



**Sentencing in the  
Children's Court of Victoria**

**Jennifer Bowles  
Magistrate**

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# SENTENCING IN THE CHILDREN'S COURT OF VICTORIA

## INTRODUCTION

Vincent JA in *R v Evans*<sup>1</sup> stated that the considerations applicable to the sentencing of children “*can and do lead to dispositions which could be regarded as entirely inappropriate in the case of older and presumably more mature individuals.*”<sup>2</sup>

The purpose of this Paper is to provide an overview of the Criminal Division of the Children's Court, the principles which apply when sentencing children and the sentencing orders which are made pursuant to the *Children Youth and Families Act 2005* (hereinafter referred to as CYFA).

I have been assisted in the preparation of this Paper by two Papers delivered by the President of the Children's Court, Judge Grant<sup>3</sup> and by the research materials on the Children's Court website prepared by Magistrate Power.<sup>4</sup> I have also been assisted by the Report of the Sentencing Advisory Council “*Sentencing Children and Young People in Victoria.*”<sup>5</sup> (hereinafter referred to as the *SAC Report.*)

## DEFINITION OF A CHILD

As and from 1/7/2005 the Children's Court's criminal jurisdiction was extended to include 17 year olds.<sup>6</sup>

“Child” means

*a person who at the time of the alleged commission of the offence was under the age of 18 years but of or above the age of 10 years but does not include any person who is of or above the age of 19*<sup>7</sup>

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<sup>1</sup> [2003] VSCA 223 Refer to Attachment 1.

<sup>2</sup> At [44]. Ormiston JA expressly approved this statement at [4].

<sup>3</sup> Young People Criminal Offending and Sentencing 23/11/2010; Young People and Criminal Justice 11 November 2010.

<sup>4</sup> [www.childrencourt.vic.gov.au](http://www.childrencourt.vic.gov.au)

<sup>5</sup> April 2012

<sup>6</sup> Children and Young Persons (Age Jurisdiction) Act 2004. A number of the cases to which I refer were decided before 1/7/2005 and therefore make reference to young people aged 17 appearing in the adult jurisdiction.

<sup>7</sup> In the event a proceeding commenced in the Children's Court when the accused was a child but the accused is now of or above the age of 19 years, the Children's Court must hear and determine the

*years when a proceeding for the offence is commenced in the Court.*<sup>8</sup>

It is conclusively presumed that a child under the age of 10 cannot commit a criminal offence.<sup>9</sup>

There is a rebuttable Common Law presumption that a child aged under 14 is incapable of crime (*Doli incapax*). The onus is on the prosecution to rebut the presumption beyond reasonable doubt. The prosecution must prove that the child understood that their conduct was “seriously wrong.”

The *SAC Report* indicates that for the period 2000 – 2009 “the most common age for the commission of principal proven offences was 16 years for both males and females.”<sup>10</sup>

In a proceeding against a child or young person for a summary offence, proceedings must commence within 6 months after the date on which the offence is alleged to have been committed unless the Court extends the time; or the accused after having received legal advice consents in writing and a member of the Victoria Police of or above the rank of sergeant consents to the proceeding being commenced after the expiry period.<sup>11</sup>

## **DIVISIONS OF THE CHILDREN’S COURT**

The Criminal Division of the Children’s Court of Victoria consists of the:-

- Criminal Division<sup>12</sup>
- Koori Court (Criminal Division)<sup>13</sup>
- Neighbourhood Justice Division<sup>14</sup>

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charge unless the Court finds exceptional circumstances having regard to the matters referred to in s.516(5) CYFA.

<sup>8</sup> s. 3(1) CYFA

<sup>9</sup> s. 344 CYFA.

<sup>10</sup> Page 95

<sup>11</sup> Section 344A CYFA. Refer also to ss. 344B-D regarding applications for extension of time and rehearing provisions.

<sup>12</sup> s. 516 CYFA

<sup>13</sup> ss. 517 – 520 CYFA

<sup>14</sup> ss. 520A – 520E CYFA

## **CRIMINAL JURISDICTION OF THE COURT –**

The Children’s Court has jurisdiction to hear and determine

- all summary offences in which the accused is a child,<sup>15</sup>
- summarily determine all indictable offences<sup>16</sup> in which the accused is a child, save for
  - murder
  - attempted murder
  - manslaughter
  - child homicide
  - defensive homicide
  - arson causing death
  - culpable driving,
- conduct committal proceedings,
- grant, extend, vary or revoke bail;
- deal with a breach or variation of a sentencing order.<sup>17</sup>

## **THE CHILDREN’S KOORI COURT<sup>18</sup>**

The Children’s Koori Court is a sentencing Court in the Criminal Division of the Children’s Court. The first Children’s Koori Court commenced sitting at Melbourne on 6/10/2005. The Children’s Koori Court at Mildura commenced sitting in November 2007. Both Courts sit each alternate Thursday. On 28 June 2012 the first sitting took place of the Children’s Koori Court at Warrnambool. There are now Koori Children’s Koori Courts sitting at Hamilton, Portland, the Latrobe Valley and Bairnsdale. The recent expansion of the Courts was able to occur due to the goodwill of the local Aboriginal communities, Police, Youth Justice and the Court.

The Magistrate sits at the bar table which has been specifically designed for the Court, with two members of the Aboriginal community who are Elders or Respected Persons.<sup>19</sup> The accused, defence counsel,

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<sup>15</sup> 516(1) CYFA

<sup>16</sup> Subject to s. 356 CYFA

<sup>17</sup> Section 516(1) CYFA.

<sup>18</sup> Children and Young Persons (Koori Court) Act 2004

<sup>19</sup> Refer to s. 536(1) CYFA.

prosecutor, a member of the accused's family or a support person, Koori Court Officer and a Youth Justice representative also sit at the table.

The Children's Koori Court has jurisdiction to deal with a proceeding for an offence if :-

- (a) the child is Aboriginal<sup>20</sup>; and
- (b) the offence is within the jurisdiction of the Criminal Division, other than a sexual offence as defined in s. 6B(1) Sentencing Act 1991; and
- (c) the child –
  - (i) intends to plead guilty to the offence; or
  - (ii) pleads guilty to the offence; or
  - (iii) has been found guilty of the offence by the Criminal Division; and
- (d) the child consents to the proceeding being dealt with by the Koori Court (Criminal Division).<sup>21</sup>

A proceeding may be transferred to the Koori Court whether sitting at the same or a different venue and the Koori Court may transfer a proceeding (including a proceeding transferred to it) to the Criminal Division.<sup>22</sup>

The jurisdiction includes criminal offences (other than sexual offences), which can be dealt with in the Children's Court, a breach or variation of a sentencing order which had been made by it or by the Criminal Division of the Court and any other jurisdiction given to it by the CYFA or any other Act.<sup>23</sup>

Section 520 CYFA provides for the sentencing procedure in the Children's Koori Court. The Court may –

- consider any oral statement made to it by an Aboriginal elder or respected person;<sup>24</sup>
- inform itself in any way it thinks fit, including a report, statement, submission or evidence from
  - (a) a Children's Court Koori officer; or
  - (b) a youth justice worker; or
  - (c) a health service provider;

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<sup>20</sup> s. 3(1) CYFA defines "Aboriginal person."

