

CHAPTER 5

Criminal proceedings

Criminal prosecution or appropriate disciplinary action that protects children and young people from their abusers are important parts of the child protection system. Access to mandated treatment and community supervision is dependent on successful outcomes in the criminal justice system. When a person is charged with an offence, even if it does not proceed to court, this action may enable agencies to commence other protective processes such as work-related disciplinary proceedings and risk assessments for child-related employment.

In addition to criminal prosecutions, proceedings might also be brought for other offences such as those pursuant to sections of the care legislation. It is usually the responsibility of either the NSW Police or the Department of Community Services to commence proceedings for breach of offences under this legislation. Where either the Department of Community Services or the police undertakes prosecutions of offences under the Act, each will communicate this to the other.

In relation to the prosecution of offences under the *Crimes Act 1900*, either the NSW Police or the Office of the Director of Public Prosecutions may be involved, but not the Department of Community Services.

REFER Sections 227 to 231 of the Act for offences involving children and young people

REFER The *Crimes Act 1900*.

5.1 ISSUES TO CONSIDER

It is the responsibility of whoever is bringing the prosecution to decide whether there is sufficient evidence to proceed with charges against offenders, and to make an assessment about the emotional and cognitive competency of a child or young person to give evidence in any criminal proceedings and to determine the likelihood of a successful prosecution. In making that determination, consideration will be given to matters including evaluating prospective witnesses in terms of perceived honesty, credibility and ability to handle the rigours of the court process.

When criminal charges in relation to child sexual assault or serious offences of violence against children are being considered, police may make a written request for legal advice to the Office of the Director of Public Prosecutions. The request may be made in relation to such issues as the sufficiency of evidence or the appropriateness of charges, or for advice during the course of an investigation as to the admissibility of evidence, or about evidence that is likely to be obtained, or the legal implications of alternative or proposed courses.

Participating in criminal proceedings has a significant impact on children and families. Families may have reservations about their child's participation in criminal proceedings that need to be addressed.

NSW has established a *Charter of Victims' Rights*, to protect and promote the rights of victims. The Charter obliges government agencies in the treatment of victims and the effective delivery of services to meet their needs, including the provision of information. Consistent with the Charter, children, young people and their caregivers need clear information in relation to the process of criminal prosecution and need to be consulted and informed as steps are taken. The Director of Public Prosecutions, under the Charter, must provide children and their carers with clear information in relation to the criminal prosecution. Any alleged breaches of the Charter may be referred to the Victims of Crime Bureau.

REFER The *Charter of Victims' Rights* and a resource kit are available on the Lawlink website: http://www.lawlink.nsw.gov.au/lawlink/victimsservices/ll_vs.nsf/pages/VS_victimrightscharterz.

Families should not feel they have the responsibility for making decisions about whether an alleged offender is charged, or be expected to make decisions in the early days following discovery of abuse. In fact, police make the decision about whether or not to charge an alleged offender, with one of their considerations, although not the only one, being whether the family is willing to proceed.

Practitioners and agencies need to be responsive to the dilemmas faced by families going through criminal prosecutions and work with children, young people and families to:

- ▶ reduce uncertainty by providing as much information as possible about court processes and procedures, including dates and the purpose of proceedings
- ▶ increase support and practical assistance
- ▶ acknowledge the reality of their distress.

If, in the process of criminal proceedings undertaken by the police or the Office of the Director of Public Prosecution, the Department of Community Services becomes aware that a report of harm or risk of harm to a child or young person has not been made in line with mandatory reporting requirements, the Department of Community Services will bring this to the attention of the relevant agency.

5.2 COORDINATING CRIMINAL PROCEEDINGS

After criminal charges have been laid in relation to sexual assault offences or other serious offences involving violence against children or young people, the police will forward a brief of evidence to the Office of the Director of Public Prosecutions. That Office will screen the brief and allocate it to a solicitor to prosecute, or instruct a Crown Prosecutor (a barrister) where necessary, based on the complexity and seriousness of the alleged offending.

At this stage, the Office of the Director of Public Prosecutions assumes responsibility for the conduct of the criminal proceedings.

Where charges do not involve child sexual assault offences or other indictable offences (matters involving serious violence against children or young people) and are to be heard in a Local Court or District Court, the police or the Department of Community Services (as the case may be) retain responsibility for the prosecution. The officer in charge of the case assumes responsibility for coordinating criminal proceedings and keeping everyone informed of progress. Where the police or the Department of Community Services undertakes prosecutions of offences under the Act, each will communicate this to the other.

NOTE A coordinated interagency approach will reduce the trauma to a child victim during the court process. This is facilitated by having an appointed case manager from the Department of Community Services or from another agency – although in reality many matters proceeding through the criminal justice system do not have an allocated case manager. Changes of placement, outcomes of care proceedings or other significant changes in circumstances should be conveyed to the case manager, who should then inform the prosecutor of these developments. Attempted contact by the alleged offender or any pressure put on the child or young person not to give evidence should be notified promptly to the police or prosecutor, as well as to the case manager.

