

When children/juveniles* come to court

CHECKLIST 2

For Chief Justice
Judge, Magistrate and Court Staff

* Those under the age of 18 years old under international law; noting each country has different age-related provisions for age of criminal responsibility under domestic law



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**FEDERAL COURT
OF AUSTRALIA**



Purpose Statement and User Guide

This is the 2nd in a series of six Human Rights Checklists designed to support coordinated “best practice” actions to apply human rights in the daily practice of judges, magistrates and court staff. The Checklists provide practical step-by-step guidance for applying relevant human rights standards to particular groups of court users and for making courts more inclusive and welcoming.

Each checklist has separate sections containing guidance for judges/ magistrates and court staff which can be ticked off by the user as each step is taken. While not every recommended action will be attainable for all courts from the outset, Courts are encouraged to also use the checklists as an end-point for guiding ongoing reform of court processes.

The Checklists are designed to be used alongside the PJSI Human Rights Toolkit, (available here <https://www.fedcourt.gov.au/pjsi/resources/toolkits/Human-Rights-Toolkit.pdf>), which provides further background about the human rights standards that the recommended actions in the checklists are based upon. The Checklists are designed to provide general guidance for Pacific court actors and not specific legal advice. Court actors should always ensure that the actions they take are also consistent with national laws and in accordance with the guidance and direction provided by Chief Justices.

Full Series of Human Rights Checklists

- **Checklist 1** Minimising Pre-Trial Detention
- **Checklist 2** When juveniles/children come to court
- **Checklist 3** Judicial visits to places of detention
- **Checklist 4** When victims of family or sexual violence come to court
- **Checklist 5** When people with disabilities come to court
- **Checklist 6** Creating welcoming, inclusive courts

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For Chief Justices to consider

- Chief Justices can play a key role in providing leadership and setting into motion coordinated standards and practices to be applied across the court for when children and juveniles come to court. These are aimed at ensuring that the special human rights protections owed to children and juveniles are applied in any court process. This includes giving primary consideration to the best interests of the child/juvenile and ensuring that children/juveniles are able to understand and participate in the court process and have their views considered, to the maximum degree possible.....
- Consider endorsing this Checklist and encouraging or directing judges, magistrates and court staff to use this checklist in their daily practice to create an "all of court" coordinated response.

For further background and guidance see PJST Human Rights Toolkit <https://www.fedcourt.gov.au/pjsi/resources/toolkits/Human-Rights-Toolkit.pdf> especially Chapter 6

RECOMMENDED ACTIONS

If there is no specific child/juvenile justice law and procedure in your jurisdiction, issue Practice Directions for Child/Juvenile Cases binding upon all courts and judicial officers.

Guidance for content of Practice Direction

- ✓ Ensure an on-call judge is readily available 24 hours a day/7 days per week by telephone to hear applications regarding whether a child/juvenile can be detained or not. 
- ✓ Cases involving people under 18 years old need to be immediately identified by the court, colour coded by registry and prioritised for allocation of a court date.
- ✓ Judges must tightly control the timing of steps leading to trial and give early warning to the parties that adjournments will only be granted in the most exceptional circumstances, and that the case will proceed or be dismissed based on the evidence available.
- ✓ Cases involving children/juveniles in the lower courts should take no more than three months to be finalised, and for higher courts, a maximum of six months. 
- ✓ The Court will schedule a particular day/schedule for hearing cases involving children/juveniles, so that they do not mingle with adult offenders and so different court arrangements and measures can be made for them.
- ✓ Ensure that judges/magistrates can only order pre-trial detention (for any period) of a child/juvenile as a last resort, for the shortest possible time and only for the most serious cases of violent crimes against the person (never for property offences or minor offences). 
- ✓ Judges/magistrates should be encouraged to refer cases involving children/juveniles who plead guilty to a family conferencing process to identify recommendations for the judge for dispensation of the case.
- ✓ Sentences must take into account the child/juvenile's age and focus on rehabilitation more than punishment. Prison should only be used in the most serious cases as a last resort, and be for the shortest possible period in a facility separated from adults. Custodial sentence can always be supplemented with other community-based rehabilitation activities or probation, supervision orders, or educational/vocational programs. 

