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10.0 Consistent magistrate to oversee criminal proceedings

Section 522A(1) of the Children, Youth and Families Act 2005 (Vic) [No.96/2005] ('the CYFA') provides that if criminal proceedings are brought in the Criminal Division against a child and the child has previously been brought before the Criminal Division of the Court constituted by a particular magistrate, the Court is to be constituted by that magistrate unless-

- that magistrate does not still hold office; or
- it is otherwise impracticable for that magistrate to constitute the Court; or
- the child consents to another magistrate constituting the Court.

Section 522A(2) of the CYFA provides that if a child is before the Criminal Division of the Court in relation to more than one proceeding, the Court must, as far as practicable, ensure that the Court is constituted by the same magistrate for all of the proceedings.

However s.522A(3) provides that these provisions do not apply to contested proceedings.

10.1 Indictable offences triable summarily

The power of the Children's Court to try summarily charges against children for indictable offences is much greater than the power of the Magistrates' Court to try summarily charges against adults for indictable offences. However, significant amendments were made to s.356(6) of the CYFA by Act No. 43/2017 to the circumstances in which charges for indictable offences allegedly committed on or after 05/04/2018 by children aged 16 or over may be heard and determined summarily under the CYFA. These amendments have resulted in more charges involving accused 16 & 17 year olds proceeding via committal and subsequent trial in the County or Supreme Court than was previously the case.

10.1.1 Sections 356(3), 356(4) & 356A of the CYFA

Under ss.356(3) & 356(4) of the CYFA, the Court must hear and determine summarily any charge for an indictable offence other than one of the seven death offences (murder, attempted murder, manslaughter, child homicide, homicide by firearm, arson causing death, culpable driving causing death) unless:

- (a) before the hearing of any evidence the child objects or, if the child is under the age of 15 and is not legally represented, a parent objects on the child's behalf; or
- (ab) section 356(6) applies; or
- (b) at any stage the Court considers that the charge is unsuitable by reason of exceptional circumstances to be heard and determined summarily.

It is virtually unprecedented for a child or parent to object to a summary hearing. Prior to the introduction of s.356(6), it had been quite uncommon for the Court to find that a charge which is triable summarily is unsuitable to be heard and determined summarily.

Section 356A(1) – introduced on 26/02/2018 – provides that for the purposes of s.356(3)(b) exceptional circumstances exist if the Court considers that the sentencing options available under the CYFA are inadequate to respond to the child's offending. In determining whether the sentencing options are inadequate s.356A(2) requires the Court to have regard to-

- (a) the seriousness of the conduct alleged, including the impact on any victims of the conduct and the role of the accused in the conduct; and
- (b) the nature of the offence; and
- (c) the age and maturity of the child, and any disability or mental illness of the child, at the time of the offence and the time of sentencing; and
- (d) the seriousness, nature and number of any prior offences committed by the child; and
- (e) whether the alleged offence was committed while the child was in youth detention, on parole or in breach of an order made under the CYFA; and
- (f) any other matter the Court considers relevant.

The equivalent provision to s.356 for adults is in s.29(1) of the Criminal Procedure Act 2009 ('the CPA') [formerly s.53(1) of the Magistrates' Court Act 1989] and is expressed the other way around from s.356. The adult provision prevents the Magistrates' Court from conducting a summary hearing of an indictable offence that is triable summarily unless the accused consents to it being heard in the Magistrates' Court. How that consent, once given, can be withdrawn was the subject of the judgment of Kaye J in *Clayton v Hall & Anor* [2008] VSC 172. The adult accused, a deserted mother of two 14 year old children, had consented to a summary hearing of three charges of wilfully committing an

indecent act with a child under the age of 16 years (contrary to s.47(1) of the Crimes Act 1958) and two charges of assaulting a female in indecent circumstances (contrary to s.39(1) of the Crimes Act 1958). The charges had initially been listed in the committal stream but “due to lack of funds” the accused had consented for them to be heard and determined summarily pursuant to s.53(1) of the Magistrates’ Court Act 1989. Subsequently she changed her mind and prior to the summary hearing she applied to withdraw her consent. Her application was refused on the basis that:

- a practice direction of the Chief Magistrate in 2004 had stipulated that any application to withdraw a consent to summary jurisdiction “must be supported by exceptional circumstances”; and
- the Magistrate was “not satisfied to any extent that exceptional circumstances [had] been made out”.

Granting an application for certiorari to quash the Magistrates’ refusal to permit the accused to withdraw consent, Kaye J held:

- at [23] that the Court, in determining whether to grant leave to withdraw consent, was to be guided by “the justice of the circumstances” (see *R v Southampton Justices Ex Parte Briggs* [1972] 1 WLR 277, 280; *R v Craske, Ex Parte Metropolitan Police Commissioner* [1957] 2 QB 591, 600; *Macri v Ryan* (1993) 74 A Crim R 504); and
- at [24] that the practice direction requiring exceptional circumstances to be demonstrated was “a significant detraction from, and fetter upon, the broad discretion which a magistrate otherwise has under s.53(1)(a)” and was “more stringent than the test recognised in the authorities, namely, the justice of the case”.

The writer believes that the test enunciated by Kaye J is equally appropriate in a case when a child or parent wishes to withdraw an objection to a summary hearing pursuant to ss.356(3)(a) or 356(4) of the CYFA.

In *Treloar v Richardson* [2020] VSCA 216 the Court of Appeal held that a magistrate had not erred in accepting the applicant’s consent to summary jurisdiction given by her counsel in the absence of the applicant.

There is another significant difference between s.356 of the CYFA which deals with proceedings in the Children’s Court and ss.29 & 30 of the CPA which deal with proceedings in the Magistrates’ Court. Section 356(3)(b) of the CYFA empowers the Children’s Court to refuse to hear and determine summarily any charge for an indictable offence for which it has jurisdiction if **at any stage** the Court considers that the charge is unsuitable by reason of exceptional circumstances to be determined summarily. The power of a Magistrate to refuse to hear and determine an indictable offence summarily in the Magistrates’ Court is much more restricted. In *Williams v Hand and Anor* [2014] VSC 527 a magistrate had adjourned charges involving an adult accused for a contested summary hearing. Before the hearing date the accused was charged with three other offences in lieu of – but in essentially the same terms as – the original charges. A different Magistrate commenced hearing the summary contest. However, on the morning of the second day, that Magistrate discontinued the summary hearing and remanded the accused to Melbourne for a filing hearing as a preliminary to a committal hearing. On the hearing of an originating motion, McDonald J held that the Magistrate had erred in law, stating at [47]:

“Once an order has been made by the Magistrates’ Court for an indictable offence to be heard summarily, it is not open for the court, constituted by a different magistrate, to purport to revoke that order. This conclusion is supported by the proper construction of s 29 of the *Criminal Procedure Act*. It is also supported by consideration of the very real prospect of prejudice to an accused if a magistrate has power to terminate a summary hearing which had previously been ordered by the court. Trials of indictable offences, whether heard summarily or before a jury, are preceded by committal hearings. The practical effect of the order made on 6 February 2014 was that a trial of indictable offences preceded a committal hearing.”

10.1.2 Serious youth offences – ss.356(6), 356(7) & 356(8) of the CYFA

The following new definitions were included in CYFA/s.3(1) as and from 05/04/2018 and the specific terrorism offences were amended as and from 08/08/2018:

- **Category A serious youth offence** means any of the following offences-

Murder, attempted murder, manslaughter, child homicide, homicide by firearm, arson causing death (Crimes Act/ s.197A), culpable driving causing death (Crimes Act/s.318)
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- Intentionally causing serious injury in circumstances of gross violence (Crimes Act/s.15A)
- Aggravated home invasion (Crimes Act/s.77B)
- Aggravated carjacking (Crimes Act/s.79A)

- One or more of various terrorism offences (Terrorism (Community Protection) Act 2003 (Vic)/s.4B; Criminal Code (Cth)/offence in Chapter 4, Division 72, Subdivision A; Criminal Code (Cth)/offence in Part 5.3 or Part 5.5; offence in Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth) as in force before its repeal).
- **Category B serious youth offence** means any of the following offences-
 - Recklessly causing serious injury in circumstances of gross violence (Crimes Act/s.15B)
 - Rape (Crimes Act/s.38)
 - Rape by compelling sexual penetration (Crimes Act/s.39)
 - Home invasion (Crimes Act/s.77A)
 - Carjacking (Crimes Act/s.79).

CYFA/s.356(6) introduces a presumption of uplift to a higher court when a child is charged with a **Category A serious youth offence** (other than one of the seven death offences for which uplift is mandatory) **allegedly committed when the child was aged 16 years or over where the relevant offending is alleged to have been committed on or after 05/04/2018**. The Court must not hear and determine such charge summarily unless-

- (a) the child or the prosecution requests that it be heard and determined summarily; and
- (b) the Court is satisfied that the sentencing options available under the CYFA are adequate to respond to the child's offending; and
- (c) any of the following applies-
 - (i) it is in the interests of the victim(s) to do so; or
 - (ii) the accused is particularly vulnerable because of cognitive impairment or mental illness; or
 - (iii) there is a substantial and compelling reason to do so (bearing in mind that the intention of Parliament is that a charge for a Category A serious youth offence should not normally be heard and determined summarily: s.356(7)).

CYFA/s.356(8) requires the Court to consider whether the charge should not be heard and determined summarily when a child is charged with a **Category B serious youth offence allegedly committed when the child was aged 16 years or over where the relevant offending is alleged to have been committed on or after 05/04/2018**.

Practice Direction No.2 of 2018 sets out directions in relation to the listing, procedure and venue for charges falling within s.356(6) [Category A serious youth offence committed by child aged 16+] and s.356(8) [Category B serious youth offence committed by child aged 16+].

10.1.3 Summary of uplift (via committal) provisions – Section 356 of the CYFA

Mandatory uplift to higher court – Child aged 10 to 17 at time of alleged offence – s.356(3)	<ul style="list-style-type: none"> • Murder • Attempted murder • Manslaughter • Child homicide • Homicide by firearm • Arson causing death • Culpable driving causing death <div style="background-color: black; color: white; padding: 5px; text-align: center;">THE 7 DEATH OFFENCES</div>
Presumption of uplift to higher court – Child alleged to have committed a Category A serious youth offence when aged 16 years or over – s.356(6) CATEGORY A SERIOUS YOUTH OFFENCES-->>	<ul style="list-style-type: none"> • Intentionally causing serious injury in circumstances of gross violence • Aggravated home invasion • Aggravated carjacking • One or more of various terrorism offences
Court must consider appropriateness of uplift to higher court – Child alleged to have committed a Category B serious youth offence when aged 16 years or over – s.356(8) CATEGORY B SERIOUS YOUTH OFFENCES -->>	<ul style="list-style-type: none"> • Recklessly causing serious injury in circumstances of gross violence • Rape • Rape by compelling sexual penetration • Home invasion • Carjacking
Court may order uplift to higher court if exceptional circumstances exist – Child aged 10 to 17 at time of alleged offence – s.356(3)(b)	Any indictable offence

10.1.4 Whether Uplift – Caselaw re Category A & Category B serious youth offences

10 PT v DPP [2019] VCC 836: This case involved an application by PT to transfer a charge of aggravated home invasion – a Category A serious youth offence – back to the Children’s Court pursuant to s.168A of the CPA. Since this section is in similar terms to ss.356(6)-(7), the reasoning of Judge Gamble – set out in 10.1.6 – is relevant to the interpretation of those sections.