<sup>21</sup> s. 519(1) CYFA.

<sup>22</sup> s. 519(2) CYFA

<sup>23</sup> s 518 CYFA.

<sup>24</sup> s.520(2) CYFA

- (d) a victim of the offence; or
  - (e) a family member of the child; or
  - (f) anyone else whom the Koori Court thinks appropriate.<sup>25</sup>
- The rules of natural justice apply.<sup>26</sup>

The Koori Court must exercise its jurisdiction with as little formality and technicality as is possible having regard to the requirements of the CYFA and the proper consideration of the matters before the Court.<sup>27</sup>

## **NEIGHBOURHOOD JUSTICE DIVISION**

The Neighbourhood Justice Centre is located in Collingwood. The presiding magistrate applies the principles of therapeutic jurisprudence and restorative justice.

In relation to the Criminal Division, the Neighbourhood Justice Centre only has jurisdiction if the child consents<sup>28</sup> and the child

- (i) resides in the municipal district<sup>29</sup>; or
- (ii) is a homeless person who is alleged to have committed the offence in the municipal district; or
- (iii) is a homeless person who is alleged to have committed the offence outside the municipal district but who is living in the municipal district in accommodation as defined in the definition of homeless person in s.3(1); or
- (iv) is an Aboriginal person with a close connection to the municipal district and is alleged to have committed an offence in that district.<sup>30</sup>

Section 520C CYFA provides for the sentencing procedure in the Neighbourhood Justice Centre.

## **DIVERSION**

Unlike the Magistrates' Court there is not a Statewide legislated diversion program in the Children's Court. The following programs

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<sup>25</sup> s 520(3) CYFA

<sup>26</sup> s.520(4) CYFA

<sup>27</sup> s. 517(3) CYFA

<sup>28</sup> s. 520C(2) CYFA

<sup>29</sup> City of Yarra

<sup>30</sup> Section 520C(3) CYFA



divert children and young people from the criminal justice system. However, apart from the Victoria Police cautioning programs not all children and young people in Victoria have access to the other programs.

## **Cautions**

Victoria Police caution a large number of young people every year. In 2009-2010 9029 young people or 25% of those young people processed for alleged offences received a caution.<sup>31</sup> Cautions are administered by the Police. The young person must admit their guilt and there must be sufficient evidence to prove the offence. They are unconditional and are most often given to first time offenders.

The *SAC Report* noted that within one year of receiving a caution 80% of those young people had not reoffended and after 3 years 65% had not reoffended.<sup>32</sup> It was further noted that the young people most likely to receive a caution were those who had allegedly committed drug offences. (In 2009 – 2010 : 48.2%).<sup>33</sup>

## **Drug Diversion Caution Program**

The drug diversion caution program does not include people detected with Cannabis. Those matters form part of the above cautioning program. The drug diversion program is for those young people detected with a small quantity of an illicit drug (use and possess charges). A young person is still eligible for such a caution even if they have a prior Court appearance. The caution is administered and the young person is referred to an assessment and drug program conducted by the Department of Human Services.<sup>34</sup>

## **Ropes Program**

The Ropes Program is a diversionary program available for those young people who may have previously received caution/s but who have no prior appearances before the Children's Court.

The Police Informant recommends a young person for the Program. It is generally available for lower level offending. The Court determines

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<sup>31</sup> Sentencing Young People and Children in Victoria Sentencing Advisory Council Report April 2012 page 29.

<sup>32</sup> SAC page 29

<sup>33</sup> SAC at page 31.

<sup>34</sup> SAC page 33.

whether the matter will be referred for the young person to complete the Program.

The Program consists of young people who have been referred to the Program together with members of the Police (preferably the relevant Informant). The Program includes a physical component (low and high ropes) and seeks to improve relations between young people and police, to embrace challenge, team work and trust and to emphasise choices and consequences of poor choices.

The benefit for the young person is that provided they complete the Program, their charge/s will be struck out and their clear criminal record will be maintained.<sup>35</sup>

## **Other Diversionary Programs**

Other programs include:-

- Koori Youth Diversion Pilot<sup>36</sup>
- Right Step<sup>37</sup>
- GRIPP Program<sup>38</sup>

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<sup>35</sup> Refer to the Children's Court website and SAC pages 33.and 34

<sup>36</sup> SAC page 33 The program is available to Koori young people who admit the offence and the police have sufficient evidence to prove the offence.. If the young person and parent/guardian consent, the matter may be diverted with a program being designed to provide the young person with access to appropriate resources.

<sup>37</sup> SAC page 35 Pilot program conducted by the Police and Youth Connect in which cases are adjourned for the young person to engage in counselling and to receive guidance and referrals . It is only available for young people residing in Kingston, Bayside or Glen Eira Municipalities. The matter is adjourned for 8 weeks and a report is provided to the magistrate. If the magistrate is satisfied the young person has completed the program, the charges are dismissed.

<sup>38</sup> SAC page 35 Program for young males 13-17 with anger management problems. It is only available to young people residing within the Dandenong, Casey Cardinia and Monash Municipalities.

## INDICTABLE OFFENCES TRIABLE SUMMARILY

Save for the indictable offences over which the Children's Court does not have jurisdiction, the Court must hear and determine the charge summarily unless :-

- (a) before the hearing of any evidence the child objects; or
- (b) at any stage the Court considers that the charge is unsuitable by reason of exceptional circumstances to be determined summarily.<sup>39</sup>

In those circumstances, the Court must conduct a committal proceeding.

It is a rare circumstance that there is not consent to summary jurisdiction. I have only had one matter in which counsel indicated to the Court that the accused would be seeking a committal hearing and that he would not be consenting to summary jurisdiction. On the subsequent occasion, different counsel appeared and there was consent to the Children's Court hearing the matter summarily.

In relation to the Court considering whether there are exceptional circumstances, Magistrate Power on the Children's Court website summarises authorities which discuss the circumstances which may give rise to a matter being un/suitable for summary jurisdiction.<sup>40</sup> The authorities acknowledge the specialist therapeutic nature of the Children's Court. They also indicate that in assessing suitability regard must be had not only to the circumstance of the offence but also the personal characteristics of the accused.

Vincent J stated in *DL (a minor by his litigation guardian) v A Magistrate of the Children's Court and Others*<sup>41</sup>

*A legislative scheme has been devised with respect to the conduct of criminal proceedings involving young persons. .... For very good reasons, our society has adopted a very different approach to both the ascertainment of and response to criminality on the part of young persons to that which is regarded as appropriate where adults are involved. It is only where very special, unusual or*

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<sup>39</sup> Section 356(3) CYFA

<sup>40</sup> [www.childrenscourt.vic.gov.au](http://www.childrenscourt.vic.gov.au) Refer to Chapter 10.1 *D (a Child) v White* [1988] VR 87, *A Child v A Magistrate of the Children's Court and Others* (SCV, unreported 24/2/1992), *DL (a minor by his litigation guardian) v A Magistrate of the Children's Court and Others* (SCV unreported 09/08/1994), *DPP v MA* 2013 VSCA 45 (7/3/2013).