5.3 COMMUNICATING THROUGHOUT CRIMINAL PROCEEDINGS

During the progress of criminal proceedings, issues will arise that need to be communicated to those working with the child or their family. Where there is an allocated case manager, that person should advise the Office of the Director of Public Prosecutions of their role and how they can be contacted. For those situations where the accused person is in the care of the Minister or the Director-General, the Department of Community Services will provide additional support as needed.

It is the responsibility of the Office of the Director of Public Prosecutions or the police officer in charge of the case, when less serious charges are involved, to keep the case manager informed of changes as they occur. These include:

- ▶ dates of court listings, hearings, trial adjournments
- ▶ dates for the hearing of evidence from a victim
- ▶ bail applications, granting of bail and any conditions
- ▶ breaches of bail conditions
- ▶ progress of proceedings
- ▶ charges withdrawn by the Crown ('no bill' applications)
- ▶ findings or determinations of courts
- ▶ sentencing decisions
- ▶ appeals
- ▶ any other matter that arises which is relevant to the safety, welfare or wellbeing of the child or young person.

It is the responsibility of the case manager to ensure this information is conveyed to other relevant agencies involved with the child or young person and their parents or care givers and, if appropriate, adjustments made to the case plan in light of the new information.

5.4 VICTIMS' SERVICES – COUNSELLING, SUPPORT AND COMPENSATION

A child or young person who has been abused or neglected may be receiving counselling from a NSW Health Sexual Assault Service, a Physical Abuse and Neglect of Children (PANOC) service, or from another counselling service such as a non-government service provider.

The Attorney General's Department's Victims' Services provides services and entitlements to victims of crime under the *Victims Support and Rehabilitation Act 1996* and the *Victims Rights Act 1996*. Primary victims of violent crime, or an adult or child who witnesses a crime in NSW, may be eligible for approved counselling and/or victims' compensation.

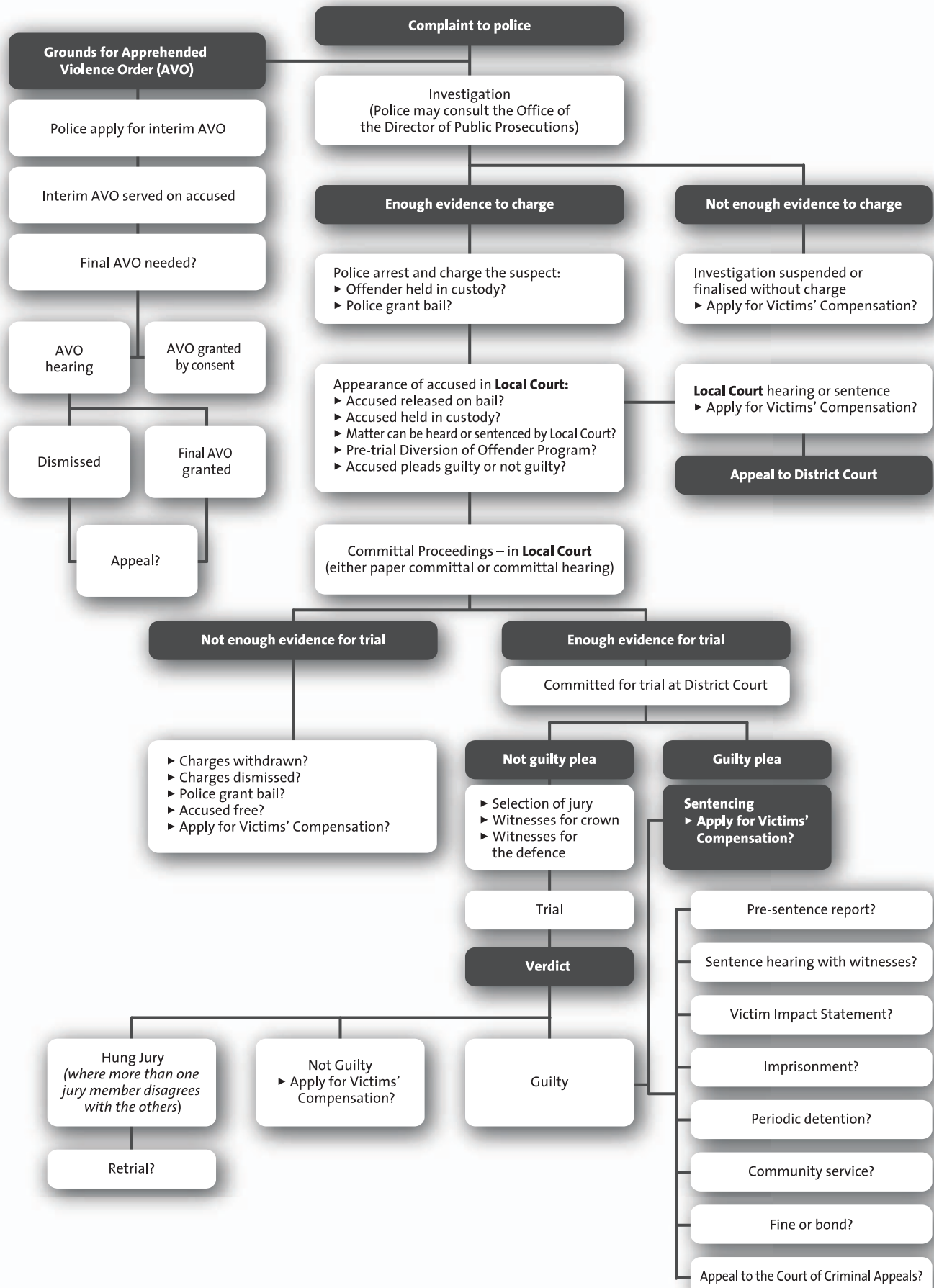
A convicted offender does not need to be identified for a victim to qualify for counselling or compensation, although the victim needs to be able to provide substantiation of the act of violence. The person with parental responsibility for the child victim should initiate the compensation claim. Where the Minister has parental responsibility for a child, the Department of Community Services initiates the compensation claim. An eligible victim can have a solicitor to assist them with compensation claims free of charge. Information about accessing victims' compensation and approved counselling and other remedies for victims of crime can be obtained from the Victims Support Line, a 24-hour telephone information referral and support service.