20 WB v DPP [2019] VChC 1 [Children’s Court of Victoria – Judge Chambers, 24/06/2019 – available on Children’s Court website]: WB was charged with aggravated carjacking and associated offences arising from an incident in January 2019 when he was 17 years old. WB was in the company of a male HC aged 18 and a female aged 16. HC demanded that the victim Dr E hand over his car keys. Assuming he was joking, Dr E walked past the group. WB then went up to Dr E, raised his fists and again demanded the keys. While his attention was on WB, Dr E felt blows to his back. He then tried to walk away from the group however WB tried to grab the keys from his hand and a struggle ensued. Dr E lost his balance and fell forward onto the concrete ground. In this process, the keyring snapped, and WB took the car key. The three offenders then jumped into Dr E’s car, with WB in the driver’s seat. The group then stole Dr E’s Mercedes Benz, with WB driving the car out of the carpark at speed. Arising from the incident, Dr E suffered a fractured left wrist and bruising to his back and left hip.

WB applied for the charge of aggravated carjacking to be heard and determined summarily in the Children’s Court together with the other charges for which no application for uplift had been made. His offending was aggravated by the facts that he was subject to a 12 month youth supervision order and that he had a significant criminal history – including for offences of aggravated carjacking with an offensive weapon, dangerous driving and recklessly causing injury – for which he had previously been sentenced to detention.

It was accepted by the prosecution that WB’s early childhood and adolescence had been marked by significant adversity and disadvantage. He had been diagnosed with an intellectual disability within the meaning of the *Disability Act 2006*, with the Statement of Intellectual Disability finding that he has “significant sub-average general intellectual functioning” and “significant deficits in adaptive behaviour” for which he is eligible for disability services through DHHS. In custody, WB had been subject to a serious sexual assault.

The application was opposed by the prosecution although it conceded (see [25]) that the Children’s Court did have adequate sentencing powers.

In granting WB’s application for summary jurisdiction, Judge Chambers held that-

- The Children’s Court did have adequate sentencing powers to respond to WB’s offending: see [16]-[25]. Hence s.356(6)(b) was satisfied.
- Section 356(6)(c)(i) did not apply: see [11].
- Sections 356(6)(c)(ii) was not made out (see [37]): “Whilst I am satisfied that WB is a highly vulnerable young person, I am not satisfied that his borderline cognitive capacity or mental health issues, either alone or combined, are the reason why he is especially or particularly vulnerable. Rather, WB’s vulnerability is caused by a range of factors that each impact one upon the other and which I find to be relevant to the third limb of s356(6)(c). However, I am not satisfied the link between his vulnerability and his cognitive impairment or mental illness has been demonstrated such that the criteria under s356(6)(c)(ii) applies.”
- Section 356(6)(c)(iii) was made out (see [58]): “In my view, the combination of factors including WB’s background of trauma, abuse and neglect combined with his low level of cognitive functioning, diagnosed disorders and mental health issues, including moderate depression and mild anxiety – which I accept are each ‘compounding and interacting’ – coupled with cogent evidence of WB being the victim of two instances of rape whilst in custody and the trauma associated with those events, constitute ‘substantial and compelling’ reason for the Category A serious youth offence to be heard and determined summarily in a specialist Children’s Court.”

In relation to the term “substantial and compelling reason” in s.356(6)(c)(iii) Judge Chambers held:

[40] “In *Hudgson* [2016] VSCA 254, the Court was considering the meaning of the phrase ‘substantial and compelling circumstances’ in the context of the *Sentencing Act 1991* provisions that require the fixing of a mandatory minimum non-parole period of four years for adults sentenced for the offence of intentionally causing serious injury in circumstances of gross violence.

[41] In considering the phrase ‘substantial and compelling reason’ for the purposes of the CYFA however, the starting point is to construe the words in a way that is consistent with the ordinary meaning to be given to those words, whilst having regard to the statutory context in which they appear when viewed as a whole: *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]. By its language, the provision does not create an obligation to establish an ‘irresistible, exceptional or rare’ reason or reasons, but rather a reason or reasons that are ‘substantial and compelling’, and no more.

[42] A recent decision of the County Court in *PT v DPP* [2019] VCC 836 analysed this phrase and the extent of the burden upon an applicant, albeit under s168 and subject to s168A of the *Criminal Procedure Act 2009*, in an application to transfer a Category A serious youth offence to the Children’s Court. In *PT*, Judge Gamble concluded that whilst the phrase ‘substantial and compelling’ imposes a test that is more stringent than the test of ‘compelling reason’ it is nonetheless a somewhat less stringent test than that of ‘substantial and compelling circumstances’ in the original form of s10A(2)(e) of the *Sentencing Act 1991* as interpreted by the majority in *Hudgson*. In the event, at [61] Judge Gamble described the test to be applied as ‘a ‘relatively high’ one, as opposed to a ‘high’ or ‘very high’ one, and that the relevant provisions impose on an applicant something less than a ‘heavy’ onus or burden’.

[43] I respectfully adopt the characterisation given by Judge Gamble in *PT* of the test to be applied in considering the words ‘substantial and compelling reason’ in s356(6)(c) of the CYFA. I consider this approach to be consistent with the statutory context in which the words appear in the CYFA. The test is also aligned with the child-specific rights enshrined in the *Charter of Human Rights and Responsibilities Act 2006* (the Charter) including, ‘as far as it is possible to do so’ interpreting the phrase ‘substantial and compelling reason’ as it is used in s356(6) of the CYFA in a way that is compatible with the child, WB’s, human rights, including:

- The right to such protection as is in his best interests and is needed by him by reason of being a child: s17(2) of the Charter;
- The right to be treated in a way that is appropriate for his age: s23(3) of the Charter; and
- The right to a criminal procedure that takes account of his age and the desirability of promoting the child’s rehabilitation: s25(3) of the Charter.

[44] In adopting this approach, I have had regard to the fact that *Hudgson* involved an interpretation of the phrase ‘substantial and compelling circumstances’ in the context of a scheme of mandatory minimum sentencing for adult offenders under the *Sentencing Act 1991*. In contrast, the phrase ‘substantial and compelling reason’ is to be construed in the context of a decision regarding the exercise of jurisdiction by a specialist Children’s Court under child-specific legislation, the CYFA. For those reasons, **I do not consider the test requires either rare or unforeseen circumstances or imposes more than a ‘relatively high’ burden whilst having regard to Parliament’s intent that such matters should normally not be heard and determined summarily.**

[45] In the case of WB, as indicated, I am satisfied that the ‘relatively high’ burden of establishing ‘substantial and compelling reason’ has been met.”

30 AH v DPP [2019] VChC 3 [Children’s Court of Victoria – Stylianou M, 11/11/2019 – available on Children’s Court website]: AH was charged with the Category A serious youth offence of aggravated carjacking and other offences allegedly committed when he was aged 17y7m and on parole at the time. An application by AH pursuant to s.356(6)(a) for the charge to be heard and determined summarily was refused on the basis – at [38] – that the diagnosis of PTSD and Borderline Personality Disorder did not bring AH over the hurdle of ‘substantial and compelling reason’ inserted by ss.356(6) & 356(7) even when viewed in combination with AH’s family support and his background. An application by the prosecution for an additional charge of attempted aggravated carjacking to be uplifted was granted on the basis that exceptional circumstances existed pursuant to s.356(3)(b) of the CYFA and in particular the overall administration of justice.

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10.1.5 Whether Uplift – Caselaw relating to ‘exceptional circumstances’

On its face it is not absolutely clear whether CYFA/s.356A(1) is intended to confine ‘exceptional circumstances’ to cases where the sentencing options in the Children’s Court are inadequate or whether it is merely an illustration of one circumstance which will constitute ‘exceptional circumstances’. In *DPP v JM* [2018] VChC 5 at [31] Magistrate Stylianou put the dilemma pithily: “It is unclear whether s.356A prescribes merely one way in which exceptional circumstances may be found to exist, or whether it prescribes the only way.”

In *DPP v JT* [Children’s Court of Victoria, 05/07/2018] Judge Chambers preferred the “one way” rather than the “only way” interpretation, holding that the sentencing considerations in s.356A “are to be considered in addition to other matters relevant to the exercise of the Court’s discretion as summarised in *K v Children’s Court of Victoria* [2015] VSC 645. In *DPP v JM* [2018] VChC 5 – summarized as case **10** below – Magistrate Stylianou adopted Judge Chambers’ reasoning at [32], adding: “[I]t is perhaps unlikely that s.356A was intended by Parliament to exclude any other consideration other than the adequacy of the sentencing options available to this Court in determining whether exceptional circumstances exist.”

In the paragraphs below case **1** was under the Children’s Court Act 1973 (Vic) [No.8477] and cases **2** & **3** were under the Children and Young Persons Act 1989 (Vic) [No.56/1989] (‘the CYPA’). Section 356 of the CYFA replaced – and prior to 05/04/2018 was in broadly similar terms to – the earlier legislation so the earlier caselaw may still be of some relevance on the issue of ‘exceptional circumstances’.

10 *D (a Child) v White* [1988] VR 87: This case involved the statutory predecessor of s.134(3) of the CYPA, s.15(3) of the Children’s Court Act 1973 (Vic) [No.8477], which enunciated a test of ‘special reason’ rather than ‘exceptional circumstances’ as a basis for the Court refusing summary jurisdiction. D had been charged with armed robbery and conspiracy to commit armed robbery. The Magistrate ruled that the charges were not suitable to be heard and determined summarily and proceeded with the hearings as committal proceedings. In upholding the Magistrate’s decision, Nathan J. said [at p.93]:

“As the Act invests the Court with embrative jurisdiction in respect of children it should only be relinquished reluctantly. The reason to do so must be special; not matters of convenience or to avoid difficulties. As the power to divest the Court of jurisdiction may be invoked by the Magistrate personally at any stage, before doing so the Magistrate should ask for, consider and adjudicate upon submissions made by the informant, counsel or the children or parents. The power should be exercised sparingly and reasons for doing so given. The overall administration of justice is the most important criterion. That is justice as it affects the community as well as the individual. In this case a possible joint trial of co-conspirators rather than individual hearings is a significant matter involving the administration of justice. The special reason must satisfy its object, that is it would be unsuitable to determine the matter summarily. Circumstances which might give rise to unsuitability can never be categorized. The following facts are merely a guide:

- (1) The particular features of the offence, the degree of planning and complexity, or maturity of the offender.
- (2) The antecedents of the offender or particular features peculiar to him/her.
- (3) The nature of the evidence to be called by either party may render a case unsuitable for summary determination. Forensic or scientific evidence, even evidence about political motivation may be so complicated or contentious as to fall within this class. [One hopes this is no longer as relevant a consideration as in 1988.]
- (4) Whether there are adult co-accused or accessories, and if so in what jurisdiction should the majority of charges proceed.”