<sup>41</sup> SCV unreported 09/08/1994 at page 4.

*exceptional circumstances exist of a kind which render unsuitable the determination of a case in the jurisdiction specifically established with this difference in mind, that the matter should be removed from that jurisdiction to the adult courts.*

There are very few cases in which the Children's Court has not retained jurisdiction to determine matters summarily.<sup>42</sup> In *Victoria Police v CB*<sup>43</sup> Judge Grant found exceptional circumstances and declined jurisdiction.

He stated

*The case against the accused involves allegations of extremely serious offending. It is said that the accused was armed with a knife when he broke into the premises. He entered the premises with the intent to steal property and, when he did so, was reckless as to whether someone may have been present in the building. Upon being challenged by Mr and Mrs M, he assaulted Mrs M. He then stabbed Mr M 13 times in the back and abdomen. As a result, Mr M suffered life-threatening, and life changing, injuries.*

*The accused was over 17 years old at the time of the alleged offending and has prior findings of guilt in the Children's Court for offences of violence. If proved, the offending would be in breach of two youth supervision orders and demonstrate an alarming escalation in violent offending behaviour.*

*The circumstances, severity and viciousness of the knife attack, the significant injuries suffered by the victim, the age of the accused at the time and his prior criminal history, all combine to establish exceptional circumstances within the meaning of section 356(3) of the Act. It is these matters that have persuaded me that the Children's Court may not have the appropriate sentencing powers to deal with the accused if he were found guilty after contest. This is a case where the circumstances of the alleged offending and the*

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<sup>42</sup> In the following cases the Court has declined jurisdiction. (1) The accused was charged with the importation of in excess of the commercial quantity of heroin (3 charges). (2) The accused was charged with injury offences for punching a victim to the face and seven days later punched another victim to the face and had been charged with murder. (3) The accused was aged 17 years and 10 months and on parole at the time of the commission of the offences. The charge of attempted murder was withdrawn and he pleaded guilty to a number of offences including intentionally causing serious injury. It was an unprovoked knife attack, three stab wounds to the bone in each case, life threatening injuries although the victim was likely to make an almost total recovery; extensive criminal history including some offences of violence and an escalation in offending.

<sup>43</sup> [2010] VChC 3

*prior history of the accused, would justify the imposition of a significant sentence. This is a grave example of the offences of intentionally cause serious injury and aggravated burglary. The sentencing court needs to be able to consider the fullest possible range of sentencing options, not be limited to a maximum period of three years detention in a youth Justice centre.*<sup>44</sup>

## **COMMITTAL PROCEEDINGS**

Committal proceedings are conducted in respect of the offences over which the Court does not have jurisdiction (the offences in which a death is involved), in the very rare circumstances referred to above and if the accused's fitness to plead arises.

## **JOINT COMMITTAL PROCEEDINGS FOR ADULT AND CHILD CO-ACCUSED**

The jurisdiction of the Children's Court may be exercised concurrently with the jurisdiction of the Magistrates' Court for a joint committal to be conducted in the following circumstances :-

- (g) *the charges against each accused could properly be joined in the same indictment; and*
- (h) *the accused who is a child—*
  - i. *is of or over the age of 15 years at the time the criminal proceeding against the child for the offence is commenced; and*
  - ii. *is charged with murder, attempted murder, manslaughter, child homicide, defensive homicide, an offence against s.197A of the Crimes Act 1958 (arson causing death) or an offence against s.318 of the Crimes Act 1958 (culpable driving causing death); and*
- (i) *the Court makes an order under subsection (2) in relation to the accused who is a child and the Magistrates' Court makes an order under s. 25(4) of the Magistrates' Court Act 1989 in relation to the other accused.*<sup>45</sup>

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<sup>44</sup> At [12] – [14]

<sup>45</sup> s. 516A CYFA

The matters to which the Court is required to have regard in relation to ordering a joint committal are as follows :-

- (a) *the age of the child; and*
- (b) *the ability of the child to participate in the joint committal proceedings and to provide instructions to his or her legal practitioner; and*
- (c) *the effect on victims of the offence charged if the committal proceedings were not conducted jointly; and*
- (d) *the estimated duration of the committal proceedings if conducted jointly; and*
- (e) *the number of witnesses that would be cross examined by both accused; and*
- (f) *any other matter considered relevant.*<sup>46</sup>

The Court may make the Order for a joint committal on the application of a party or on its own motion.<sup>47</sup>

If a joint committal is conducted, the CYFA applies as far as practicable to the child and the *Criminal Procedure Act 2009* applies as far as practicable to the other accused together with any necessary modifications required to ensure the proceedings are conducted fairly and efficiently.<sup>48</sup>

## **MENTAL IMPAIRMENT**

Lasry J held in *CL(a minor) v Tim Lee and ORS and Children's Court of Victoria at Broadmeadows*<sup>49</sup> that whilst the *Mental Impairment and Unfitness to be Tried Act 1997 (Vic)* does not expressly refer to the Children's Court, the effect of s.5 of the Act and s.528(1) CYFA enables the defence to be raised in proceedings before the Children's Court.

If the defence is established, the Court must find the child not guilty and must discharge the child.<sup>50</sup>

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<sup>46</sup> s. 516A(2) CYFA

<sup>47</sup> s. 516A(3) CYFA. If the Children's Court makes an order under 516A(2) the Court may adjourn the proceeding for a period not exceeding 28 days to enable the Magistrates' Court to determine whether joint committal proceedings are appropriate in a particular case. S.516A(5) CYFA.

<sup>48</sup> s. 516A(6) CYFA

<sup>49</sup> [2010] VSC 517

<sup>50</sup> Sections 5(2) and 20(2) Mental Impairment and Unfitness to be Tried Act 1997.

## FITNESS TO PLEAD

Lasry J held in *CL (a minor) v Tim Lee and ORS and Children's Court of Victoria at Broadmeadows* referred to above that the Children's Court does not have jurisdiction to deal with the fitness of the accused to plead.

<sup>51</sup> The issue must be determined by a jury empanelled for that purpose.<sup>52</sup> If the issue is raised, the Magistrate is required to direct that a committal be held.<sup>53</sup> Lasry J considered that the current statutory provisions lead to an unsatisfactory result because "the important purpose of the CYFA .... cannot be effected."<sup>54</sup> He recommended that amendments be made to the *Crimes Mental Impairment and Unfitness to be Tried Act and the CYFA*.<sup>55</sup> The Court of Appeal found that there was no error in Lasry J's decision. Sifris AJA stated that "the *Crimes (Mental Impairment and Unfitness to be Tried) 1987* does not confer any jurisdiction on the Children's Court, whether expressly or by necessary implication"<sup>56</sup> and he endorsed the recommendations of LasryJ.<sup>57</sup>

## INTELLECTUAL DISABILITY

When the Court finds a child guilty of an offence and it appears to the Court that the child is intellectually disabled, the Court must before sentencing the young person order a Pre Sentence Report and adjourn the proceeding for a Report to be prepared.<sup>58</sup> An assessment is conducted as to whether the child is intellectually disabled. Unfortunately it is usually necessary to adjourn the proceedings for between 3 and 4 months for the Report to be prepared.

