDS

If a child is found not guilty or is found guilty but has the charge dismissed by the Children's Court, the court must order the destruction of any photographs, fingerprints, palm-prints and any other prescribed records of the case, except those of the Children's Court. The court may also do this, if it believes the circumstances warrant it, when the child has been found guilty and sentenced in any of the other ways described above.

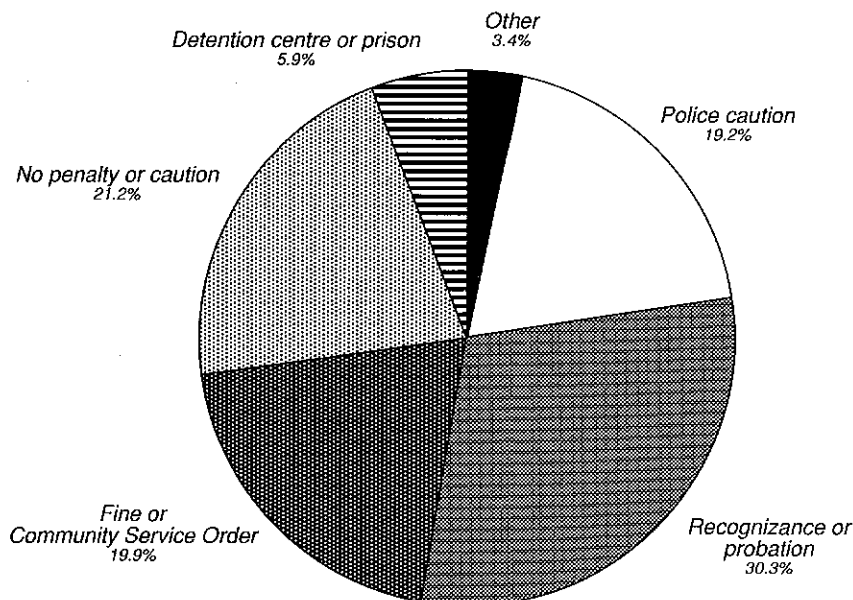
APPEALS

As with adults tried in the Local Courts, a child found guilty by a magistrate in the Children's Court has the right of appeal to the District Court against the conviction and any sentence imposed.

COMPENSATION

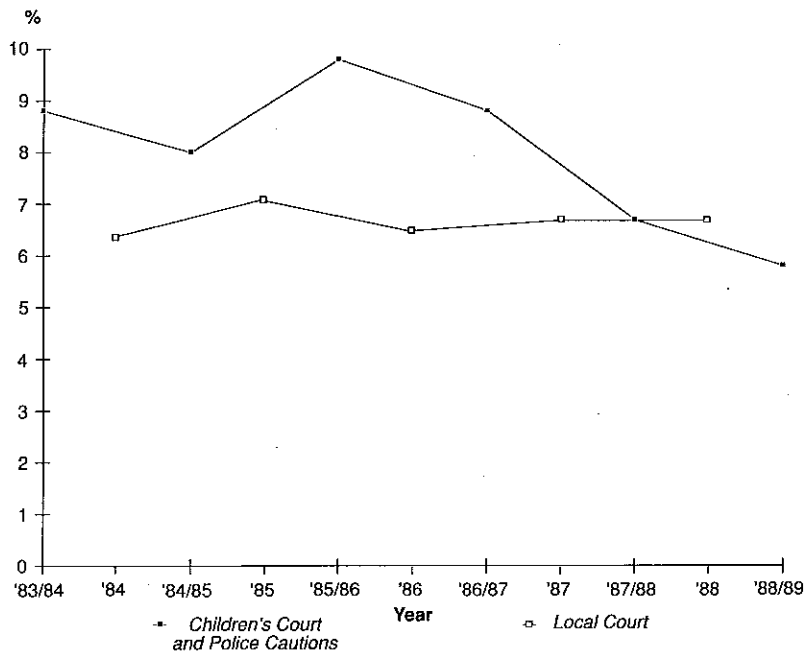
A child found guilty of an offence may be ordered to pay compensation, subject to his or her means and income, if any.¹⁷ This limitation does not affect compensation payments to victims by the State under the

Figure 3
Cases proven in the Children's Court and police cautions 1988/89
Outcomes (n= 17,599)



Source: BCSR, 1990, "Lower Criminal Courts and Children's Courts Statistics 1989". BCSR, Sydney.

