

16 Juvenile justice

16.1 Introduction

The [Child Protection and Welfare Act 2016](#) (CPWA) provides for the welfare, care and protection of all children in Nauru and for the enforcement of their rights of children in compliance with international conventions, norms and standards, while taking account of Nauruan culture, traditions and values.

For any law which relates to the rights of children, or which provides for processes relevant to dealing with children in any manner and in any context, if there is any inconsistency between the CPWA and that other law, the CPWA takes precedence: s [6](#) CPWA.

16.2 Definitions

A child is legally defined under the CPWA as any person being below 18 years of age: s [3](#) CPWA.

The use of terms such as "infant", "young person" and any other expression referable to a child is to be read as a reference to "child" or "children", as the case may be.

There is currently no Children's Court but if one is established, it will be presided over by the Resident Magistrate. When children are involved in criminal matters, the court is closed and the principles applicable for a child accused or witness are applied, including the provisions of sections [54](#) and [55](#) of the CPWA.

16.3 Guiding principles

s [5](#) CPWA

The core principle for administering this Act is that the safety, wellbeing and best interests of a child are paramount. This Act must be enforced in accordance with Nauruan tradition, culture and community values, except where in conflict with the rights of children provided in this Act.

When interpreting or applying this Act, and when exercising any power, duty or function related to the protection of a child or the promotion of the welfare of children, the following principles apply:

- 1 a child has a right to be protected from harm or risk of harm;
- 2 a child's family has the primary responsibility for the child's upbringing, protection and development;
- 3 the preferred way of ensuring a child's safety and wellbeing is through supporting the child's family;
- 4 if a child does not have a parent who is able and willing to protect the child, the Government is responsible for protecting the child;
- 5 in protecting a child, the Government should only take action that is warranted in the circumstances

- 6 if a child is removed from the child's family, support should be given to the child and their family to allow the child to return to the child's family, if that is in the child's best interests;
- 7 if a child does not have a parent who is able and willing to give the child ongoing protection in the foreseeable future, the child should have long-term alternative care;
- 8 if a child is removed from the child's family, as a first option, the child should be placed in the care of relatives as is consistent with Nauruan custom and tradition;
- 9 if a child is removed from the child's family, the child should be placed with the child's siblings, to the extent possible;
- 10 a child should only be placed in the care of a parent or other person who has the capacity and is willing to care for the child (with assistance or support);
- 11 a child should have stable living arrangements that provide:
 - 11.1 for a stable connection with the child's family and community, to the extent that is in the child's best interests; and
 - 11.2 for the child's developmental, educational, emotional, spiritual, health, intellectual and physical needs to be met;
- 12 a child should be able to maintain relationships with the child's parents and relatives, if appropriate for the child;
- 13 a child should be able to know, explore and maintain the child's identity and values, including their cultural, ethnic and religious identity and values;
- 14 a delay in making a decision in relation to a child should be avoided, unless appropriate for the child.

16.4 Investigations with children

s 54 CPWA

Whenever an investigation or inquiry is undertaken in relation to a child by a police officer or an authorised officer, or person (despite any other laws to the contrary) they must:

- 1 consider the best interests of the child at all stages of the investigation or inquiry;
- 2 recognise and protect the rights and interests of the child at all stages of the justice process, and reduce trauma and secondary traumatisation;
- 3 promptly notify and refer the matter to other relevant agencies to promote and protect the welfare of the child, and their rights;
- 4 take any action to permit the child to fully state their views, take into account the child's views in accordance with their age and maturity, and respect the child's right to privacy;
- 5 use child-friendly interview environments and interview techniques
- 6 apply special procedures to reduce the number and length of interviews for children;
- 7 provide special facilities and apply appropriate processes where the child has a disability to ensure the other requirements are met under this section;

- 8 allow a parent, guardian, legal representative or other appropriate support person agreed to by the child, to be present with them at all stages of the investigation and trial proceedings;
- 9 ensure children are protected from direct confrontation with persons accused of violating their rights, and not be subjected to hostile, insensitive or repetitive questioning or interrogation;
- 10 conduct all investigations and court proceedings expeditiously;
- 11 use investigators who have received special training in relation to dealing with cases involving children in the process, if available: s 54 CPWA.