In the event that the child is assessed as intellectually disabled, a Declaration of Eligibility is issued and a report which specifies services available to reduce the risk of further offending is provided to the Court.<sup>59</sup>

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<sup>51</sup> [2010] VSC 17 at [77].

<sup>52</sup> Section 7 Mental Impairment and Unfitness to be Tried Act 1997. Refer to [28].

<sup>53</sup> [2010] VSC 17 at [78].

<sup>54</sup> At [80].

<sup>55</sup> At [81].

<sup>56</sup> *CL, A Minor (by his Litigation Guardian) v DPP (on behalf of Tim Lee) and Ors.* [2011]VSCA 227 per Sifris AJA at [34] with whom Warren CJ agreed.

<sup>57</sup> At [51]

<sup>58</sup> s. 571(3) CYFA

<sup>59</sup> s. 571(4) CYFA. Intellectually Disabled Persons' Services Act 1986. A condition to comply with a Plan of Services may be attached to a Bond or Supervisory Order. However, participation is voluntary.

## **REMAND IN CUSTODY**

A child cannot be remanded in custody for longer than 21 clear days.<sup>60</sup> In the event the child does not wish to attend Court on a day on which his/her matter is to be further adjourned, a written waiver confirming that the matter is to be adjourned to a date not exceeding 21 days can be signed by the child.

## **ALLEGING OF CHILDREN'S COURT PRIOR FINDINGS OF GUILT**

Evidence that a child was found guilty of an offence in the Children's Court may be given provided the Order was made not more than ten years before the hearing at which it is sought to be proved.<sup>61</sup>

## **SENTENCING PRINCIPLES**

The sentencing principles as contained in the CYFA are very different to those detailed in s.5(1) Sentencing Act which apply in the adult jurisdiction. Section 5(1) Sentencing Act 1991 provides that when sentencing adults, the following principles apply:-

- punishment
- deterrence both general and specific
- rehabilitation
- denunciation of the conduct
- protection of the community
- a combination of two or more purposes.<sup>62</sup>

These principles can be compared with those contained in the Children Youth and Families Act.

In determining which sentence to impose on a child, the Court must, as far as practicable, have regard to –

- (a) the need to strengthen and preserve the relationship between the child and the child's family; and

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<sup>60</sup> s. 346(5) CYFA.

<sup>61</sup> s. 584 (3) CYFA.

<sup>62</sup> Refer to Attachment 2..



- (b) the desirability of allowing the child to live at home; and
- (c) the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance; and
- (d) the need to minimise the stigma to the child resulting from a court determination; and
- (e) the suitability of the sentence to the child; and
- (f) if appropriate, the need to ensure that the child is aware that he or she must bear a responsibility for any action by him or her against the law; and
- (g) if appropriate, the need to protect the community, or any person, from the violent or other wrongful acts of the child.<sup>63</sup>

I have prepared the following chart which compares the principles in s. 362(1) CYFA with those contained in s.5(1) Sentencing Act.<sup>64</sup> There is an emphasis on rehabilitation of the child and rehabilitation of the child in the community wherever appropriate.

<b>CHILDREN YOUTH AND FAMILIES ACT</b>	<b>SENTENCING ACT</b>
<ul style="list-style-type: none"> <li>• The need to strengthen and preserve the relationship between the child and the child’s family;</li> </ul>	<ul style="list-style-type: none"> <li>• To facilitate rehabilitation of the offender</li> </ul>
<ul style="list-style-type: none"> <li>• The desirability of allowing the child to live at home;.</li> </ul>	<ul style="list-style-type: none"> <li>• To facilitate rehabilitation of the offender</li> </ul>
<ul style="list-style-type: none"> <li>• The desirability of allowing the education, training or employment of the child to continue without interruption or disturbance;</li> </ul>	<ul style="list-style-type: none"> <li>• To facilitate rehabilitation of the offender</li> </ul>
<ul style="list-style-type: none"> <li>• The need to minimise the stigma to the child resulting from a Court determination;</li> </ul>	<ul style="list-style-type: none"> <li>• To facilitate rehabilitation of the offender</li> </ul>

<sup>63</sup> s. 362(1) CYFA. Refer to Attachment 3.

<sup>64</sup> The chart is reproduced in Attachment 4.

<ul style="list-style-type: none"> <li>• The suitability of the sentence to the child;</li> </ul>	<ul style="list-style-type: none"> <li>• To facilitate rehabilitation of the offender</li> <li>• To deter the offender ..... from committing offences of the same or similar character</li> </ul>
<ul style="list-style-type: none"> <li>• If appropriate, the need to ensure that the child is aware that he or she must bear a responsibility for any action by him or her against the law;</li> </ul>	<ul style="list-style-type: none"> <li>• To deter the offender ..... from committing offences of the same or similar character;</li> <li>• To punish the offender</li> </ul>
<ul style="list-style-type: none"> <li>• If appropriate, the need to protect the community, or any person from the violent or other wrongful acts of the child.</li> </ul>	<ul style="list-style-type: none"> <li>• To protect the community from the offender;</li> </ul>

## **MATTERS TO WHICH THE COURT IS TO HAVE REGARD WHEN SENTENCING**

The only matters to which the Court is to have regard when sentencing are :-

- Pre Sentence Reports and evidence, if any, of the author; (Youth Justice Reports and Children’s Court Clinic Reports);<sup>65</sup>
- Group Conference Report and evidence, if any, of the author;<sup>66</sup>
- Any report, submission or evidence on behalf of the child;<sup>67</sup>
- Prior convictions or findings of guilt;<sup>68</sup>
- Prosecutor’s sentencing submission;<sup>69</sup>
- Any Victim Impact Statement or other evidence given.<sup>70</sup>

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<sup>65</sup> s. 358(a) CYFA

<sup>66</sup> s. 358(b) CYFA

<sup>67</sup> s. 358(c) CYFA

<sup>68</sup> s. 358(d) CYFA. A formal police caution is not admissible. O v McDonald [2000]TASSC 13, Y v F [2002] VSC 166

<sup>69</sup> s. 358(e) CYFA

<sup>70</sup> s. 358(f) CYFA, Refer to s. 359 CYFA.

## **DEFERRAL OF SENTENCE**

The Court may and very often does defer sentencing. The maximum period for a deferral is 4 months<sup>71</sup> and the court defers sentence if it is of the opinion that

- it is in the young person's interests and
- the child agrees to the deferral.<sup>72</sup>

It includes a deferral for a child to engage in a Group Conference where the Court is considering a Probation or Youth Supervision Order.<sup>73</sup>

It is rare for the Court not to request a Pre Sentence Report/Deferral Report to be provided by Youth Justice when a matter is deferred. The Court may also request a Children's Court Clinic Report.<sup>74</sup> A Clinic Report is requested when a psychological/ psychiatric/ neuropsychological assessment of the child is required. There are also psychologists with expertise in drug and alcohol abuse.