20 *A Child v A Magistrate of the Children’s Court & Others* [Supreme Court of Victoria, unreported, 24/02/1992]: A 16½ year old accused was charged with importation from China on 3 occasions of large amounts of heroin, totalling well in excess of a commercial quantity. In upholding the Magistrate’s ruling that there were exceptional circumstances which rendered the charges unsuitable to be heard and determined summarily, Cummins J approved and applied [at p.9] the reasoning of Nathan J in *D (a Child) v White* and continued:

‘Exceptional’ in its ordinary English meaning and in its statutory meaning in the CYPA means more than ‘special’. It means very unusual, and thus I proceed upon the basis that the provision in s.134(3)(b) is *a fortiori* to that in s.15(3) of the 1973 Act.”

Cummins J stated that it "is apparent from the scheme, terms and nature of the provisions of the CYPA", in particular ss. 1, 3, 16, 18, 134, 139 & 276, that "the Children's Court ought give up its jurisdiction only with great reluctance" [p.6]. He continued:

"[I]t is plain that the protective and therapeutic character of the Children's Court jurisdiction is markedly different from that of adult courts. The comprehensiveness of s.16 is, in that regard, significant. The nature of the considerations to be taken into account in sentencing also is significant. In *The Queen v S* 31 SASR 263, the learned Chief Justice notes like but not identical provisions in s.7 of the Children's Protection and Young Offenders Act 1982 (S.A.) and at p.266 contrasted those with general principles of adult sentencing: see also *The Queen v Wilson* 35 SASR 200."

Subsequently his Honour said [at pp.11-12]:

"I do not consider that the classification of 'exceptional circumstances' in s.134(3)(b) is limited to the circumstances of the charge. In my view, it includes the circumstances of the offender, including the offender's age, experience, maturity, and characteristics of intelligence and personality. I take into account these considerations applicable to this [accused] and the circumstance that there were very much older and very worldly men involved in the operation.

On the other hand, I take into account the [accused's] age relative to the categorization of 'child' as defined by the Act and the circumstances of her statements to the various investigating officers, where her step by step role alleged by the Crown was revealed. The revelation of real significance of the matter did not come from the [accused]. It came from elsewhere.

Although it is not necessary to my conclusion, I would think that ordinarily questions of considerations of joint trials with adults should not be a consideration justifying the removal of a matter from the Children's Court to an adult court and ordinarily would not constitute an exceptional circumstance. But given the nature of the enterprise alleged by the Crown and the personal considerations I have referred to, I am satisfied that the case comes within the category contemplated by s.134(3)(b)."

Approving the above dicta of Cummins J, the Court of Appeal (Maxwell P, Harper JA & Lasry AJA) held in *DPP (Vic) v Hills* [2011] VSCA 228 at [85] that "ordinarily the need for a joint trial should not be a consideration justifying the removal of a matter from the Children's Court to an adult court".

30 DL (a minor by his litigation guardian) v A Magistrate of the Children's Court & Others

[Supreme Court of Victoria, unreported, 09/08/1994]: A magistrate declined to hear and determine summarily multiple charges of rape of a young woman, some charges relating to the accused's own actions and others relating to his alleged complicity in the actions of 4 young adults who, it was said, participated in the episode. Vincent J allowed the accused's appeal and returned the case for summary hearing in the Children's Court. His Honour agreed in broad terms with the approach adopted by Nathan J & Cummins J in the above two cases:

"[A] legislative scheme has been devised with respect to the conduct of criminal proceedings involving young persons...[F]or 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 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." [p.4]

However, his Honour was not persuaded that exceptional circumstances existed in this case:

"[T]he gravity of the conduct, and the role ascribed to the applicant in it, appear to be the central, if not the only, factors to which regard was had as these were the only considerations mentioned. They are clearly important features but it is obvious that, as has been indicated, there are other matters to which attention should have been given. No reference was made, for example, of the consideration of any personal factors relative to the young accused." [pp.3-4]

The above dicta of Vincent J was referred to and approved by the Court of Appeal (Maxwell P, Harper JA & Lasry AJA) in *DPP (Vic) v Hills* [2011] VSCA 228 at [83]-[85].

In referring to the above cases in *CL (a minor) v Tim Lee and Ors* [2010] VSC 517 at [66], Lasry J said: "I would take no issue with the contention that when legislation invests the Children's Court with 'embrasive jurisdiction in respect of children it should only be relinquished reluctantly'."

41 **Victoria Police v CB** [2010] VChC 3: The accused was charged, *inter alia*, with intentionally causing serious injury and aggravated burglary. Armed with a knife he had broken into a hotel with the intent to steal property. Upon being challenged by the publican and his wife, he assaulted the wife. He then stabbed the publican 13 times in the back and abdomen causing life threatening, and life changing, injuries. The accused was over 17 years of age at the time. The offending breached two youth supervision orders and demonstrated an alarming escalation in violent offending behaviour. The then President of the Children's Court granted the prosecution application for the Children's Court to refuse to hear the charges summarily and to conduct a committal proceeding. He said at [14]:

"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 s.356(3)(b) of the CYFA. 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 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 3 years detention in a youth justice centre."

51 **DPP v Michael Anderson** [2013] VSCA 45; (2013) 228 A Crim R 128: The accused was charged, *inter alia*, with intentionally causing serious injury. He had used a knife to inflict grievous injury, without cause, on an innocent shop assistant. He was just under 18 at the time. He had a significant record of violent offending. His background, however, was one of overwhelming disadvantage. He suffered physical abuse, first from his father and then from his stepfather, and was taken into State care from the age of 12. His personality deficits and his tendency to isolate himself from other make his prospects of rehabilitation uncertain at best. The victim sustained a stab wound to the middle of the back, a large laceration to his left upper arm and large lacerations to both upper legs. All three lacerations were to the bone, and required surgical repair. The laceration to the left arm resulted in complete left radial nerve laceration. The victim has had no neurological return and has no function in the fingers and thumb of his left hand. His prognosis in respect of its return is guarded. He spent several months in hospital and in rehabilitation after the incident. He suffers sclerosis on his arm, which requires treatment three times a week.

The Children's Court had found that exceptional circumstances existed which made the charge unsuitable to be determined summarily, giving the following reasons which the Court of Appeal reported at [26]:

"It is clear that the Children's Court should only relinquish its jurisdiction with great reluctance. It is a specialist jurisdiction with a specialist approach to the criminality of children and young persons under the age of 18 years. I have sought guidance on the issue as to what constitutes 'exceptional circumstances' for the purpose of such a relinquishment from the following three main authorities in this area:

- *D (a child) v White* (1988) VR 87 Nathan J;
- *A Child v A Magistrate of the Children's Court & Ors* (unreported) 24/2/1992 Cummins J;
- *DL (A Minor by his Litigation Guardian) & Ors* (unreported) 9/8/1994 Vincent J.

In particular, I have had regard to the comments of Vincent J in *DL (A Minor by his Litigation Guardian) & Ors*, where he said:

'...that 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 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.'

The circumstances, severity, viciousness and gratuitous nature of the knife attack and the significance of the injuries suffered by the victim makes the offending a grave example of the offence of intentionally cause serious injury. The age of the accused at the time of the offending, his extensive prior criminal history, which include matters of violence, and the fact that the offence was committed whilst on parole, demonstrate an alarming escalation in violent offending behaviour by the accused. These matters combine to establish 'exceptional circumstances' within the meaning of s 356(3) of the Act. This is a case where the sentencing court would need to be able to consider the fullest possible range of sentencing options.

Although an aggregate term of three years' detention could be imposed by the Children's Court for all these offences, the Court is nonetheless restricted to an individual term of two years for the specific offence of intentionally cause serious injury. In the circumstances of this particular case, I do not consider that limitation on the powers of the sentencing court to be appropriate. Further, to impose an artificial inadequate sentence for this offence with orders for cumulation in respect of the other offences would be to offend against the prima facie rule for concurrency.

I have considered the issues raised by the defence relating to the totality principle, the time the accused has spent in custody over the last 12 months, and the necessity to avoid a crushing sentence, together with the other matters that would be put on a plea for the accused. Those matters do not persuade me that the Children's Court would have the appropriate sentencing powers to deal with the accused."

At [27] the Court of Appeal said that the Children's Court decision was plainly correct, for the reasons the Court gave.

60

C v Children's Court of Victoria & Anor [2015] VSC 40: The accused who was 17y3m old at the time of the alleged offending was charged, *inter alia*, with false imprisonment, two counts of rape and attempting to procure sexual penetration by threats. The complainant who was aged 15y7m had been in a physically intimate relationship with the accused for about a month prior to the alleged rapes. According to the complainant he treated her well at the beginning of their relationship but began to change as a result of using ice. The accused was also charged with intentionally causing injury to the complainant – alternatively recklessly causing injury and assault – on two separate occasions 3 days and 5 days prior to the alleged rapes. The accused had no priors for sexual offending and had not previously been sentenced to a term of detention.

A magistrate in the Children's Court had found that the case was "unsuitable by reason of exceptional circumstances to be determined summarily". In so finding, her Honour had referred to the decisions of Nathan J in *D (A Child) v White* [1988] VR 87, Cummins J in *A Child v A Magistrate of the Children's Court & Others* [Supreme Court of Victoria, unreported, 24/02/1992] and DL (a minor by his litigation guardian) v *A Magistrate of the Children's Court & Others* [Supreme Court of Victoria, unreported, 09/08/1994]. The accused appealed pursuant to Order 56. Beale J quashed the Magistrate's decision holding at [2]:

"Rape is a most serious offence but Parliament has decided that rape charges against children should ordinarily be heard in the Children's Court. The two rape charges brought against the plaintiff are not at the upper end of the spectrum of rape offences: they are mid-range instances of that offence. Further, the plaintiff's criminal history is limited. Most importantly, he has no priors for sexual offences and has never been sentenced to detention. Having regard primarily to these considerations and the principle that the Children's Court should only surrender its jurisdiction with 'great reluctance' [*A Child v A Magistrate of the Children's Court & Others* (Supreme Court of Victoria, 24/02/1992)], her Honour's decision to refuse a summary hearing was a jurisdictional error."

70

K v Children's Court of Victoria [2015] VSC 645: The accused, who was the first child to be charged with terrorism offences in Victoria, made an application to review the decision of Judge Couzens to uplift two charges laid under the Criminal Code 1995 (Cth) and the Crimes Act 1914 (Cth). In dismissing the application for judicial review, T Forrest J outlined the relevant principles at [26]:

- (a) The Children's Court should relinquish its embrative jurisdiction only with great reluctance (see eg. *D (A Child) v White* [1988] VR 87, 93; *A Child v A Magistrate of the Children's Court* [Supreme Court of Victoria-Cummins J, unreported, 24/02/1992] at 11).