16.5 Court proceedings with children

s 55 CPWA

When cross-examination of the child is conducted, you must be sensitive to the child's special vulnerability in deciding if you should allow the questions to be asked, as under the [UN Convention of the Rights of the Child](#), you must give primary consideration to the interests of children.

Regardless of whether a child shall be called to give sworn or unsworn evidence (ie: is competent) is at your discretion, and will depend upon the circumstances of the case and upon the child who is being asked to give evidence.

Whenever any court proceedings are undertaken in relation to a child (despite any other laws to the contrary) they must:

- 1 prioritize and expedite the hearing of the cases as far as practicable;
- 2 apply and enforce measures to protect the child's privacy, including closed court proceedings and bans on publishing the child's identity or any information leading to identifying the child;
- 3 applied and implement measures to protect the safety of children and their families, and to prevent intimidation and retaliation;
- 4 provide appropriate facilities and support provided to children with disabilities;
- 5 allow a parent, guardian, legal representative or other appropriate support person agreed to by the child, to be present with them at all stages of the court proceedings;
- 6 promote and apply child-friendly court procedures, including alternative arrangements for giving testimony such as the use of screens, video-taped evidence and closed circuit television;
- 7 provide social and legal counselling where appropriate, and give children adequate information concerning the purpose and effect of the court processes;
- 8 give children the right to effectively participate in any proceedings that affect them, to express their views, and to have those views given due weight;
- 9 ensure that police officers, prosecutors, lawyers and court officers receive specialised training in dealing with cases involving children;
- 10 not require any proof of resistance to establish non-consent in sexual assault where the victim is a child;
- 11 not require corroboration of a child's evidence in criminal proceedings for sexual assault;

- 12 not use prior sexual conduct to establish non-consent in sexual assault proceedings involving a child;
- 13 allow automatically any expert evidence regarding patterns of disclosure or behaviour of children in cases involving sexual abuse;
- 14 remove all discriminatory provisions or processes applying to children: s 55 CPWA.

All rules of court are to be read and applied subject to the above requirements, and necessary modifications to make such rules consistent with this section made as soon as is practicable.

16.6 Sentencing of juvenile offenders

Section 48 CPWA states that in any criminal proceeding against a child, you must not impose a sentence of death or imprisonment for life under any Act, and a sentence of imprisonment is only imposed as a last resort.

Below are some useful summaries of sentencing decisions involving children.

- [Republic of Nauru v AD \(Juvenile\) \[2019\] NRSC 1; Criminal Case 19 of 2018 \(2 February 2019\)](#)

A juvenile offender of 16 years of age had pleaded guilty to the offence of indecent acts against a child under 16 years old under s 117 of the Crimes Act. The victim his younger brother, was 12 years old.

Sentencing in this case requires a balancing act of ss 277–280 of the Crimes Act including mitigating factors, such as the defendant’s age and Article 37(b) Convention on the Rights of the Child with aggravating factors for the victim and similar previous offending.

The Supreme Court noted (amongst other matters) that in sentencing the defendant the following factors applied:[57] “The court is mindful in arriving at this conclusion with the guiding principles set out under Article 37(b) of the UN Convention on the Rights of the Child and reflected under section 48 of Nauru’s Child Protection and Welfare Act 2016 that, inter alia, states, at section 48(b), that in criminal proceedings against a child:

“(b) a sentence of imprisonment may only be imposed against a child as a sentencing option of the last resort.”

Decision: [58] “It is clear to the court that there is no other option available to it, other than impose a term of imprisonment as the only suitable punishment. In terms of the sentencing considerations for imprisonment under section 280, the defendant clearly is showing a propensity to commit similar offences in the future if he is released into the community.”

“[61] In all the circumstances, I am satisfied that a sentence of 18 months of imprisonment is the most appropriate in this case.”

- [Republic of Nauru v Kepae \[2019\] NRDC 2; Criminal Case 91 of 2017 \(2 May 2019\)](#)

This matter included sentencing of a juvenile defendant in the District Court who pleaded guilty to:

- one count of Burglary contrary to section 419(1) of the Criminal Code 1899; and
- one count of Theft contrary to section 398 and IV of the Criminal Code of Queensland 1899 (Adopted).