In determining an appropriate sentence, the Court is required on the adjourned date to have regard to :-

- (a) the child's behaviour during the deferral; and
- (b) any Pre Sentence Report; and
- (c) if the child participated in a Group Conference, the fact of that participation; and
- (d) any Group Conference Report; and
- (e) any other relevant matter.<sup>75</sup>

## **SENTENCING ORDERS IN THE CHILDREN'S COURT**

The Sentencing Orders which are made pursuant to the CYFA are as follows<sup>76</sup>:-

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<sup>71</sup> s 360(2) and 414(1) CYFA

<sup>72</sup> s 414(1)(a) and (b) CYFA

<sup>73</sup> s. 415(1) and 570(a) CYFA.

<sup>74</sup> s. 572(b) CYFA.

<sup>75</sup> s. 416(3) CYFA.

<sup>76</sup> I have reproduced them in Attachment 5.

Dismiss the charge <sup>77</sup>	
<b>Sentences without conviction</b>	
Non accountable undertaking <sup>78</sup>	(UUT)
Accountable undertaking <sup>79</sup>	(AUT)
Good behaviour bond <sup>80</sup>	(GBB)
<b>Sentences with or without conviction</b>	
Fine <sup>81</sup>	(FIN)
Probation <sup>82</sup>	(PRO)
<b>Sentences with or without conviction</b>	
Youth Supervision Order <sup>83</sup>	(YSO)
<b>Sentences with conviction</b>	
Youth Attendance Order <sup>84</sup>	(YAO)
Youth Residential Centre Order <sup>85</sup> / Youth Justice Centre Order <sup>86</sup>	(YRC) (YJC)

<sup>77</sup> s. 360(1)(a) CYFA

<sup>78</sup> s.363, 364 CYFA

<sup>79</sup> s. 365, 366 CYFA. [Maximum period 6 months; 12 months exceptional circumstances.]

<sup>80</sup> s. 367 – 372 CYFA [Maximum period 12 months (18 months in exceptional circumstances and if the child is aged 15 or more on the day of sentencing.)

<sup>81</sup> s. 373 – 379 CYFA [Consideration must be given to the financial circumstances of the child.

Maximum fines in respect of each offence the lower of the maximum fine for an adult for the offence or 1 penalty unit if child u/15 or otherwise 5 penalty units; in respect of more than one offence maximum of 2 penalty units if child u/15 or 10 penalty units in any other case.]

<sup>82</sup> s. 380 – 386 CYFA [ Maximum period 12 months or 18 months if the offence/s is punishable by > 10 years imprisonment; may not extend beyond child’s 21<sup>st</sup> birthday. Mandatory conditions and optional special conditions.]

<sup>83</sup> s. 387 – 395 CYFA [Refer to footnote 30. In addition, YSO cannot be ordered without child’s consent.]

<sup>84</sup> s 396 – 409 CYFA [YAO is an alternative to YJC for a child aged 15 or more who would otherwise be sentenced to detention due to “the gravity or habitual nature of the unlawful behaviour. Maximum period is 12 months and may not extend beyond child’s 21<sup>st</sup> birthday. Prior to sentencing, requires enquiries to be made of the Secretary DOHS as to the child’s suitability to the Order; requires the child’s to consent to the Order. Maximum of three attendances a week (10 hours of which no more than 4 hours may be spent in community service activities.)

<sup>85</sup> s 410, 411 CYFA [Sentence of detention for those aged 10 – 14 on date of sentencing, applies to indictable and summary offences for which a sentence of imprisonment is provided upon a finding of guilt; requires a pre sentence report, maximum term is the lower of the prescribed term and for one offence 1 year and for more than one offence 2 years. No non parole period can be specified. State in writing the reasons for the Order.]

<sup>86</sup> s. 412, 413 CYFA [Sentence of detention for those aged 15 – 20 on the date of sentencing. Applies to indictable and summary offences for which a sentence of imprisonment is provided upon a finding of guilt; requires a pre sentence report, maximum term is the lower of the prescribed term and for one offence 2 years and for more than one offence 3 years. No non parole period can be specified. State in writing the reasons for the Order.]

There is a sentencing hierarchy which requires the Court not to impose a sentence unless it is satisfied that it is not appropriate to impose a less severe sentence referred to in any preceding paragraph.<sup>87</sup>

For the year 2008/2009 the breakdown of Sentencing Orders expressed as a percentage were as follows<sup>88</sup>:-

<b>Sentence</b>	<b>%</b>
Dismissal	9
Un/Accountable Undertaking	9
Good Behaviour Bond	27
Fine <sup>89</sup>	32
Probation	13
Youth Supervision/Attendance Order	6
Youth Residential/Justice Centre Order	3 <sup>90</sup>

The statistics indicate that 62% of children who are sentenced in the Court do not return before the Children’s Court and a total of 78% do not return after they have been sentenced on two occasions. The converse is of course that 22% continue to appear before the Children’s Court.

The Table above indicates that 72% of the children sentenced in the Children’s Court were placed on undertakings, good behaviour bonds or fines. The statistics have been relatively consistent.<sup>91</sup> This is indicative of the offending being at the lower end of the spectrum and/or the prospects for rehabilitation being good and/or the child may have participated in a Group Conference.

## **GROUP CONFERENCES**

If the Court is considering a Probation or Youth Supervision Order, the Court may defer sentencing in order for the child to participate in a Group Conference.<sup>92</sup> The Group Conferences are modelled on

<sup>87</sup> s. 361 CYFA See also Yv F [2002] VSC 166

<sup>88</sup> Sentencing Outcomes in the Children’s Court by Number, Sentencing Advisory Council

<sup>89</sup> The vast majority of fines imposed are imposed in respect of transit offences.

<sup>90</sup> 2009/2010 4% were sentenced to detention.

<sup>91</sup> The Report of the Sentencing Advisory Council “Sentencing Young People and Children in Victoria” at page 113 indicates that (excluding all transit fines) over the period 2000-2009 undertakings and good behaviour bonds : 51.4%, Fines : 18.9% supervisory orders : 25.6% and sentences of detention 4.1%.

<sup>92</sup> s. 415(1) CYFA

restorative justice principles and must be attended by the child, his/her legal practitioner, the informant or other member of police and a convenor. The other people who are invited and may attend are members of the child's family, support person/s for the child, the victim of the offence or victim's representative and any other person permitted to attend by the convenor.<sup>93</sup>

The objectives are:-

- (a) to increase the child's understanding of the effect of their offending on the victim and the community;
- (b) to reduce the likelihood of the child re-offending;
- (c) to negotiate an outcome plan which is agreed to by the child.<sup>94</sup>

An assessment as to the child's suitability to participate in the Group Conference is undertaken at Court by Youth Justice. The child must consent to participating in the Group Conference prior to a Group Conference being ordered.<sup>95</sup> The Court must order the preparation of a Group Conference Report.<sup>96</sup>

The convenors who conduct the Group Conference are from Jesuit Social Services. Prior to the Group Conference taking place, discussions take place with the child in preparation for the Group Conference.