Request a briefing where judges order pre-trial detention of children/juveniles and monitor ongoing detention in these cases

- ☒ Ensure appropriate and separate facilities, and care of child/juveniles when they come to court, including during their transportation to court, by appointing a responsible court staff member who is trained in this role.
- ☒ Ensure there is a group of judges in each court who have received special training for handling cases involving children/juveniles, and that judges from this pool are appointed to all cases involving children/juveniles. Gradually expand this pool, as resources allow, until all judges have had training in handling cases involving children/juveniles.
- ☒ Allocate separate court hearing days to deal with cases involving children/juveniles more efficiently, discreetly and using a more informal layout for court room furniture.
- ☒ Support judicial officers with diversion approaches to the maximum degree permitted by the law.

Click here to access the Court Infrastructure checklist which considers the additional requirements of juveniles accessing the court building.



- ☒ If there is no specific child /juvenile justice law and procedure in your jurisdiction, advocate for the Parliament to pass one, and for the Government to provide resources for a child/juvenile court facility and training for judges/court staff.
- ☒ Work with prosecution service to ensure Standard Operating Procedure (SOP) in place guiding decision making around:

- ▶ Ensuring compliance with criminal age of responsibility;
- ▶ Diverting child/juveniles from prosecution;
- ▶ Exercise of prosecutorial discretion not to lay charges;
- ▶ Prioritising cases involving children/juveniles;
- ▶ Ensuring children/juveniles are appointed legal representation from the outset;
- ▶ Ensuring children/juveniles are only detained as a last resort, for the shortest possible period and only regarding serious violent charges against the person;
- ▶ Monitoring timeframes and targets for completion of investigations, filing of indictments, reducing delay;
- ▶ Standards for keeping child/juvenile defendants updated on progress of prosecutions.





Judge and Magistrate responsibilities

Overview of responsibilities

Judges and Magistrates are responsible for ensuring that the special human rights protections owed to children and juveniles are applied in any court process. This includes giving primary consideration to the best interests of the child/juvenile and ensuring that children/juveniles are able to understand and participate in the court process and have their views considered, to the maximum degree possible.....

To meet these responsibilities, it is necessary for judges/magistrates to actively manage cases involving children/juveniles as per the recommended actions below.

For further background and guidance see PJST Human Rights Toolkit
<https://www.fedcourt.gov.au/pjsi/resources/toolkits/Human-Rights-Toolkit.pdf>
 especially Chapter6

RECOMMENDED ACTIONS

- ☒ Are identified as early as possible and given priority.
- ☒ Always have legal representation appointed to them.
- ☒ Are diverted from criminal justice processes wherever possible. This would usually occur at police/prosecution with decisions not to charge, however judges may additionally be able to refer cases involving guilty pleas to a family conference and then consider its recommendations for dispensation of the case. This is especially for cases where the child/juvenile has been charged with low-level offences and who have little or no prior history of offending.

Family Conference Process







- ▶ A family conference will involve the child/juvenile as well as their family, victim, police, lawyer, conference convener and any other interested and relevant party.
- ▶ Family conferences provide a good opportunity for the child/juvenile to hear how their offending impacted on the victim.
- ▶ Family conferences provide recommendations to the judge for a plan for dispensing with the case. If the plan is satisfactorily completed the court will consider granting an absolute discharge so that it is as if the charge was never laid.
- ▶ Family conferences can recommend accountability measures such as: community work, meaningful apology, reparation/restitution, and counselling and working with the young offender and his/her family.
- ▶ Family conference can also recommend that probation/correctional services provide a report to the Court.

- ☒ Always follow the Practice Direction's guidance on timeframes for finalising the case and provide early warning to the parties that adjournments will not be granted, except in truly exceptional circumstances which are beyond the control of the parties.
- ☒ Strong emphasis by judge on young person's participation in the court process, and commitment to find out young person's views and as far as practicable to give effect to them.
- ☒ Are only detained as an absolute last resort, for the shortest possible period, and only for the most serious cases of violent crimes against the person and never for property offences or minor offences, and always in age-appropriate and separated facilities that meet minimum conditions (see separate 'prison/detention visits checklist').
- ☒ Understand and can participate in court processes to the maximum degree possible, including through use of their native language (through an interpreter arranged by the court, if necessary).
- ☒ If guilty, are given a sentence that focuses on rehabilitation more than punishment by minimising custodial sentences and supplementing with other community-based rehabilitation activities.
- ☒ Prison should only be used in the most serious cases as a last resort and for the shortest possible period in a facility separated from adults.