- (b) The gravity of the conduct and the role ascribed to the accused are important matters but are not the only factors to be considered (see eg. *D (A Child) v White* [1988] VR 87, 93).
- (c) Other factors for consideration may include:
 - the maturity of the offender;
 - the degree of planning or its complexity; and
 - the antecedents of the alleged offender or particular features peculiar to him or her (see eg. *D (A Child) v White* [1988] VR 87, 93).
- (d) The most important consideration is the overall administration of justice (justice as it affects the community as well as the individual) (see eg. *D (A Child) v White* [1988] VR 87, 93).
- (e) The nature of the evidence to be called by either party may render a matter unsuitable for summary determination, eg:
 - evidence about political motivation; or
 - forensic or scientific evidence (see eg. *D (A Child) v White* [1988] VR 87, 93).
- (f) The word “exceptional” in this statutory context means more than special. It means “very unusual” (see eg. *A Child v A Magistrate of the Children’s Court* [Supreme Court of Victoria-Cummins J, unreported, 24/02/1992] at 9).

At [32] T Forrest J said that the inadequacy of the sentencing jurisdiction of the Children’s Court may constitute an exceptional circumstance justifying the Court uplifting the matter to a higher court. See also *DPP v Michael Anderson* (2013) 228 A Crim R 128, [26]-[27].

In finding ‘exceptional circumstances’ under CYFA/s.356(3)(b), T Forrest J said at [31] & [34]:

[31] “The finding of exceptional circumstances imports a discretionary value judgment. The Court is required to undertake a nuanced consideration of the factors of the alleged offending, the antecedents of the accused child, the statutorily enshrined values of the Children’s Court and the sentencing jurisdiction and considerations of that Court. Each case is unique and will be determined on its own facts (citation omitted).”

[34] “I do not accept that (absent militating antecedents) exceptional circumstances will only be demonstrated in ‘top of the range’ offending. A 13 year old charged with a ‘top of the range’ intentionally causing injury offence will almost certainly be able to be sentenced within Children’s Court sentencing constraints. A 17 year old charged with a ‘top of the range’ intentionally causing serious injury offence may well not be able to be sentenced within those constraints. Each case will turn upon its own facts, and in each case the Children’s Court magistrate or judge will look at all the circumstances that surround both the offending and the alleged offender. And in this case that is what his Honour did. In my view, having regard to all the circumstances, three years [the then maximum YJC sentence under the CYFA], if this young man is found guilty of the offences, would not be sufficient.”

81

Le v JA [2018] VChC 1 [Children’s Court of Victoria – Judge Chambers, 31/01/2018 – available on Children’s Court website]: The accused, who was aged 17y11m at the time of the alleged offending, was charged with intentionally causing serious injury in circumstances of gross violence, robbery and other offences alleged to have occurred at 11pm on 09/11/2017 [prior to the commencement of s.356(6)]. The victim was a 47 year old man with a pre-existing diagnosis of dementia who was not known to either JA or his 15 year old co-accused. The informant applied pursuant to s.356(3)(b) of the CYFA for the charges to be uplifted. At [14]-[15] her Honour adopted the summary of the relevant principles outlined by T Forrest J in the above case of ***K v Children’s Court of Victoria*** [2015] VSC 645. The factors personal to JA included that he had an IQ of 66 with “symptoms consistent with a diagnosis of Intellectual Disability” and that he had no criminal history although he was facing charges relating to two earlier incidents involving allegations of violent offending in June 2017. In finding that exceptional circumstances existed warranting uplift, her Honour said at [39]-[41]:

[39] “Whilst these matters [personal to JA] are relevant and acknowledged, they must be considered and balanced against the severity and gravity of the alleged offending in determining this application. In my view, this is a grave example of the offence of intentionally causing serious injury in circumstances of gross violence. That this is a serious offence is reflected in the maximum penalties applicable to adults. The facial injury suffered by the victim was significant with potential life-long consequences. The accused was 17y11m old at the time of the offence, at the very upper range of the characterisation of a ‘child’ as defined in the CYFA.

[40] Balancing each of these considerations, I am satisfied that exceptional circumstances exist within the meaning of s.356(3) of the CYFA, and that the charges should be fixed for committal hearing. In doing so, I consider that the sentencing court needs to be able to consider the fullest possible range of sentencing options available under the *Sentencing Act 1991* [including under s.586 of the CYFA which gives a higher court the power to sentence a child to detention in a youth justice centre under Subdivision (4) of Division 2 of Part 3 of the *Sentencing Act 1991*] should the charges be found proved, and not limited to the maximum jurisdictional limit of this Court. Other sentencing considerations, including the age of the accused, his cognitive functioning and prospects of rehabilitation, will also remain relevant and can be taken into account when sentencing.

[41]...[T]his application is being heard at an early stage of these proceedings, noting that the matters are yet to resolve. If the charges were to resolve on less serious alternate charge/s or on an agreed basis other than as outlined in these reasons, then the question of jurisdiction may need to be further considered. If this were to occur following committal, the matter could be remitted to the Children's Court."

91U ***DPP v A & Ors* [2017] VChC 1** [Children's Court of Victoria—Judge Chambers, 14/03/2017 – available on Children's Court website]: The 5 offenders were aged 16 or 17 and were charged with offences arising from an armed robbery on a jewellery store at 12.40pm on 14/01/2017 at which jewellery valued at approximately \$100,000 was stolen. Accused A was also charged with offences arising from an earlier armed robbery on a jewellery store at 1.05pm on 12/01/2017 at which jewellery valued at approximately \$526,000 was stolen. The informant applied pursuant to s.356(3)(b) of the CYFA for the charges to be uplifted. At [19]-[23] her Honour reviewed the case law in relation to "exceptional circumstances". At [34] her Honour accepted the prosecution characterisation of the armed robberies as "high-end instances of that kind of offence. Both were planned and coordinated, executed in broad daylight when staff and potentially customers would be present, attended by threatened and actual violence, conducted in company and with the use of weapons including in the case of the armed robbery [on 12/01/2017], a firearm. In the manner in which they occurred, the armed robberies terrified and terrorised the victims. In respect of the offending on 14/01/2017, the manner in which the co-accused fled the scene in the waiting vehicle was characterised by dangerous driving placing members of the public at risk. There was a modest degree of sophistication associated with the offending, including the use of gloves, clothing and cloth masks to avoid identification."

In holding that exceptional circumstances existed for offender A, her Honour said [at 46]: "Given the objective gravity of the two incidents of armed robbery, A's prior criminal history and the fact that the two offences were committed within two days of each other whilst A was under a Youth Supervision Order of the Court, I do not consider that the limitation on sentencing powers [under the CYFA], including the power to make appropriate orders for cumulation (if necessary) to be appropriate." A's charges were therefore uplifted.

Her Honour found that notwithstanding the objective gravity of the armed robbery on 14/01/2017, there were adequate sentencing powers to deal with the charges, if proved, against the other 4 co-accused (see [52], [55] & [59]) and accordingly, the uplift applications in relation to A's co-accused B, D, E & P were refused.

10U ***DPP v JM* [2018] VChC 5** [Children's Court of Victoria—Magistrate Stylianou, 01/11/2018]: JM, aged 16, was charged with being an accessory after the fact to murder and common law assault. The prosecution application for 'uplift' was refused, her Honour not being satisfied that 'exceptional circumstances' existed within the meaning of CYFA/ss.356(3)(b) & 356A. At [31]-[33] her Honour said [emphasis added]:

[31] "In enacting s.356A, Parliament has mandated for the Children's Court to have regard to the adequacy or otherwise of the sentencing options available to it by reference to the factors in s.356A(2) of the CYFA in determining whether exceptional circumstances exist under s.356. **It is unclear whether s.356A prescribes merely one way in which exceptional circumstances may be found to exist, or whether it prescribes the only way.**

[32] On the face of it, the legislation appears restrictive and prescriptive. However, a myriad of issues and complexities may arise in the hearing of serious criminal offences. Ultimately, the most important criterion must be the overall administration of justice, as it affects the community as well as the individual. That being the case, **it is perhaps**

unlikely that s.356A was intended by Parliament to exclude any other consideration other than the adequacy of the sentencing options available to this Court in determining whether exceptional circumstances exist. In *DPP v JT* [Children's Court of Victoria-Judge Chambers, 05/07/2018] Chambers J said that the sentencing considerations in s.356A 'are to be considered in addition to other matters relevant to the exercise of the Court's discretion as summarised in *K v Children's Court of Victoria*'. There have, however, also been recent contrary interpretations on this issue by this Court: see for instance *Vicpol v LV* [Children's Court of Victoria, 19/10/2018].

[33] The meaning of 'exceptional circumstances' has been considered in the context of s.356 of the CYFA in a number of cases in the Supreme Court and the Court of Appeal some of which have been referred to by each of the parties to this application, including *D (a child) v White* [1988] VR 87, *A Child v A Magistrate of the Children's Court and Ors* and *DL (A minor by his litigation guardian) v A Magistrate of the Children's Court*. In *K v Children's Court of Victoria and Anor* to which both parties have referred, Justice Forrest extracted the relevant principles from these authorities summarising them [as set out in case [7] above]."

At [49] her Honour held that "the sentencing options available to this Court under the CYFA are adequate to respond to JM's offending". At [50] her Honour – applying the dicta of Judge Chambers in *DPP v JT* that the sentencing considerations in CYFA/s.356A are to be considered in addition to other matters as summarized by T Forrest J in *K v Children's Court of Victoria* [2015] VSC 645 – went on to determine whether there were any other matters which may amount to 'exceptional circumstances' under s.356. Ultimately she held that a joint trial with the principal offender, the time and expense of running two trials and the impact of two trials on witnesses and the victim's family – although important factors – "are not special, unusual or exceptional".

11 *Victoria Police v CA* [Children's Court of Victoria-Magistrate Coghlan, 03/07/2019]: The accused child – aged 17y2m – was originally charged with: (1) intentionally causing serious injury in circumstances of gross violence (a Category A serious youth offence), (2) intentionally causing serious injury, (3) reckless endangerment and (4) contravening a parole order. CA had used a knife to inflict serious wounds on the young victim – whom he knew – in broad daylight on a street in Geelong. CA stabbed the victim in the right groin area which severed his femoral artery and vein and pierced his bladder. He then stabbed the victim a second time penetrating his right chest wall. When the victim arrived at the hospital he was in cardiac arrest and was receiving CPR. A doctor who examined the victim on his arrival at hospital opined: "[T]his was an extremely serious and life threatening injury. The patient would certainly have died had the injury occurred any further from a large hospital in daylight hours – the initial resuscitation which took place involved at least 11 doctors, 6 of whom are specialists in their field...Discharge indicate that the patient has significant lifelong disability as a result of these injuries". His Honour was satisfied that this was not a spur of the moment incident as it appeared that CA approached the victim with the intent of causing harm, removing the knife from a satchel he was holding as he approached. There was no suggestion of self-defence. CA had an extensive history of prior serious offending, some of which had involved the use of weapons and for some of which he had previously been sentenced to YJC detention. He was on youth parole at the time.