Everyone who attends the Group Conference has an opportunity to speak and listen. The child together with his/her lawyer and support person/s prepare an Outcome Plan.<sup>97</sup> The Plan is put before all of the people attending the Conference and is agreed upon. The purpose of the Plan is for the child to accept responsibility, to agree to do and/or refrain from doing certain things which will reduce the risk of recidivism and may include offering to assist the victim. The Outcome Plans permit greater creativity in enabling restorative justice principles to be considered. If the young person has participated in a Group Conference the Court is to have regard to that fact amongst others when sentencing.<sup>98</sup> If the young person has participated in a Group Conference and has agreed to an outcome plan, the Court must impose a less severe sentence than it

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<sup>93</sup> s. 415(6)(7) CYFA

<sup>94</sup> s. 415(4) CYFA

<sup>95</sup> S. 414(1)(c)(i) and (ii) CYFA.

<sup>96</sup> S. 414(2)(c) CYFA.

<sup>97</sup> S. 415(5) CYFA.

<sup>98</sup> s. 416(3) CYFA

would have imposed had the young person not participated in the Group Conference.<sup>99</sup>

It is important to note that whilst many victims do not elect to attend to attend group conferences, for those who do attend the experience can be very positive.<sup>100</sup> I made the following submission to the Sentencing Advisory Council and it was included in its Report *Statutory Minimum Sentences For Gross Violence Offences*.

*A Group Conference was conducted in a matter in which the accused pleaded guilty to recklessly causing serious injury. ... The incident and the injuries had a profound impact on the victim. He was too angry to attend the Conference but his mother attended. She indicated that the Group Conference convenor was the first and only person who had spoken to her about the criminal proceedings since the incident had occurred. She agreed to participate in the Conference because she wanted her son and her family to have a voice.*

*Just prior to the Conference she found it almost too overwhelming to attend. However, she did attend and graphically and emotionally explained the most unbearable consequences of the incident for her son and her family. The effect was immense upon the accused. He was made aware of the pain and the impact of his actions on the victim and his family. Somewhat incredulously but very generously the victim's mother stated at the end of the Conference that she was pleased the accused had commenced to do some positive things in his life.*

*The Group Conference provided an opportunity for the accused's family to have a voice and to be involved in the process. It was the only stage during the criminal proceedings that the accused's family considered that they have been acknowledged. It was a positive experience for the victim's family; a very different experience to that undergone by victims giving evidence in contested proceedings. It provides a greater voice for victims than the provision of a Victim Impact Statement.<sup>101</sup>*

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<sup>99</sup> s. 362(3) CYFA

<sup>100</sup> Victims have reported the following :- After having attended a Group Conference being able to sleep at night without the light on (victim of a burglary); not feeling that the accused had targeted them; the outcome plan provided an opportunity for the victim's needs to be considered (eg washing a victim's car for 6 months; assisting in landscape gardening at a school. However issues surrounding public liability insurance have on occasions adversely impacted on the possible options.)

<sup>101</sup> 8.70 [140] Pages 281, 282.

An evaluation of the Group Conference Program found:-

- Three quarters [75.5%] of participants were placed on non-supervisory orders after completing the Conference<sup>102</sup>;
- Conference participants were less likely to reoffend within 12 to 24 months as compared with those sentenced to Probation or a Youth Supervision Order and not having participated in a Group Conference<sup>103</sup>;
- Victims, family members and the vast majority of offenders were satisfied with the process;
- Financial savings, that is, for every dollar invested in the Program, more than a dollar was “saved” in the short term diverting young people from supervisory orders and reducing the rate of recidivism.<sup>104</sup>

## **SENTENCING OF SEXUAL OFFENDERS IN THE CHILDREN’S COURT**

The Children’s Court at Melbourne has a specialist Sexual Offences List which sits on the first Friday of each month (excluding January). In order for a matter to be booked into this List from another Court, the Children’s Court Co-ordinator must be contacted to confirm it should be heard in this List and to obtain the next available listing date.

When sentencing a young male for sexual offending in the Children's Court, regard should be had as to whether it is appropriate to include a condition on a probation, youth supervision order, youth attendance order or a recommendation in relation to a youth residential centre<sup>105</sup> or youth justice centre order,<sup>106</sup> for the young person to attend and participate in counselling at MAPPs. (Male Adolescent Program for Positive Sexuality.) Due to a lack of resources MAPPs is no longer able to conduct pre-sentence assessments. However, provided the young person is placed on a supervisory order or a sentence of detention, MAPPs can provide counselling for young male offenders aged 10 to 21 years. The

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<sup>102</sup> 22% were sentenced to Probation Orders.

<sup>103</sup> After 12 months the reoffending rates were:

18.6% Group Conference participants

27.6% sentenced to Probation or Youth Supervision Orders.

After 24 months the reoffending rates were:

19.2% Group Conference participants

42.9% sentenced to Probation or Youth Supervision Orders.

<sup>104</sup> Young People and Criminal Justice 11 November 2010 Grant P.

<sup>105</sup> Section 411(4) CYFA

<sup>106</sup> Section 413(5) CYFA



form of counselling for the majority of young people who attend the MAPPS program is group counselling.

Another organisation which provides counselling for sexual offending (for both male and female offenders) is the Children's Protection Society.<sup>107</sup>

For a young person with an intellectual disability who has sexually offended, it may be appropriate to consider the Australian Community Support Organisation's "Problematic Sexualised Behaviour Service"(PSBS). The PSBS is funded by Disability Services and is available for those young people over the age of 12 who have an intellectual disability and are at risk or have committed a sexual offence. Prior to attending the Service, Disability Services may advise that assessment of the young person by ASK (Assessment of Sexual Knowledge) may be appropriate.

*Victoria Police v MA*<sup>108</sup> is a decision in relation to the *Sex Offenders Registration Act 2004*. Whilst this Paper is in respect of sentencing and the decision to place someone on the SOR is not a sentence, if an application is to be made the prosecutor generally makes reference to the application either after any priors have been alleged or at some stage prior to sentence. Due to the high threshold which must be met, it is rare for these applications to be granted in the Children's Court.

## **DISCOUNT FOR A PLEA OF GUILTY**

Section 362(1) CYFA details the matters to which the Court is to have regard when imposing a sentence. There is no specific provision within s. 362(1) akin to s. 5(2)(e) Sentencing Act. However, s. 362A CYFA requires the Children's Court when sentencing a child who has pleaded guilty and who is to be sentenced to a Youth Attendance Order, Youth Residential Centre Order or Youth Justice Centre Order to state in respect of each offence the sentence which would have been imposed but for the plea of guilty. Unlike the adult jurisdiction when imposing a sentence of imprisonment, s.362A requires the Children's Court to state the sentence of detention it would have imposed in respect of each offence but for the plea of guilty.

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<sup>107</sup> The CPS also provides counselling services for victims and the families of victims and perpetrators.

<sup>108</sup> [2011] VChC 7 per Bowles M

## SENTENCES OF DETENTION

Magistrate Peter Power has compiled on the website a comprehensive chart which compares the detention rates of people aged 10 – 17 in the States and Territories of Australia. I have attached it at the end of this Paper.<sup>109</sup>

It is apparent that Victoria has consistently enjoyed a significantly lower proportion of children in custody since the introduction of the *Children and Young Persons Act 1989*, the predecessor to the *Children Youth and Families Act 2005*.