Figure 4
Trends in custodial sentences as a percentage of guilty findings
1983/84 to 1988/89 Local Court and Children's Court plus police cautions



Source: BCSR, 1989, "Lower Criminal Courts and Children's Courts Statistics 1988", BCSR, Sydney.
BCSR, 1990, "Lower Criminal Courts and Children's Courts Statistics 1989", BCSR, Sydney.

criminal injuries compensation provisions.

FURTHER READING

The Law Handbook, 1988, Redfern Legal Centre Publishing, Redfern.

This book offers practical information about the law, including children's rights and entitlements, and lists agencies which provide help and advice.

Children's Court Guidebook, 1989, Law Society of New South Wales, Young Lawyers Section, Sydney.

This book is designed primarily for members of the legal profession working in the area of juvenile justice. It provides up-to-date information on legal practice in the Children's Court.

NOTES

- These Acts are:
The Children's Court Act 1987;
The Children (Care and Protection) Act 1987;
The Children (Criminal Proceedings) Act 1987;
The Children (Community Service Orders) Act 1987;
The Children (Detention Centres) Act 1987.
- Reference: R. Blackmore, April 1988, "The New Children's Court", Law Society Journal, Sydney, Vol 26, pp 34-36.
- That is, the District Court or the Supreme Court.
- Reference: Interdepartmental Monitoring Committee, August 1987, "Revised Police Cautioning Procedures: Review of the First Year of Operation", p. 2-3.
- That is, an offence which attracts a maximum penalty of more than 2 years in prison and can therefore be heard before a judge and jury in the District or Supreme court. See: BCSR, 1987, "Ball In NSW" (Crime and Justice Bulletin No. 2), BCSR, Sydney.
- A summons is an order to attend court, issued by the court at the request of the informant (i.e. whoever commenced the prosecution, e.g. the police). It specifies the alleged offence and the place and time where the case is to be heard. A summons may be served on the alleged offender in person or through the mail and is usually issued for minor offences. Failure to attend court may result in the issuing of a warrant of arrest, or the case being heard in the defendant's absence. A Court Attendance Notice operates in a similar way to a summons, but is issued directly by the police to the alleged offender in person.
- The cautioning figures for Queensland are 1983/84 - 69.1%; 1984/85 - 71.0%; 1985/86 - 69.1%; 1986/87 - 69.0%; 1987/88 - 67.4%. Source: Queensland Police Department, 1984 to 1988, *Annual Reports*, Government Printer, Queensland.
- Source: Freiberg, A., Fox, R., and Hogan, M., 1988, "Sentencing Young Offenders", Australian Law Reform Commission, Alken Press, Smithfield.
- More information on bail procedures is contained in BCSR, 1987, "Ball in NSW" (Crime and Justice Bulletin, No.2), BCSR, Sydney.
- A recognizance is an agreement entered into by the offender before the court to comply with certain conditions upon release - e.g. to be of good behaviour, not to consort with certain persons etc. - for a certain period of time. Recognizances may be accompanied by a monetary bond or surety which is forfeited if the terms of the recognizance are breached. If a recognizance is breached the court has the power to re-sentence the offender in any way appropriate to the original offence.
- Under the new legislation (see note 1) there is little to distinguish release on probation from release on recognizance. A period of probation, however, may have a condition of regular supervision by a probation officer attached to it.
- A Community Service Order is a form of penalty whereby the young offender must perform a set number of hours of community service work.
- This means that the child is ordered to serve a specified period in a detention centre. Detention centres are custodial facilities run by the Department of Family and Community Services for juvenile offenders. Their establishment and operation is governed by the Children (Detention Centres) Act. Whilst serving a sentence in a detention centre the child will either attend school or be involved in other programmes.
- See note 13
- The Children's Court is not empowered to deal with traffic offences committed by children over the age of 16 (licensable age) unless the offence arose out of the same incident as another offence which has come before the Children's Court. The Local Court figures given here, therefore, exclude drink/drive matters. Sources: BCSR, 1989, "Lower Criminal Courts and Children's Courts Statistics 1988", BCSR, Sydney. BCSR, 1990, "New South Wales Lower Criminal Courts and Children's Courts Statistics 1989", BCSR, Sydney.
- Note that these figures may underestimate the percentages by a small amount because, when cases are appealed against to the District Court, the statistical returns from the Local Court are not always completed.
- Under the Child Welfare Act of 1939 a child's parents could be obliged to pay compensation on the child's behalf, but this provision does not exist under the current legislation at the time of writing.

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