The Judge has responsibilities they need to proactively address in three stages: pre-hearing, during hearings and post hearing/sentencing.



Stage One Pre hearing

-  Ensure the court contacts relevant Government department for child/juvenile welfare (eg. social services, probation officer) to ensure child/juvenile is linked in to available supports and that some assessment of the child/juvenile's circumstances is completed.
-  Determine the exact age of the child/juvenile at the time of the alleged offence, based on their birth certificate or other documents, where possible. If none are available, determine age based on statements of parents, other relatives and the child/juvenile themselves. Conduct a hearing and take evidence from relevant parties regarding child's age if necessary.
-  Based on your age finding, determine if the child/juvenile can be legally charged or prosecuted: that is, you must be satisfied the child/juvenile is above the criminal age of responsibility in your jurisdiction. If not, dismiss the charges.
-  Apply specific child/juvenile justice law and procedure in your jurisdiction, and if there is no one, then apply the Court Practice Directions for Child/Juvenile Cases or the standards provided for in this guidance. Ensure you apply those standards consistently with the Convention on the Rights of the Child (see PJSI Human Rights Toolkit for a summary) and your National Constitution ('Bill of rights' section).
-  Look for any opportunity to divert the case from the criminal justice process or to refer cases involving guilty pleas to case conferences (as outlined above in 'overarching roles' section).
-  Ensure that court staff are appointed to make arrangements for the care of children/juveniles attending the court well before the day of the hearing. (See below for details of arrangements they need to make).

Stage Two First and subsequent hearings

-  Cases involving children/juveniles should be held in closed court, as the privacy of children/juveniles must be specially protected.
-  Make sure the court is set up in a less formal way. Ideally U-shape or horse shoe configuration to allow for participation by young person and his/her family.
-  Ideally the child/juvenile will attend court on a day allocated only for hearings of young people so they do not mix with adult offenders and to make it easy for arrangement of furniture for the day.
-  Adopt a more informal manner: introduce yourself, ask the child/juvenile how they are, and ask if they have anyone with them at court that day.
-  Make sure the child/juvenile has a lawyer. If child/juvenile does not have a lawyer:
 -  Ask police/prosecution why they have not arranged a lawyer.
 -  Make an order for legal aid/appoint a lawyer to provide assistance and stand the matter down to next possible date.
 -  But where child/juvenile is detained, proceed to determine the issue of release but do not progress the substantive matter until next hearing when the child/juvenile has legal representation.

























Explain to the child/juvenile in simple, clear language appropriate to their age and in short sentences:

- ▶ Why they are at court and the purpose of the hearing;
- ▶ That their participation in the hearing is encouraged and that you will take their views into account at all stages, to the maximum degree possible;
- ▶ If there is anything confusing or he/she cannot understand then he/she must tell the judge straight away so that problem can be fixed;
- ▶ Set out which laws the child/juvenile is accused of breaking;
- ▶ Explain the role of the judge, prosecutor and the role of their lawyer;
- ▶ Explain the sequence of the hearing. This will depend on the nature of the hearing, but for example:
 - ☐ First the prosecution will be presenting the proof they have gathered that you did this;
 - ☐ Then your lawyer will speak on your behalf to tell the court whether you will be pleading guilty or not. If you are pleading not guilty, then your lawyer will be leading evidence to show you did not do this; and
 - ☐ If you are pleading guilty then the court may agree to refer the case to a family group conference, (see pop out above), which will produce a plan for the court to consider. If the plan is satisfactorily completed the court will consider granting an absolute discharge so that it is as if the charge was never laid.
- ▶ If the child/juvenile is going to give evidence, explain that the role of the judge is to make sure the questions by the prosecution are clear, relevant and fair.
- ▶ Explain that he/she should not answer any questions unless they fully understand them, and that the questions can be further clarified or simplified.
- ▶ Set out anything further expected of the child/juvenile and their lawyer that day.
- ▶ Set out the possible outcomes of the hearing (including the process for deciding whether child/juvenile will continue to be detained or released).
- ▶ Check that child/juvenile understands what you have explained to them. Ask them to explain back to you their understanding and then fill any gaps and adjust your communication style to make it easier for them to understand going forwards.
- ▶ Explain that after the hearing a court staff member (ensure you name them) will be in regular touch to provide regular updates on how the case is progressing and likely timeframes.