The *Children and Young Persons Act 1989* introduced the sentencing principles and the sentencing orders contained in the *Children Youth and Families Act*. Prior to the *Children and Young Persons Act*, the legislation did not include any sentencing principles and there were only four sentencing orders available. They were – a bond, a fine, probation and detention.

The impact of the introduction of the sentencing principles and the additional sentencing orders have had a profound impact on the numbers of children in custody in Victoria.

I have attached a chart which confirms that Victoria has the lowest detention rates per 1000 offenders in Australia (including States and Territories).<sup>110</sup> However, a comparison with the chart of offending rates for 2008 to 2011 (refer to attached chart) confirms that for example, whilst NSW has a significantly higher detention rate, the offending rate is also higher than in Victoria.<sup>111</sup>

The *SAC Report* contained the following:-

*..... it does not follow that offenders are specifically deterred by custodial sentences. A recent review of the evidence on deterrence conducted by the Council has found that detention “has at best, no effect on the rate of offending and often results in a greater rate of recidivism” by those detained compared with those receiving a different sentencing outcome.*<sup>112</sup>

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<sup>109</sup> Attachment 6.

<sup>110</sup> Attachment 7 Source :- SAC Page 163 Figure 70.

<sup>111</sup> Attachment 8 Source :- Australian Health and Welfare Juvenile Justice Data.

<sup>112</sup> Page 57 Footnote 323.

## DETENTION CENTRE ORDERS

Prior to sentencing a child to a period of detention, it is necessary for the Court to order a pre sentence report.<sup>113</sup>

The maximum sentences of detention which can be imposed are :-

- Youth Residential Centre  
Single offence – must not exceed the maximum term of imprisonment for the offence if committed by an adult and in any event, must not exceed one year.<sup>114</sup>  
More than one offence – the aggregate period of detention in respect of all offences must not exceed 2 years.<sup>115</sup>
- Youth Justice Centre  
Single offence – must not exceed the maximum term of imprisonment for the offence if committed by an adult and in any event must not exceed 2 years.<sup>116</sup>  
More than one offence – the aggregate term of detention in respect of all of the offences must not exceed 3 years.<sup>117</sup>

When sentencing a child to a period of detention in a YRC or YJC, any period of time the child has spent in custody in respect of the offences for which the child is being sentenced will be reckoned as already served.<sup>118</sup>

## THE DETENTION FACILITIES AND THOSE UNDERGOING A SENTENCE OF DETENTION

The detention facilities for young people sentenced in the Children's Court are<sup>119</sup> :-

- Parkville Youth Residential Centre –  
in which males aged 10 – 14 are detained and there is a separate facility within Parkville Youth Residential

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<sup>113</sup> s. 410(1)(e) and s. 412910(e0) CYFA.

<sup>114</sup> s. 411(1) CYFA.

<sup>115</sup> s. 411(2)(b) CYFA.

<sup>116</sup> s. 413(2) CYFA.

<sup>117</sup> s. 413(3)(b) CYFA.

<sup>118</sup> ss. 411(5) and 413(1) CYFA

<sup>119</sup> There are provisions which detail where the young person is to serve their sentence if they are undergoing a custodial sentence and then the young person receives a subsequent custodial sentence. (Refer to sections 474-477 CYFA).

Centre for females in which all females aged 10 – 20 years of age are detained;

- Melbourne Youth Justice Centre – in which males aged 15 – 18 years are detained. It is also located at Parkville.

As at 20/11/2011 the capacity at Parkville was 213. The average number of persons per day was 190.

Koori young people are over represented in custody, for example, in 2009 – 2010 the average number of young Kooris in detention per day was 16%. However, only 1.2% of people aged 10 – 17 years were of Aboriginal or Torres Strait Islander descent.<sup>120</sup> I have included a chart containing the rates of young people aged 10 – 17 years in detention by Indigenous status for all of the Australian States and Territories.<sup>121</sup>

In addition, there is an over representation of young people in detention who have been or are on a current child protection order. As at September 2010 35% had a previous child protection order and 16% had a current order. (total 51%).<sup>122</sup>

A school (currently for those on remand but to be extended to those undergoing sentence) and other training programs (for example motor mechanics) operate within the detention facilities and programs designed to deal with the issues contributing to the child's offending are also conducted at Parkville. These programs are consistent with the facilities providing opportunities for rehabilitation for those in custody. There has been a new approach to education for the boys in detention.<sup>123</sup> It is based on the "Knowledge is Power" model.<sup>124</sup> There has also been a new approach introduced regarding promoting positive behaviour by rewards rather than concentrating on punishment for poor behaviour, albeit there are still consequences for poor behaviour.

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<sup>120</sup> SAC Report page 167.

<sup>121</sup> Annexure 9 Source :- The Australian Institute of Health and Welfare Juvenile Justice in Australia 2009-2010.

<sup>122</sup> Youth Parole Board and Residential Board Victoria Annual Report 2011. Referred to in the SAC Report page 168 footnote 786.

<sup>123</sup> Whilst there is schooling for the girls, the new approach is not currently available to them.

<sup>124</sup> [www.kipp.org/](http://www.kipp.org/)

In September 2010 young people in detention identified their offending as being related to the following factors<sup>125</sup>:

<b>FACTOR IDENTIFIED</b>	<b>%</b>
Alcohol and drug use	88
Mental health	34
Intellectual functioning issues	27
Intellectual functioning (diagnosed intellectual disability)	14

## **THE REMAND FACILITIES AT PARKVILLE**

The Melbourne Youth Justice Centre is a remand centre and a detention centre. The average occupancy rate for January 2011 was 97%.<sup>126</sup> The statistics indicate an increase in the number of young people on remand as a percentage of the overall custodial population.

	<b>2005/2006</b>	<b>2009/2010</b>
Average number of Y/P on remand (per day)	26	49
Percentage of young people in custody on remand	36%	51%

There are 26 dedicated remand beds at Melbourne Youth Justice Centre but the numbers of young people on remand have been as indicated 40+. On those occasions, remandees have slept in the detention centre for those undergoing sentence. During 2010, 30% of young people were remanded for 22 days or longer. As at 24 February 2012 Mr Ian Lanyon Director Youth Justice Custodial Services advised that the average remand period was 3 weeks. The Intensive Bail Support Program commenced as a Pilot in June 2010. It has had an impact in reducing the period of time some young people are on remand.

However a snapshot of data on 17 January 2011 indicated that 60% of those in the Melbourne Youth Justice Centre were on remand<sup>127</sup> and 73% of those in the Parkville Youth Residential Centre were on remand.<sup>128</sup>

<sup>125</sup> Report of the Sentencing Advisory Council Sentencing Children and Young People in Victoria April 2012 page 169.

<sup>126</sup> Increasing Remands in the Youth Justice System Report April 2011. The statistics in relation to young people in custody have been reproduced from that Paper.

<sup>127</sup> There were 34 young people undergoing sentence and 50 on remand.

<sup>128</sup> There were 4 young people undergoing sentence and 11 on remand.