The prosecution ultimately accepted the accused's proposal of a plea to charges 2 & 4. The striking out of charge (1) meant that there was no longer a presumption under s.356(6) of the CYFA that that charge would be uplifted. However, the prosecution applied for charge (2) to be uplifted, arguing that there were 'exceptional circumstances' within the meaning of ss.356(3)(b) & 356A, while conceding that "the Children's Court is a specialised jurisdiction and that any decision to relinquish jurisdiction should be made with great reluctance: *A Child v A Magistrate of the Children's Court* (unreported, Supreme Court of Victoria-Cummins J, 24/02/1992 at p.9.)"

In a detailed *ex tempore* judgment Coghlan M refused to grant summary jurisdiction, noting that this was the first occasion in over 16 years where he had held that a charge was not suitable to be dealt with in the Children's Court. At pp.7-8 his Honour said:

"I am satisfied that exceptional circumstances exist by way of a combination of all of the factors I have mentioned under paragraphs (a), (b), (c), (d) & (e) of s.356A(2). That does not mean, because this is not a sentencing hearing, that the County Court upon consideration of all matters including...the possibility of psychological and other material

in relation to the accused, including obviously a willingness to plead guilty at an early stage to these proceedings, may not consider ultimately a sentence which is within the range that is permitted [to] this Court...

However, at this stage I say that there is clearly the possibility of the [County] Court considering a sentence in excess of 3 years in relation to the single charge that this Court has the power to impose. I take into account also the maximum penalty applicable in relation to this charge, and I believe that this is a matter not too dissimilar...from *DPP v Michael Anderson* [2013] VSCA 45 [summarized above as case 5]."

See also *DPP v E* [2016] VChC 4 [exceptional circumstances -> 1 matter fixed for committal]; *Victoria Police v CB* [2010] VChC 3 per Judge Grant [exceptional circumstances -> 1 matter fixed for committal]; *OPP v BW* [2010] VChC 2 per Judge Grant [no exceptional circumstances -> 0 summary hearing]. All of these judgments are available on the Children's Court website.

10.1.6 Transfer back from Supreme or County Court to Children's Court

Sections 168 & 168A of the CPA empower the Supreme Court and the County Court to transfer back to the Children's Court a proceeding for a charge for an indictable offence that may be heard and determined summarily at any time except during trial provided that certain pre-conditions are met.

In particular s.168(2) provides that, subject to s.168A, the court must not transfer a charge that the Magistrates' Court or the Children's Court has refused to hear and determine summarily unless there has been a significant change in the charges against the accused or in the prosecution case against the accused. Sections 168A(1) & 168A(2) provide that despite s.168(2), the court may under s.168(1) transfer a charge in respect of an accused who is a child to the Children's Court if-

- (a) the charge is for a Category A serious youth offence committed when the child was aged 16 years or over, other than murder, attempted murder, manslaughter, child homicide, homicide by firearm, arson causing death, culpable driving causing death; and
- (b) the Children's Court has refused to hear and determine the charge summarily; and
- (c) the child or prosecution requests that the charge be heard and determined summarily; and
- (d) the court is satisfied that the sentencing options available to the Children's Court under the CYFA are adequate to respond to the child's offending; and
- (e) any of the following applies-
 - (i) it is in the interests of the victim(s) that the charge be heard and determined summarily;
 - (ii) the accused is particularly vulnerable because of cognitive impairment or mental illness;
 - (iii) there is a **substantial and compelling reason** why the charge should be heard and determined summarily notwithstanding the intention of Parliament that a charge for a Category A serious youth offence should not normally be heard and determined summarily.

In *PT v DPP* [2019] VCC 836 the applicant PT was a child within the meaning of the CYFA. At the age of 17y9m he committed an offence of aggravated home invasion – a Category A serious youth offence – and two associated offences of theft in company with 3 other youths aged 20, 18 & 15 during a forced entry to a residential home at 5.15am on 10/06/2018. Each offender wore a hooded top as a means of disguise. Two of the offenders were armed, one with a knife or machete, another with a wooden stick or bat. All 4 occupants of the house were asleep in their beds: an elderly woman in one bedroom and her son, his pregnant wife and their young child in another bedroom. The offenders first confronted the elderly woman who fled and hid in another area of the house, injuring herself in the process. The offenders then woke the couple and confronted them, banging on the walls and demanding their car keys. The pregnant female tried to hide her young child under the bed covers. During the invasion the offenders had put a hole in a wall, ripped an alarm off a wall, smashed a number of pictures and slashed the bedhead of the couple's bed with a bladed weapon. A video made on PT's phone suggests that he was drug affected and his offending was aggravated by the fact that it occurred while he was on bail for other serious indictable offences. The prosecution case against PT is based on complicity. On 29/11/2018 Magistrate Stylianou in the Children's Court refused to hear and determine the matter summarily, giving detailed reasons available on the Children's Court website as [2018] VChC 7. Although her Honour was satisfied that sentencing options available to the Court under the CYFA were adequate to respond to PT's offending, she was not satisfied that PT had established under s.356(6)(c) "**a substantial and compelling reason**" why the charge should be heard summarily – the onus of establishing which Judge Gamble held at [3] fell on PT.

On 13/02/2019 PT applied under ss.168 & 168A of the CPA for his case to be transferred back to the Children's Court for a summary hearing and determination. On 22/05/2019 Judge Gamble refused the

application, giving detailed reasons for his decision. As between the parties there was no dispute that the matters referred to in s.168A(1) (a)-(d) had been established and at [19]-[21] Judge Gamble ultimately – albeit “not without some hesitation” – held that PT had discharged the onus that rested on him in relation to s.168A(1)(d). That left s.168A(1)(e) for determination. PT did not rely on either paragraphs (i) or (ii). So the question for Judge Gamble was whether PT had shown a **substantial and compelling reason** why the charge should be heard and determined summarily as required by s.168A(1)(e)(iii), a question which left his Honour in what he described at [29] as “unchartered waters”. After referring to s.35 of the Interpretation of Legislation Act 1984 (Vic), ss. 17(2), 23(2), 23(3), 25(3) & 32 of the *Charter of Human Rights and Responsibilities Act* 2006 and the cases of *Baini v The Queen* (2012) 246 CLR 469, *Gul v The Queen* [2017] VSCA 153 per Ashley & Priest JJA, *DPP v Hudgson* [2016] VSCA 254 esp. at [111]-[112] and the bail case of *Ceylan* [2018] VSC 361 per Beach JA, Judge Gamble held at [60]-[61] (emphasis mine):

[60] “In light of the aforementioned matters, and having regard to the text, context and purpose of s.168A(1)(e)(iii) of the CPA, including the context provided by the relevant provisions of the Charter, I have concluded that the phrase ‘substantial and compelling reason’ employed in that section imposes a test that is more stringent than any test of ‘compelling reason’ and a somewhat less stringent test than that of ‘substantial and compelling circumstances’ in the original form of s.10A(2)(e) of the *Sentencing Act* 1991, as interpreted by the majority in *Hudgson*.

[61] In light of the Attorney-General’s use of the expression ‘this is similar to’, as opposed to ‘this is the same as’ the special reason exception available under the statutory minimum sentence provisions of the *Sentencing Act* 1991 in reference to the test of ‘substantial and compelling reason’ in the CYFA, I consider that the test under the equivalent provision of s.168A(1)(e)(iii) should be viewed as being not equivalent to or identical with the test of ‘substantial and compelling circumstances’ employed in the original form of s.10A(2)(e) of the *Sentencing Act* 1991, but not too far below it in terms of the stringency of the test. The use of the word ‘normally’ in sub-s.(3) of s.168A also supports this conclusion. I do not, however, intend to descend any further into an analysis of the test, for example by precisely defining the words employed, other than to say that **I consider the test to be a ‘relatively high’ as opposed to a ‘high’ or ‘very high’ one, and that the relevant provisions impose on an applicant something less than a ‘heavy’ onus or burden.**”

His Honour heard positive evidence about PT’s current circumstances from witnesses including Mr K, an African Program Coordinator for Parkville College, PT’s mother and Ms S, his Youth Justice Case Manager (see [64]-[67]) and appears to have accepted the bulk of the following matters put by PT’s counsel and detailed at [68]:

- The prosecution are unable to prove that PT was personally armed with a weapon during the aggravated home invasion, in the context of which PT had no prior convictions.
- PT has already served a period of 87 days pre-sentence detention in respect of that offending.
- PT is still only 18 years of age and faces a severe risk of damaging stigma if he receives a custodial sentence, particularly one involving adult imprisonment.
- PT comes from a refugee background, he has a history of self-harming on occasion, has witnessed his mother being subjected to family violence and has assumed a role within the family where he provides more support to his mother and a higher level of care for his siblings than would ordinarily be expected.
- Whilst on youth remand for the current offences, he impressed Mr K as very remorseful and sorry for what he had done. He was considered to have shown maturity, a good application to study and work, and a high level of engagement.
- Prior to being placed on probation for the earlier offending, he participated in a Children’s Court ordered Group Conference, in the course of which he was considered to have engaged well, reflected on his situation and shown remorse, insight and victim empathy.
- Putting to one side his further offending while subject to the probation order, he has complied with all of the requirements of that order. He has attended and engaged in weekly supervision appointments with Ms S in which he has discussed relevant triggers for his past offending. She considers that he has shown remorse and a willingness to assist with any referrals to relevant programs and agencies in order to address his substance abuse and reasons for offending, as well as for the purposes of enhancing his employment prospects. Since being placed on a community correction order on 20/12/2018 for subsequent offences – including an affray – committed on 10/11/2018, he has complied with all the conditions of that order.

- He is now living in the community with the benefit that being on both probation and a CCO provides.
- He enjoys strong family support, particularly from his mother and an aunt and currently has a supportive partner.
- He has very good prospects of rehabilitation.

Nevertheless his Honour refused PT's application, stating at [69]-[74] [emphasis added]:

"Clearly, not all witnesses were aware of the full details of all of PT's offending and to some extent, their observations as to his prospects of rehabilitation and level of remorse need to be tempered to some degree.

That said, I accept counsel's ultimate submission that his client is still very young with much room for further maturity, and that his prospects are very good. I would only add the rider that such prospects are also guarded. He will clearly need ongoing and significant support in the future if those prospects are to be realised.

I have had regard to the circumstances of PT's prior, current and subsequent offending and the circumstances in which it occurred.

I have also taken account of his age and personal circumstances, to the extent that they have been presented to this court. Whilst he is still very young, I also note that he fell at the upper limit of the age range covered by s.168A of the CPA.

Similarly, with respect to the matters in mitigation upon which he can likely rely.