If child/juvenile is detained

A Inquiries into detention and treatment to date

-  Explain that because they are under the age of 18, the court has a special responsibility to make sure they are being treated according to the rules and you are going to ask them some questions about their situation.
-  Explain that they are safe to disclose any issues concerning their detention or treatment without fear of retribution, including by court staff, police, guards or other detainees/prisoners.
-  Start with the easier questions, for example, ask the child/juvenile how they were brought to court:
 -  If they were brought with other adults or separately?
 -  If there was enough air in the vehicle?
 -  If they had to wait a long time in the vehicle?
 -  If they were handcuffed or shackled?
 -  Where they have been held in the court (with adults or separately)?
 -  If they have had access to water, food, bathroom while held at the court (if not, raise these issues with the Chief Justice)?
-  Ask them:
 -  How many hours or days they have been detained.
 -  To explain the sequence of what happened from when they were arrested.
 -  If any force was used during arrest (and make inquiries to help clarify if this was the minimum needed, and proportionate).
 -  If the police explained to them the reason for their arrest at the time they were arrested.
 -  If they were given the chance to call their parents/guardian, whether they first came to the police station, and whether parents/guardian were present during any questioning.
 -  If the police arranged for a lawyer for them prior to questioning and if they had a lawyer present during any questioning.
-  If they are healthy or not.
 -  If not, ask if they have received any medical treatment.
-  Ask them if they have any physical injuries or not.
 -  Be observant. Look for any signs of physical injury.
 -  If they have any visible injuries ask them how they got them.
 -  Ask them if they have received any medical treatment.

- ☒ Ask them if anyone, including guards, police or other child/juveniles, has physically harmed or threatened them since being detained, including during questioning.
 - ▶ If so obtain details from the child/juvenile.
 - ▶ If mistreatment was used during questioning/obtaining admission, this then becomes part of the case and the defence will need to call police involved as witnesses.
 - ▶ In addition, the judge/magistrate can initiate a new case against the guard/police officer, and lodge a complaint with corrections/police/Ombudsman/human rights body, to ensure the alleged mistreatment is investigated.
 - ▶ Also raise with Chief Justice.
- ☒ Ask child/juvenile if he/she has been held with other pre-trial child/juveniles or with adults or sentenced prisoners
 - ▶ If with adults or sentenced prisoners, report to corrections service/police that separation is required.
- ☒ Ask if he/she has adequate space, enough light, bedding, clean water, food, essential items (like toothbrush, toothpaste, soap, sanitary items for girls or if they need any of these).
 - ▶ If any of these are lacking, report to correction service/police that these must be provided and also raise with Chief Justice.



B Deciding to release or extend pre-trial detention

Detention of a child/juvenile can only be ordered:



As an absolute last resort; Follow the points below to make sure all alternatives are covered:



Bail: Require evidence for why bail cannot be set at a reasonable/feasible level;



Reporting conditions: Require evidence why reporting conditions/undertakings by adults would not be sufficient to ensure attendance at court;



Undertakings from parent/responsible adult: Exhaust all safe family/friends/social services accommodation options (court should hear directly from the parents/responsible adult and social services to help identify all options);



Require evidence for why undertakings of family/friends to monitor/support reporting conditions/behaviour would not be sufficient to ensure attendance at court); **AND**



Only for the most serious cases of violent crimes against the person and never for property offences or minor offences; **AND**



Based on assessment/evidence there is an ongoing substantial risk of:



Harm to others; or



Interference with evidence/witnesses; or



Risk the suspect will abscond/not appear before court.



Only order detention if all of these conditions above are met; AND



Only detain for the shortest possible time (ie detention should be reviewed again in no more than one week); **AND**



Set down a tight timetable for steps to the trial with a clear direction to the parties that extensions will not be given, and that if the parties do not comply with directions then unless there are truly exceptional circumstances, the suspect will be released or the charges dismissed.