## **DUAL TRACK SYSTEM – ADULT YOUTH JUSTICE CENTRE**

There is a unique system in Victoria which is referred to as the “dual track” system. Males aged 18 – 20 who are immature or vulnerable or due to the nature of their offending, may be sentenced in the adult jurisdiction to a custodial sentence in an adult youth justice centre rather than a sentence of imprisonment in an adult prison.<sup>129</sup> Those males serve their sentences at Malmsbury Youth Justice Centre.<sup>130</sup>

## **SENTENCING ORDERS IN THE SUPREME AND COUNTY COURTS**

When sentencing a child the Supreme Court or County Court has found guilty, the Court has the power to impose a sentence pursuant to both the *Sentencing Act*<sup>131</sup> and the *Children Youth and Families Act*.<sup>132</sup> Section 586 CYFA provides :-

*The powers that the Supreme Court or the County Court may exercise in sentencing a child for an indictable offence include the power to impose any sentence which the Children’s Court may impose under this Act but an order that the child be detained in a youth residential centre or youth justice centre must be made in accordance with Subdivision (4) of Division 2 of Part 3 of the Sentencing Act 1991.*

## **TRENDS IN OFFENDING BY CHILDREN**

It is important to keep in mind whenever there is a discussion about children committing criminal offences that it is a very tiny percentage of children who commit offences.

In 2009, the total population of 10-17 year olds was 547,862.<sup>133</sup> 6,633 were found guilty of offences in the Children’s Court that is 1.2% of the total population. Those sentenced to detention represent 4% of the 1.2% which is an increase from 3% in 2008/2009.

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<sup>129</sup> Sections 3 and 32 Sentencing Act 1991.

<sup>130</sup> The relevant maximum sentences are detailed in s.32(3) Sentencing Act 1991.

<sup>131</sup> Section 7(1) and s. 32 – 37 Sentencing Act 1991, DPP v SJK & GAS [2002] VSCA 131

<sup>132</sup> s. 586 CYFA.

<sup>133</sup> Australian Bureau of Statistics data 2009.

Of concern is the increase in the incidence of violence and the severity of violence over the past few years. Statistics from Victoria Police indicate that in 2005/2006 4,792 young people were processed for crimes against the person. In 2008/2009 the number had increased to 6,429.<sup>134</sup>

The offences for which young people were sentenced to detention are primarily for offences against the person.<sup>135</sup> This represents a significant change from what was the situation previously<sup>136</sup>.

Primary Offence	2001 (%)	2007 (%)
Against the person	23	71
Property	63	15
Vehicle	8	10
Drug	6	4

I have attached a chart prepared by Magistrate Peter Power which graphically highlights this change<sup>137</sup>.

## **THE ROLE OF GENERAL DETERRENCE WHEN SENTENCING CHILDREN**

Unlike s.5(1) Sentencing Act, s.362(1) CYFA does not expressly include the sentencing principle of general deterrence. The question as to whether nevertheless general deterrence is a relevant sentencing consideration when sentencing children has been the subject of a number of decisions. Prior to *Kaye J* in *DPP v Hills, NC, Brodie Cooper and RC*<sup>138</sup> the understanding was that general deterrence was not relevant to the sentencing process in the Children's Court.<sup>139</sup>

*Kaye J* however found that general deterrence was a relevant sentencing consideration albeit that he accepted that their youth was "of principal

<sup>134</sup> Recent Trends in Violent Offences Committed By Young People Grant J.

<sup>135</sup> Young People and Criminal Justice 11 November 2010 Grant J. The Court statistics indicate that where the principal charge is intentionally causing serious injury in 75% of cases sentences of 6 months detention or more were imposed and in 53.6% of those cases sentences of 1 -2 years were imposed.

<sup>136</sup> I have attached a chart prepared by Power M which graphically demonstrates these statistics.

<sup>137</sup> Attachment 10.

<sup>138</sup> [2001]VSC 88

<sup>139</sup> *R v Angelopoulos* [2005] VSCA 258 [2] per Callaway and [56] per Eames JA raised the issue but did not decide it, *H V Rowe and Others* [2008] VSC 369 per Forrest "The principle of specific deterrence is incorporated within s. 362(1)(g) CYFA: general deterrence is not a relevant sentencing principle. *The Appeal of JD* Unreported County Court 22/2/2008 [12] There is nothing in s. 362 which appears to sanction general deterrence as a sentencing consideration.

importance, both in determining their level of culpability; and in placing emphasis on the need to rehabilitate both offenders.”<sup>140</sup>

The Court of Appeal did not agree.<sup>141</sup>

*In our view, the language of s. 362(1) and the nature of the matters to which regard must be had, are such as to preclude any consideration of general deterrence.*<sup>142</sup>

and

*..... if a sentence were increased – for the purpose of general deterrence – beyond what would otherwise have been imposed on the child, the sentencing court would have breached its obligation to secure “as far as practicable” the objectives set out in s. 362(1). More particularly, to treat a child as a vehicle for general deterrence would amount to “making an example” of the child, for the purpose of deterring others. This would, in our view, be in direct conflict with the Court’s obligation under s. 362(1)(d) to “minimise the stigma to the child” resulting from the Court’s determination.*

*For the reasons we have given,<sup>143</sup> the language of the statute conveys a clear legislative intention to exclude general deterrence. Whilst that intention is not made explicit, it is necessarily implied by the terms in which s. 362(1) prescribes the sentencing court’s task.*<sup>144</sup>

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<sup>140</sup> At [16].

<sup>141</sup> CNK v The Queen [2011] VSCA 228 per MaxwellP Harper JA Lasry AJA.

<sup>142</sup> At [7]

<sup>143</sup> Refer to [8] to [13]

<sup>144</sup> {14} and [15]. Refer also to Minister for Aboriginal Affairs v Peko-Wallsend (1986) 162 CLR 24, 39–40 and JPR v The Queen [2012] VSCA 50 at [2] per Bongiorno JA and at [33] per Hollingworth AJA (with whom Buchanan JA agreed.).



## RELEVANT AUTHORITIES

The following authorities:-

- *CNK v The Queen*<sup>145</sup>
- *R v P and Others*<sup>146</sup>
- *DPP v DDH.*<sup>147</sup>
- *Victoria Police v CB*<sup>148</sup>

are illustrative of the application of the relevant principles when sentencing young people in the Children's Court.

## CONCLUSION

The role of rehabilitation remains pivotal to the sentencing of children. The Children's Court of Victoria has a variety of sentencing options available to it in order to promote the rehabilitation of children in the community. Whilst for some children the only appropriate sentence is detention, it is important to bear in mind that Victoria enjoys a significantly lower proportion of children sentenced to detention than the other States and Territories of Australia and as the SAC found when comparing the relative detention and offending rates, detention has "*at best, no effect on the rate of offending and often results in a greater rate of recidivism.*"<sup>149</sup> Rehabilitating children in the community wherever possible, benefits not just the child but the community in general.

Jennifer Bowles  
Magistrate  
Children's Court  
31 August 2013

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<sup>145</sup> [2011] VSCA 228

<sup>146</sup> [2007] VChC 3 per Grant J

<sup>147</sup> [2011] VCC (Date of Ruling 10/11/2011) per Wood J

<sup>148</sup> [2010] VChC 3

<sup>149</sup> Page 57 Footnote 323.