After paying due regard to all of those matters, as well as to the meaning and effect of the test contained in s.168A(1)(e), I have concluded that the applicant PT has failed to discharge the onus that rests upon him. I do not consider that any of the matters relied on by his counsel, either alone or in combination are sufficient to meet the relatively high test of 'substantial and compelling reason'. They are matters which not infrequently arise in offending of this type and must be considered alongside other relevant factors, one of which is the applicant's preparedness to commit further serious offences while on bail for the current offences and probation for the earlier offences."

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10.2 Committal proceedings

In the event that the Court cannot or will not hear and determine an indictable offence summarily, s.356(3) of the CYFA requires the Court to conduct a committal proceeding into the charge. See also s.96 of the CPA. Section 516(1)(c) of the CYFA invests the Court with jurisdiction to conduct a committal proceeding into a charge against a child for an indictable offence and provides 2 alternative outcomes, namely the Court may either:

- (i) direct the accused be tried in the County Court or the Supreme Court and order that the accused be remanded in custody or released on bail until trial [an accused committed for trial for murder or attempted murder is tried in the Supreme Court; an accused committed for trial on any other charge may be tried in the County Court: see s.36A County Court Act]; or
- (ii) discharge the accused.

10.2.1 Purposes

The primary purpose of a committal proceeding has long been to ensure that no person is required to stand trial unless a *prima facie* case is made out. In *Barton v The Queen* (1980) 147 CLR 75 Gibbs ACJ & Mason J (with whom Aickin J concurred) said:

"Lord Devlin in *The Criminal Prosecution in England* was able to describe committal proceedings as 'an essential safeguard against wanton or misconceived prosecutions' (p.92). This comment reflects the nature of committal proceedings and the protection which they give to the accused". [p.99]

"It is now accepted in England and Australia that committal proceedings are an important element in our system of criminal justice. They constitute such an important element in the protection of an accused that a trial held without antecedent committal proceedings, unless justified on strong and powerful grounds, must necessarily be considered unfair." [p.100]

See also *Williams, Brincat and Traglia v DPP* [2004] VSC 516 at [18]-[36] per Gillard J. In that case the DPP had filed a presentment in the Supreme Court charging the 3 accused with murder. This had the effect of presenting the accused for trial directly without a committal proceeding having taken place. The accused made an oral application for a stay of the trial pending the hearing and determination of a committal proceeding. Gillard J granted a stay. At [54] His Honour said:

"It is now necessary to consider the interests of both the accused and the Crown and to determine where the balance of justice lies. As I have said, the accused have the burden of persuading this Court to grant a stay. History is on their side. It has always been the practice to hold a committal. It is rare not to do so: see *Barton v the Queen* at pp.100-1 per Gibbs ACJ & Mason J. Committal proceedings have always played an important part in the administration of the criminal law, affording a protection to the accused which of course includes the right to make a submission that an accused person should be discharged because the evidence is not sufficient. In addition, there are other benefits of having a committal: see *Barton v The Queen* at p.99 per Gibbs ACJ & Mason J; at pp.105-6 per Stephen J. The loss of these benefits would prejudice the accused, and this provides cogent evidence in favour of a stay being granted.

Section 97 of the CPA now defines the purposes of a committal proceeding as follows:

- (a) to determine whether a charge for an offence is appropriate to be heard and determined summarily;
- (b) to determine whether there is evidence of sufficient weight to support a conviction for the offence charged;
- (c) to determine how the accused proposes to plead to the charge;
- (d) to ensure a fair trial, if the matter proceeds to trial, by-
 - (i) ensuring that the prosecution case against the accused is adequately disclosed in the form of depositions;
 - (ii) enabling the accused to hear or read the evidence against the accused and to cross-examine prosecution witnesses;
 - (iii) enabling the accused to put forward a case at an early stage if the accused wishes to do so;
 - (iv) enabling the accused to adequately prepare and present a case;
 - (v) enabling the issues in contention to be adequately defined.

10.2.2 Nature of committal proceeding

A committal proceeding may be described as a judicially conducted administrative proceeding. In *Spautz v Williams* [1983] 2 NSWLR 506 at 515, Hunt J categorised a magistrate's decision to discharge or commit an accused for trial as "executive in its nature". In *Potter v Tural and the Magistrates' Court of Victoria* [2000] VSCA 227, Batt J categorised such an order as "ministerial and not judicial". See also *Phelan v Allen* [1970] VR 219; *Mokbel v DPP (Vic) & Ors* [2008] VSC 433 at [27] per Kaye J. In *R v Murphy* (1985) 158 CLR 596 at 616, the joint judgment of Gibbs CJ, Mason, Wilson, Brennan, Deane & Dawson JJ characterized a committal proceeding thus:

"The hearing of committal proceedings in respect of indictable offences by an inferior court is a function which is *sui generis*. Traditionally committal proceedings have been regarded as non-judicial on the ground that they do not result in a binding determination of rights. At the same time they have a distinctive judicial character because they are curial proceedings in which the magistrate or justices constituting the court is or are bound to act judicially and because they affect the interests of the person charged: *Sankey v Whitlam* (1978) 142 CLR 1 at 83-4....Even though they are properly to be regarded as non-judicial in character, committal proceedings themselves constitute the first step in the curial process, possibly culminating in the presentation of the indictment and trial by jury. They have the closest, if not an essential, connexion with an actual exercise of judicial power: see *Ammann v Wegener* (1972) 129 CLR at 437; *Barton v The Queen* (1980) 147 CLR 75 at 99."

Section 155 of the CPA states that nothing in the CPA alters the nature of a committal proceeding from that existing immediately before the commencement of s.155.

10.2.3 Hearings, case direction and procedure

Section 100(1) of the CPA sets out 6 types of hearings that may be held in a committal proceeding in the Magistrates' Court. Read in conjunction with s.528(2) of the CYFA, these hearing types and the associated procedures are also applicable in the Children's Court:

- (a) **Filing hearing** [ss.101+102]: The Court may fix a date for a committal mention hearing, fix a time for service of a hand-up brief and make any other order or give any direction the court considers appropriate.
- (b) **Special mention hearing** [s.153]: The Court may change the date fixed for any hearing in a committal proceeding, may make any order or give any direction the court considers appropriate and may immediately conduct a committal mention hearing or determine a committal proceeding.
- (c) **Compulsory examination hearing** [ss.103-106]: On application by the informant, the Court may make an order requiring a person to attend court for the purpose of being examined by or on behalf of the informant or producing a document or thing or both.
- (d) **Committal mention hearing** [ss.125-126]: The Court may-
 - (i) immediately determine the committal proceeding;
 - (ii) offer a summary hearing or determine an application for a summary hearing;
 - (iii) hear and determine an application for leave to cross-examine a witness, as to which see s.124];
 - (iv) fix a date for a committal hearing;
 - (v) hear and determine any objection to disclosure of material;
 - (vi) fix another date for a committal mention hearing;
 - (vii) make any other order or give any direction that the court considers appropriate.
- (e) **Committal case conference** [s.127]: A committal case conference, conducted by a judicial officer, should be conducted on the date of the committal mention hearing wherever practicable. The contents of a conference (except for evidence of offending alleged to have been committed during, or in connection with, the conference) are privileged unless all parties to the conference agree otherwise.
- (f) **Committal hearing** [ss.128-144]: The Court-
 - (i) may offer a summary hearing or determine an application for a summary hearing;
 - (ii) may hear evidence in accordance with s.130;
 - (iii) if the committal hearing proceeds, must determine, in accordance with s.141, whether there is evidence of sufficient weight to support a conviction;
 - (iv) may make any order or give any direction that the court considers appropriate.

Section 100(2) of the CPA requires the accused to attend all hearings in the committal proceeding unless excused under s.135 or s.330.

Sections 107-117 of the CPA regulate pre-hearing disclosure of the prosecution case. These involve provisions relating to-

- [ss.107-110] contents and service of hand-up brief [see also *Henderson v The Magistrates' Court of Victoria* [2004] VSC 544];
- [s.111] a continuing obligation on informant to disclose relevant information, documents or things;
- [ss.112-113] rules with respect to statements & recordings;
- [s.114] a *prima facie* prohibition of disclosure of address or telephone number of any person in anything provided to the accused;
- [s.115] inspection of exhibits;
- [ss.116-117] contents and service of plea brief.

Sections 118-124 of the CPA regulate case direction. Sections 118-119 relate to a case direction notice and contents thereof. This includes, in paragraphs (c) & (d) of s.119, a statement of the names of any witnesses that the accused intends to seek leave to cross-examine and, if the informant opposes leave being granted to cross-examine a specified witness, a statement of-

- (i) any issue identified by the accused to which the proposed questioning relates and any reason provided by the accused as to why the evidence of the witness is relevant to that issue;
- (ii) why cross-examination of the witness on that issue is justified; and
- (iii) why the informant opposes leave being granted.

Section 120 allows a late application for leave to cross-examine a witness if the court is satisfied it is in the interests of justice to do so. Section 123 prohibits the court from granting leave to cross-examine a witness who-

- (a) is a complainant in a proceeding that relates (wholly or partly) to a charge for a sexual offence; and
- (b) was a child or a person with a cognitive impairment when the criminal proceeding was commenced; and
- (c) made a statement a copy of which was served in the hand-up brief or whose evidence-in-chief or examination at a compulsory examination hearing was recorded and a transcript of the recording was served in the hand-up brief.

Section 124(1) provides that any other witness cannot be cross-examined without leave being granted. Section 124(3) sets out the two pre-requirements for the granting of leave. Six matters to which the court must have regard in determining whether cross-examination is justified are listed in s.124(4). Nine additional matters that must be considered where the proposed witness is under 18 years of age are listed in s.124(5).

Sections 129-140 of the CPA regulate procedure in a committal hearing. These include provisions relating to-

- [ss.130 & 132] evidence-in-chief and cross-examination of a witness;
- [s.131] a *prima facie* prohibition of disclosure of address or telephone number of any witness;
- [s.133] a restriction on the persons who may be present in court during evidence of a complainant in a proceeding that relates (wholly or partly) to a charge for a sexual offence;
- [s.134] failure of a witness to attend committal hearing [this may involve the issue of a summons under s.134(1)(b) of the CPA or a warrant to arrest under s.194 of the Evidence Act 2008 (Vic) to compel the attendance of the witness];
- [s.135] court's permission for accused to be absent from the proceeding for a specified period;
- [ss.136-138] accused's absconding etc or absence at close of prosecution case;
- [s.139] admissibility of non-oral evidence.

10.2.4 Joint committal proceedings for adult and child co-accused

An informal procedure had been developed by the Magistrates' Court and the Children's Court in which joint committals have sometimes been conducted in cases where:

- there is at least one adult accused and at least one child co-accused; and
- the charges the subject of the committal have included at least one of the seven death offences (murder, attempted murder, manslaughter, child homicide, homicide by firearm, arson causing death, culpable driving causing death).

The procedure in these joint committals had been rather cumbersome with the presiding Magistrate formally opening and closing the respective courts depending on whether it is counsel for an adult or counsel for a child who is cross-examining the witness and/or making submissions.