Stage Three Prior to and at sentencing hearing

-  **Sentences must be based on the child's age at the time of the offence** and aim at promoting social reintegration and the child's constructive role in society. Focus on rehabilitation not punishment.
-  **Check national laws** for any other sentencing options, for example, a youth control order, where the child/juvenile can be required not to commit any further offences for its duration, attend work or study, report to the court monthly or as required, notify if they change address or leave location etc.
-  **Consider other optional orders** such as that they:
 -  Participate in community service
 -  Undergo alcohol or drug treatment if available
 -  Abstain from drinking alcohol or using drugs
 -  Attend counselling
 -  Reside at a specific address
 -  Abide by a curfew
 -  Not have contact with specified persons
 -  Participate in cultural programs
 -  Not go to particular places or areas, and/or
 -  Not use specified social media, if this is required to protect the child/juvenile or the community.
-  **Prison sentences** should only be used in the most serious cases as a last resort and be for the shortest possible period in a facility separated from adults. Custodial sentence can always be supplemented with other community-based rehabilitation activities or other measures including providing probation, supervision orders, and educational/ vocational programs.
-  **No death penalty or life imprisonment** without the possibility of release for anyone under the age of 18 at the time of the offence.
-  **Give a fresh chance:** Permanently remove/'expunge' juvenile criminal records after person turns 18 or after a maximum of five years.
 -  Juvenile records that show up on background checks can be used to deny young people a place to live, a job, admission to school/university or a line of credit.
 -  This goes against the philosophy that young people who have made mistakes should be given the opportunity to 'turn over a new leaf', without the risk of them facing stigma or discrimination.



Court staff responsibilities

Overview of responsibilities

Court staff play essential roles in ensuring that the special human rights protections owed to children and juveniles are applied across all stages of any court process including before, during and after their hearings, as per the recommendations below.....

For further background and guidance see PJST Human Rights Toolkit
<https://www.fedcourt.gov.au/pjsi/resources/toolkits/Human-Rights-Toolkit.pdf>
 especially Chapter 6

RECOMMENDED ACTIONS

Pre hearing Preparation



Ensure arrangements are made for child/juvenile well in advance of their hearing date.

- ▶ How they will get to court?
- ▶ Who will accompany them to court?
- ▶ Explain what they need to bring (food, ID etc)?
- ▶ Who from the court will receive them and look after them while at court
(to ensure they are provided with information about what will happen including the hearing process and the details of what is expected of them, as well as food, water and safe access to bathroom while at court)?
- ▶ Where will they wait so they are safe from seeing people connected with the case or questioned by curious people?
- ▶ Ensure they have legal representation appointed and if not, arrange referral to legal aid if necessary.
- ▶ Do they need an interpreter? (organise one if necessary).
- ▶ Ensure that a pseudonym is allocated in the court data system.
- ▶ Privacy: Make sure child's name is not included in any public listing notices, as well as in the judgement, to protect the privacy of the child/juvenile.



Day of hearing

- ☒ Make sure the court is set up in a less formal way. Ideally U-shape or horse shoe configuration to allow for participation by young person and his/her family.
- ☒ Meet child/juvenile at court as previously arranged.
- ☒ If child/juvenile is detained ensure they are held separately from adult detainees while they wait and that they have access to food, water and a bathroom.
- ☒ What information to give child/juvenile suspect when they come to court
- ☒ Provide all child/defendants at court information in simple, local language, about:
 - ▶ What the process will be and
 - ▶ Role of judge, prosecutor and defender
 - ▶ How long they will likely need to wait
 - ▶ Court etiquette: how to address the judge, to stand and bow when they enter and leave the hearing room etc.
 - ▶ What will be expected of them during the hearing and that they should ask their lawyer/ the judge any questions they have during the hearing
 - ▶ Where bathroom/other facilities are
 - ▶ Who and how they can contact court staff if they need to communicate anything
 - ▶ Once person is in the court room, explain to person again where different court actors will be and what will happen once the hearing commences, and to ask their lawyer or the judge any questions they have during the hearing.
- ☒ Accompany all child/juveniles to the court room and show them where they will sit and explain again the roles of the court actors, the process, and what will be expected of them.
- ☒ Ensure that all child/juveniles have someone to take them home/means of transport after the hearing.

After hearing

- ☒ Make sure child/juvenile safely leaves the court with an adult.
- ☒ Ensure that child/suspect and their lawyer are regularly updated on progress of the case and upcoming hearing dates.