The charge of burglary carries a maximum sentence of 14 years imprisonment and the second count carries a maximum sentence of 7 years imprisonment.

In this case there was an unexplained pre-trial delay of 2 years before the charges were laid and post-trial delay of 16 months before the defendant appeared in court for the first time.

Relevant legal principles

The Resident Magistrate cited the Victorian Court of Appeal in [R v Mills \[1998\] 4 VR 235](#), page 241:

1. Youth of an offender, particularly a first offender, should be a primary consideration for a sentencing court where that matter properly arises.
2. In the case of a youthful offender rehabilitation is usually far more important than general deterrence. This is because punishment may in fact lead to further offending. Thus, for example, individualized treatment focusing on rehabilitation is preferred. (Rehabilitation benefits the community as well as the offender.)
3. A youthful offender is not to be sent to an adult prison if such a disposition can be avoided, especially if he is beginning to appreciate the effect of his past criminality. The benchmark for what is serious as justifying adult imprisonment may be quite high in the case of a youthful offender; and where an offender has not previously been incarcerated, a shorter period of imprisonment may be justified.
4. Section 48(b) of the Child Welfare and Protection Act provides “a sentence of imprisonment may only be imposed against a child as a sentencing option of last resort.”

Decision

“[23] I consider because you were a child of 15 years at the time of the offending, that a custodial sentence is not necessary. You are not employed and you are unlikely to be able to pay a fine. Because of the long delay, the court will have to exercise greater leniency than would otherwise.”

[24] I convict you of the offence charged and I sentence you to 1 years’ probation for count 1 and 1 years’ probation consecutive on count 2 under the Criminal Justice Act 1999.”

16.7 Rights of the juvenile defendant

- 1 [CRC- UN Convention on the Rights of the Child](#)
- 2 [Beijing Rules – UN Standard Minimum Rules for the Administration of Juvenile Justice](#)
- 3 [ICCPR – International Covenant on Civil and Political Rights](#)
- 4 In addition to rights provided under the Constitution, juveniles charged with offences have further rights and protection under International Conventions.

These rights and protections include:

- the right to be presumed innocent until proven guilty according to law: Art [40\(2\)\(b\)\(i\)](#) CRC;
- the right not to be compelled to give evidence or to confess to guilt: Art [40\(2\)\(b\)\(iv\)](#) CRC;
- right to bail absolutely unless any of the adverse qualifications apply: s [4](#) Bail Act;
- the right not to be subjected to torture or other cruel, inhumane or degrading treatment or punishment: Art [37\(a\)](#) CRC;
- the right to have his or her privacy fully respected at all stages of the proceedings in order to avoid harm being caused to him or her by undue publicity or by process of labelling: Art [8](#) Beijing Rules;
- the right not to be deprived of his or her liberty unlawfully or arbitrarily: Art [37\(b\)](#) CRC;
- the right not to be detained or deprived of personal liberty except with the consent of his or her parents or guardians, or upon an order made by the Court: Principle [16\(3\)](#) Protection of All Persons under any form of Detention 1988;
- right not to have capital punishment or life imprisonment imposed on children/juveniles without possibility of release for offences committed by them: Art [37\(a\)](#) CRC;
- the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time: Art [37\(b\)](#) CRC;
- every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so: Art [37\(c\)](#) CRC;
- every child deprived of his/her liberty shall have the right to prompt access to legal and other assistance: Art [37\(d\)](#) CRC;
- when making decisions concerning children, the best interest of the child shall be a primary consideration: Art [3\(1\)](#) CRC;
- whenever appropriate and desirable, other measures will be taken for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected: Art [40\(2\)\(b\)](#) CRC;
- where juvenile offenders are concerned, the procedure shall be such so as to take account of their age and the desirability of promoting their rehabilitation: Art [14\(4\)](#) ICCPR; and
- a variety of dispositions, such as care, guidance and supervision orders; counselling; probation foster care; education and vocational training programs; community work and other alternatives to institutional care should be considered by the Courts to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence: Art [40\(3\)\(b\)](#) CRC.