Since the commencement of the CPA this informal procedure has a legislative basis in new s.516A of the CYFA and ss.25(3) – 25(8) of the Magistrates' Court Act 1989 (as amended). Section 516A(1) provides that despite s.505(3) of the CYFA, the jurisdiction given by s.516(c) may be exercised concurrently with the jurisdiction of the Magistrates' Court to conduct a committal proceeding if-

- (a) the charges against each accused could properly be joined in the same indictment; and
- (b) 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 committed; and
 - (ii) is charged with one of the seven death offences; and
- (c) the Children's Court makes an order under s.516A(2) to that effect 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.

Section 516A(2) of the CYPA sets out the factors to be considered by the Court in deciding whether or not to order a joint committal. Section 516A(3) empowers the Children's Court to make an order for a joint committal on the application of a party or on its own motion. Section 516A(5) appears to contemplate the Children's Court making an order for joint committal proceedings prior to the Magistrates' Court. Section 516A(6) provides that if a joint committal proceeding is conducted:

- (a) the CYFA applies as far as practicable to the child; and
- (b) the CPA as far as practicable to the adult-

with any necessary modifications to ensure that the joint committal proceedings are conducted fairly and efficiently.

These joint committal proceedings are generally held in the Melbourne Magistrates' Court building in cases where none of the child accused are in custody and in the Melbourne County Court building in cases where at least one child accused is in custody.

10.2.5 Determination of committal proceeding – Test for committing for trial

Where accused elects to stand trial [s.143]: At any time after service on the accused of a hand-up brief, the accused may elect to stand trial by filing with the registrar a notice in the prescribed form. If the court considers that the accused understands the nature and consequences of the election, the court must commit the accused for trial. In the case of an election for trial, the court is not required to determine whether the evidence is of sufficient weight to support a conviction although of course that may be a relevant issue in deciding whether the accused understands the nature and consequences of an election.

Where hand-up brief used [s.141]: After the evidence for the prosecution is concluded, the court must enquire whether the accused intends to call any witnesses or make any submissions. If the accused is not legally represented, the court must inform the accused of-

- or her right to give sworn evidence or to say nothing in answer to the charge; and
- his and his or her right to call any witnesses to give sworn evidence for the accused.

Where plea brief used [s.142]: At the committal mention hearing the court must ask how the accused pleads to the charge to which the committal proceeding relates. If the accused does not plead guilty to the charge, the court must direct the informant to prepare and serve a hand-up brief.

Test for committing for trial [ss.141(4)(b), 141(4)(c) or 142(1)(b)]: The test as to whether an accused is to be committed for trial on:

- the indictable offence with which he or she has been charged; or
- some other indictable offence-

is whether the evidence is of **sufficient weight to support a conviction** for that offence. If it is not, the accused must be discharged.

In *Thorpe v Abbotto* (1992) 106 ALR 239 at 245 Lockhart J, applying dicta from the judgment of Wilcox J in *Forsyth v Rodda* (1988) 37 A Crim R 50 and from the Full Court on appeal in that case (1989) 87 ALR 699, explained the test as follows:

"[A] magistrate conducting a committal, having heard the evidence for the prosecution and for the defence, and having formed the opinion that there are two hypotheses open on the material before him, one consistent with guilt and the other with innocence, is not necessarily bound to discharge the defendant.

The task of a committing magistrate is essentially to sift the wheat from the chaff: cases so weak that a jury properly instructed could not possibly convict the defendant and cases where it could. It is not the task of a magistrate conducting a committal proceeding to assume the role of a jury in a criminal trial."

In *Forsyth v Rodda* (1988) 37 A Crim R 50 at 68 Wilcox J said that the test of sufficient weight was designed to allow magistrates to stop at a preliminary stage those cases "where the prospect of a conviction was minimal but with a significant strain on the persons involved in the trial and a cost to the community".

Procedure before and on committing accused for trial: Before committing an accused for trial, s.144(1) requires the court, in the manner prescribed by rules of court, to-

- (a) ask the accused whether he or she pleads guilty or not guilty to the charge; and
- (b) inform the accused that the sentencing court may take into account a plea of guilty and the stage in the proceeding at which the plea or an intention to plead guilty was indicated.

On committing an accused for trial, s.144(2) requires the court to-

- (a) if the accused is not represented by a legal practitioner, explain the importance of obtaining legal representation for the trial, advise of the right, if eligible, to legal aid and warn that if the accused wishes to be legally aided, it is his or her responsibility to make application to Victoria Legal Aid as soon as possible;
- (b) explain to the accused, in a manner likely to be understood by the accused-
 - (i) the provisions of s.190 (alibi evidence) if relevant;
 - (ii) the provisions of ss.342, 344 & 346 if relevant; and
 - (iii) any other information required to be given by the rules of court;
- (c) if the accused is a natural person, remand the accused in custody or grant bail until trial or a date before trial fixed by the court;
- (d) if the accused is a corporation, order it to appear by a representative or a legal practitioner on the day on which the trial is listed to commence or any other day specified by the court.

Section 145 of the CPA requires the court to transfer all proceedings in respect of charges against the accused for related summary offences to the court to which the accused has been committed for trial unless the informant and the accused agree otherwise.

Once an accused has been committed for trial, the accused has no entitlement to a summary hearing: see the analysis of Dixon J in *Gild v Magistrates' Court of Victoria* [2015] VSC 84. In that case at [45] his Honour also held: "There is no entitlement under the *Criminal Procedure Act*, or otherwise, to a committal hearing in advance of a summary hearing and the provisions that enable a committal hearing to continue as a summary hearing do not require otherwise."

10.2.6 Effect of discharge after committal

Discharge does not mean dismissal of the charge. A committal does not result in a binding determination of rights, either of the accused or the Crown. The principle of *res judicata* does not apply. The Director of Public Prosecutions may sign a presentment in respect of a charge and serve a Notice of Trial on the accused notwithstanding that the accused was discharged at committal. Conversely, the DPP may elect to enter a *nolle prosequi* (a notice of unwillingness to proceed) and not continue prosecution of an accused even though the accused was directed at committal to be tried. A *nolle prosequi* effectively acts as a stay of the proceedings but is not a bar to the proceedings being later reinstated if further evidence comes to light. What Dawson J. said of the position in NSW in *Grassby v R* (1989) 168 CLR 1 at 14-15 applies equally to Victoria:

"Committal for trial does not in New South Wales determine, as it now effectively does in the United Kingdom, whether a person charged with an offence shall be indicted. He will, of course, ordinarily stand trial if committed, although not necessarily so, and a person discharged may nevertheless be indicted. The powers of a magistrate in committal proceedings are thus, strictly speaking, still confined to determining whether the person charged shall be discharged, committed to prison to await trial or admitted to bail and does not involve the exercise of a judicial function.

The importance of a committal in the criminal process should not, however, be underrated. It enables the person charged to hear the evidence against him and to cross-examine the prosecution witnesses. It enables him to put forward his defence if he wishes to do so. It serves to marshal the evidence in deposition form. And,

notwithstanding that it is not binding, the decision of a magistrate that a person should or should not stand trial has in practice considerable force so that the preliminary hearing operates to effectively to filter out those prosecutions which, because there is insufficient evidence, should not be pursued."

10.2.7 Taking evidence after accused committed for trial – "Basha" inquiry

Subsequent to the decision in *R v Basha* (1989) 39 A Crim R 337, a practice has developed in this State - in limited circumstances - of a pre-trial examination of witnesses before the trial judge. This is usually, but not inevitably, in cases where additional evidence has come to light after an accused has been committed for trial. In *Williams, Brincat and Traglia v DPP* [2004] VSC 516 at [40]-[41] Gillard J described the genesis and purpose of the so-called "Basha" inquiry and outlined the circumstances in which it might be ordered:

"[40] Mr Basha was committed for trial for supplying heroin. A committal took place. The person who received the heroin was an undercover police officer who did not give evidence at the committal. Prior to trial the prosecution informed the accused of its intention to call the officer as a witness and supplied the accused with a statement of evidence. The District Court Judge held that the calling of the witness by the prosecution in the circumstances was unfair and directed the case be returned for a fresh committal proceeding. The DPP appealed to the Court of Criminal Appeal which held that the District Court Judge could not direct the case be returned for a fresh committal proceeding, but recognised that he had the power to stay the proceeding to ensure a fair trial. The question then arose as to how the prejudice to a fair trial could be removed and the appeal Court held that it would have been open to the Judge to have permitted counsel for the accused to cross-examine the new witness on a voir dire before he was called at trial. This procedure has been used often in this State since, and is known as a Basha inquiry. The practice was referred to with approval in *DPP v Denysenko and Ors* [1998] 1 VR 312 at 316-7. Indeed the practice is not confined to one witness...

[41]...It should be pointed out that Basha inquiries are not as of right. They are only appropriate where to deny the accused the opportunity would result in an unfair trial. It is observed that they usually only take place where notice of additional evidence is given after committal. I would not confine the procedure to additional evidence because it is grounded on overcoming a possibility of an unfair trial but it would be only in special circumstances that an inquiry would take place in the absence of additional evidence. The test must always be – would the trial be unfair if a Basha inquiry did not occur? See *R v Sandford* (1994) 33 NSWLR 172 at 181 per Hunt CJ at CL.