REFER Victims' Support Line – toll free 1800 633 063; or Sydney 9374 3000

5.5 COURT PREPARATION FOR A CHILD OR YOUNG VICTIM

The *Charter of Victims' Rights* requires that a child or young person who gives evidence in criminal proceedings be offered information to assist their understanding of the often demanding court process and procedures. An adult of the child's choosing should also support them through the court process. This person may be any suitable person who is not a witness and who is available to assist the child or young person. The Office of the Director of Public Prosecutions should advise this court support person of the parameters of their role in relation to the victim.

Diagram 5.1: Police and court processes



The Witness Assistance Service (WAS) is attached to the Office of the Director of Public Prosecutions. The Service works closely with other agencies to ensure children and their caregivers receive counselling and support. It provides some casework services to victims and other witnesses. Services include preparing the child and other witnesses to testify, court support and debriefing, assessment and referral to other services, and facilitating liaison between victims, witnesses and the prosecution lawyers. The role of court support person for a child is not necessarily undertaken by an officer employed by WAS.

The requirement for an interpreter should be considered well beforehand by the case manager or any other worker involved with the child or young person, as this service will need to be organised in advance of the court appearance of the child or young person. Even where a child or young person's level of English proficiency seems adequate in normal day-to-day communications, it is worth noting that these skills may deteriorate under stress. The police should be informed of the language and dialect of the child or young person, parent or caregiver, to enable an appropriately skilled interpreter to be engaged.

The police should advise the Office of the Director of Public Prosecutions if a witness needs an interpreter, and it is the responsibility of the solicitor from the Office of the Director of Public Prosecutions to notify the court that an interpreter is needed. That Office holds the responsibility to arrange for interpreters in committals and in trials.

The police should also advise the Office of the Director of Public Prosecutions if the child or young person is Aboriginal. The identification of such children and accommodation of their needs is of particular importance, given the experience of Aboriginal families and communities with the legal system.

Additionally, the Office of the Director of Public Prosecutions needs to be advised by the police if a child or young person has any other special needs, such as related to a physical disability or to an intellectual or cognitive learning disability.

It is the responsibility of the Office of the Director of Public Prosecutions to ensure that a child or young person is appropriately prepared to appear as a witness. This should involve the prosecutor meeting with the child or young person and their caregivers well before the commencement of proceedings in order to assess the needs of the child or young person as a witness. If a NSW Health Sexual Assault Service or another counselling service is involved in the case, the prosecutor should liaise with that service and the case manager, if applicable, to discuss the child's or the young person's specific needs with regard to court preparation and support.

The prosecutor should at this meeting:

- ▶ assess the child's or the young person's competence to give evidence
- ▶ decide whether the child or young person's pre-recorded statement will be presented as evidence in chief, if this record has been made
- ▶ form an appreciation of the child's developmental level, including language and conceptual skills, their capacity to understand concepts of time and locality, and their capacity to concentrate
- ▶ form an appreciation of the child or young person's level of anxiety in relation to the proceedings
- ▶ establish some trust and rapport with the child or young person
- ▶ liaise with the Witness Assistance Service.

NOTE Child sexual assault matters are referred early to the Witness Assistance Service to facilitate access to counselling, support and court preparation and support.

This contact, if involving very young children, may need to occur over several meetings. It will enable the prosecutor to decide what special arrangements should be sought from the court to facilitate the child giving evidence. There is now a presumption that children will have a right to:

- ▶ the presence of a supportive person while giving evidence
- ▶ give evidence in chief in the form of a recording, wholly or partly
- ▶ give all their evidence by closed circuit television (CCTV), or when CCTV facilities are not available, by alternative arrangements.

It must be made clear to the child, young person and relevant parents or caregivers that the court determines court arrangements for children's testimony, and no promises can be given about particular arrangements. It should also be clarified to all relevant parties that, given the pressures on court lists, it is unlikely that the one prosecutor will remain with a matter from start to finish.

REFER The Witness Assistance Scheme can be accessed on the internet at:
http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_agdinfo.nsf/pages/community_relations_icac_witness_assistance.

REFER *Evidence (Children) Act 1997; Evidence (Children) Regulations 2004; ODPP Prosecution Guidelines*

All children or young person witnesses and the chosen supporting adult should attend a court preparation program.* NSW Health Sexual Assault Services conduct an accredited preparation program that has been developed taking into account all relevant law. Other agencies working with children and young people should facilitate their participation in such a program by providing transport for the child or young person and the supporting adult, or by meeting other reasonable requests of NSW Health Sexual Assault Services.

5.6 COURT DETERMINATIONS

The Office of the Director of Public Prosecutions is responsible for informing the child or young person and the parents, caregivers or guardian and the case manager, if available, of the outcome of criminal proceedings or any bargaining agreements reached with the defence. In cases conducted by a police prosecutor, they may delegate this task to the police officer in charge of the case.

When a final court outcome is reached, and where there is a current case manager, the manager should be given details of all orders made.

In cases where the Crown discontinues the prosecution and hence the charges are withdrawn (referred to as 'no billed'), and for non-full time custodial sentences, the case manager, if appointed, should reconvene a case meeting to reconsider the safety of the child or young person and his or her ongoing care and support needs. Similarly, if there is a 'not guilty' finding, the case manager should reconvene a case meeting to address any protection needs of the child or young person.

Where the Department of Community Services has addressed the safety and risk concerns that were present at the initial report, they may no longer have an open case by the time the matter is heard in the criminal court. In such circumstances, where the Department of Community Services has closed the case and the discontinuance of the criminal court case or a not guilty verdict is the outcome, a case meeting to consider safety, care and support needs of the child or young person is not likely to be held unless there is a new risk of harm report.

NOTE Where a court is not making any orders as part of criminal proceedings but considers the child to be at risk, a new risk of harm report may be required. Some courts (such as the Local, Children and Family Courts) have special procedures to lodge these reports.

Moreover, if the Department of Community Services has proceeded with other protective action to ensure the safety and wellbeing of the child, such as an application to the Children's Court, a case meeting may not be required at this juncture.

Where a conviction has resulted and sentencing has occurred, the prosecutor should write to the case manager, if available, and advise of any relevant comments of the sentencing judge.

Learning of a final court determination can be difficult for the child or young person and for their caregivers. Past experiences and feelings can be rekindled and a sense of confusion and injustice may emerge if charges have been withdrawn or guilt has not been established. Support and counselling at this time is often required. It is for this reason that agencies involved in the provision of care and support services should be aware of the roles of their interagency colleagues, and ensure that dialogue occurs to meet the ongoing needs of the child or young person and their family.°

*PRACTICE POINT

THIS IS A HIGHLY SPECIALISED AREA.
 ONLY THOSE AGENCIES ACCREDITED TO
 CONDUCT COURT PREPARATION
 PROGRAMS SHOULD DO SO.

*PRACTICE POINT

AT THE END OF THE PROCEEDINGS, THE
 PROSECUTOR SHOULD TAKE
 CONSIDERABLE TIME TO DISCUSS THE
 OUTCOME WITH THE VICTIM AND THE
 CAREGIVER. THE EFFORTS OF THE CHILD
 OR YOUNG PERSON SHOULD ALWAYS
 BE POSITIVELY ACKNOWLEDGED, NO
 MATTER WHAT THE OUTCOME OF THE
 MATTER. SIMILARLY, AN ACQUITTAL OR
 DISMISSAL SHOULD ALWAYS BE
 FRAMED POSITIVELY IN RESPECT OF THE
 EVIDENCE GIVEN BY THE CHILD OR
 YOUNG PERSON. THEY SHOULD ALSO
 BE ADVISED OF THE CONVICTED
 PERSON'S RIGHT OF APPEAL.