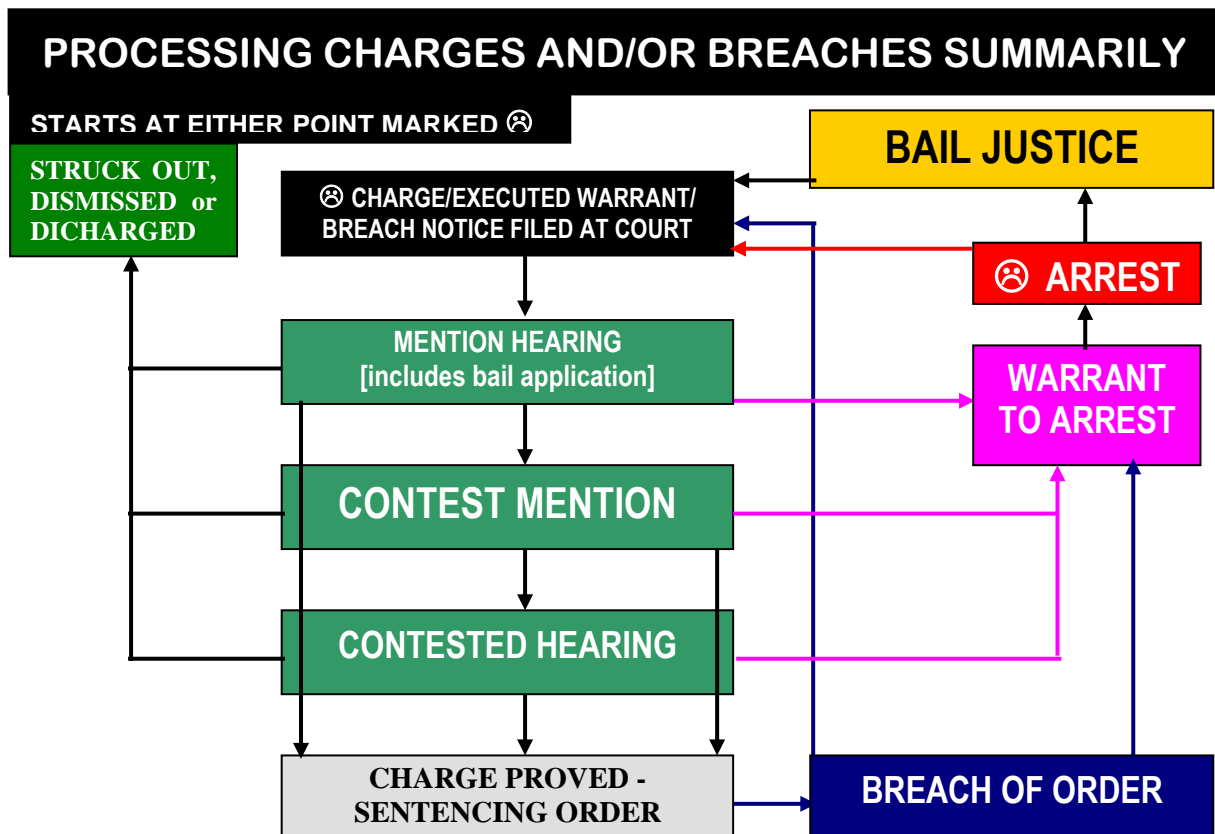
The "Basha" inquiry was not authorized by legislation. However, since 01/01/2010 a procedure has been introduced by ss.149-152 of the CPA to allow the Magistrates' Court – and read in conjunction with s.528(2) of the CYFA, the Children's Court as well – to allow an accused who has been committed for trial to apply to the committing court for the order that the evidence of an additional person be taken at a time and place fixed by that court. The writer is unsure whether these provisions were intended to cover the field formally occupied by the common law "Basha" inquiry. Whether they were so intended will have to await a subsequent judicial determination but it is to be noted that in the above dicta Gillard J specifically did not confine a "Basha" inquiry to a case involving additional evidence.

10.3 Criminal Division summary proceedings

10.3.1 Jurisdiction

Sections 516(1)(a) & 516(1)(b) of the CYFA – read in conjunction with s.356 – invest the Court with jurisdiction to hear and determine summarily all charges against a child for offences other than the seven death offences (murder, attempted murder, manslaughter, child homicide, homicide by firearm, arson causing death, culpable driving causing death). As previously stated, ss.356(3)(a) & 356(4) of the CYFA require the Court to hear and determine summarily any other indictable offence unless:

- (a) before the hearing of any evidence the child objects or, if the child is under the age of 15 and is not legally represented, a parent objects on the child's behalf; or
- (b) at any stage the Court considers that the charge is unsuitable by reason of exceptional circumstances to be heard and determined summarily.



10.3.2 Hearings

The processing summary of charges and/or breaches of sentencing orders involves one or more of the following court hearings:

- (1) **Mention:** The first hearing at court is called a "mention". Witnesses are generally not called at a mention unless it also involves an application in relation to bail. A significant proportion of cases are completed at the first mention hearing by: (i) the accused entering a plea of guilty, (ii) the Court hearing a summary of the offence(s) from the prosecutor and (iii) a plea being made on behalf of the accused. It is not uncommon for cases to be adjourned for "further mention".

Since the commencement of the CPA there has been a legislative basis for a "mention hearing" in the Children's Court. Section 53 of that Act, when read in conjunction with s.528(2) of the CYFA, provides that at a mention hearing the Children's Court may:

- (a) if the offence is an indictable offence that may be heard and determined summarily, grant a summary hearing;
- (b) proceed immediately to hear and determine the charge;
- (c) fix a date for a contest mention hearing;
- (d) fix a date for a summary hearing of the charge;
- (e) make any other order or give any direction that the court considers appropriate.

- (2) **Diversion:** The Police Cautioning Programme described in chapter 7.4 provides a police-initiated mechanism for the diversion of youth offenders from the Court process altogether. However, if a charge has been laid against a youth accused there is another diversion mechanism available at law provided that no formal plea has yet been taken but the accused acknowledges to the Court responsibility for the offence. This Court diversion process is discussed in chapter 10.7.

- (3) **Contest mention:** If the accused indicates an intention to contest some or all of the charges, the case is generally adjourned for a "contest mention". Speaking generally, the purposes of a contest mention are:
 - i. to give the parties a further opportunity to negotiate a resolution of the case without the need for a fully contested hearing;
 - ii. to enable an informal mediation to be conducted by a magistrate with the aim of enabling the case to be resolved without a fully contested hearing; this may include provision of a sentence indication;

- iii. in the event that the case cannot be resolved, to attempt to narrow the issues between the prosecution and the defence and to settle the mechanics of the case (e.g. appropriate length of time reserved for the number of witnesses who are to be called, whether an interpreter is required, whether the record of interview is in issue etc.).

The magistrate who hears a contest mention will generally not hear a contested hearing in the same case without the consent of all parties: cf. s.522A(3) of the CYFA.

In the absence of express legislative authorization, the basis of the contest mention process has sometimes been queried although it had been judicially endorsed in several cases in superior courts.

In *The Herald & Weekly Times Ltd & Andrew Bolt v Jelena Popovic* [2003] VSCA 161 - an appeal in a defamation case - the nature of a contest mention was a critical issue. In the leading judgment Gillard AJA said at [337]:

"A contest mention hearing is designed to crystallize the issues, narrow the issues if possible, ascertain the likely plea, and if appropriate to give some indication of a likely sentence, although the indication should not be too specific. Importantly, a magistrate who conducts a contest mention is disqualified from hearing the subsequent contest, unless the parties consent."

Winneke P said at [14]:

"[Magistrate Popovic] was engaged in what is called a 'contest mention' in which the relevant parties are drawn together to frankly exchange views in the hope and expectation that (inter alia) the future conduct of the matter might be shortened; and that ultimately the charges might bear some relationship to the criminality of the conduct of the alleged offending."

In *DPP v Cummings* [2006] VSC 327 at [70] Kellam J had said that there was no doubt that the use of "contest mention hearings" in the Magistrates' Court had proved to be highly effective in terms of dealing with issues and suggested that, if necessary, appropriate legislation and rules should be put in place to support contest mentions. His Honour's suggestion has now been adopted. Section 55 of the CPA, read in conjunction with s.528(2) of the CYFA, sets a legislative framework for the conduct of one or more "contest mention hearings" in the Children's Court in any proceeding for a summary offence or for an indictable offence that may be heard and determined summarily.

Section 55(3) empowers the court at a contest mention hearing to:

- (a) require the parties to provide an estimate of the time expected to be needed for the hearing of the charge;
- (b) require the parties to advise as to the estimated number and the availability of witnesses (other than the accused) for the hearing of the charge and whether any witnesses are from interstate or overseas;
- (c) request each party to indicate the evidence that party proposes to adduce and to identify the issues in dispute;
- (d) require the accused to advise whether the accused is legally represented and has funding for continued legal representation up to and including the hearing of the charge;
- (e) require the parties to advise whether there are any particular requirements of, or facilities needed for, witnesses and interpreters;
- (f) order a party to make, file in court or serve (as the case requires) any written or oral material required by the court for the purposes of the proceeding;
- (g) allow a party to amend a document that has been prepared by or on behalf of that party for the purposes of the proceeding;
- (h) if the court considers that it is in the interests of justice to do so, dispense with or vary any requirement imposed on a party by or under this Part;
- (i) require or request a party to do anything else for the case management of the proceeding.

Section 55(4) requires the accused to attend each contest mention hearing either by being physically present in court or, if authorized to do so under the Evidence (Miscellaneous Provisions) Act 1958, by appearing or being brought before the court by audio visual link.

- (4) Contested hearing:** A contested hearing generally involves the calling of *viva voce* evidence, although occasionally the hearing may be restricted, with the consent of the parties, to legal submissions based on an agreed statement of facts.

A contested case in the Criminal Division of the Children's Court is conducted in the same way as a contested criminal case in the Magistrates' Court. The prosecution usually calls one or more witnesses in support of its case and each may be cross-examined by the accused or his or her legal representative. If at the close of the prosecution case there is a case to answer – as to which see below – the accused is entitled to call witnesses and/or give evidence. However, there is no obligation on the accused to do so.

If an accused intends to call a person as an expert witness at the hearing of a charge, s.50 of the CPA requires the accused to serve on the informant and file in court a copy of the statement of the expert witness in accordance with s.50(2).

An accused who is represented by a legal practitioner on a summary hearing must not without leave of the court give evidence personally or adduce evidence from another witness in support of an alibi unless the accused has given notice of alibi in the required manner: see s.51 of the CPA.

In a summary hearing there is no distinction between the Magistrates' Court and the Children's Court in either the nature of the evidence that may be adduced, the standard of proof that is required or the rules of evidence that are applicable. On the summary hearing of a charge, whether indictable or summary, the Children's Court must be satisfied of a child's guilt on proof beyond reasonable doubt by relevant and admissible evidence: s.357(1) of the CYFA. If the court is not so satisfied, it must dismiss the charge: s.357(2). For a case in which reasonable doubt was the central issue see the decision of the High Court in *George Pell v DPP* [2020] HCA 12; (2020) 376 ALR 478, especially at [58] where the unanimous judgment stated: "It suffices to refer to the evidence concerning [3 aspects of undisputed evidence] to demonstrate that, notwithstanding that the jury found A to be a credible and reliable witness, the evidence as a whole was not capable of excluding a reasonable doubt as to the applicant's guilt." See also *Azzopardi v The Queen* (2001) 205 CLR 50 at [71]-[73]; *GBP v The Queen* [2020] HCA 40; *Hubbard v The Queen* [2020] VSCA 303.

The procedure for the summary hearing of a case in the Magistrates' Court is governed by ss.65-87 of the CPA. The majority of these sections are also applicable to the Children's Court by operation of s.528(2) of the CYFA.

SECTION	SUBJECT MATTER
62	Charge must be read or explained to unrepresented accused before plea.
63	Legal practitioner may enter plea on behalf of the accused.
64	If an accused refuses to plead, the court may order a plea of not guilty to be entered on the accused's behalf.
65	With leave of the court and before any evidence is given, prosecutor may give opening address and accused may give opening address in reply. The court may limit the length of such addresses.
66-67	Accused is entitled to respond after close of prosecution case. If accused is legally represented the court may question the legal practitioner to determine whether the accused wishes: (a) to make a submission there is no case to answer; (b) to give evidence or call other witnesses to give evidence or both; (c) not to give evidence or call other witnesses.
68	If accused is not legally represented, immediately after close of prosecution case court must inform accused that (a) accused has the right to answer the charge and must choose either to give sworn evidence or to say nothing in answer to the charge; (b) in either case accused may call witnesses to give sworn evidence.
69	Procedure for joint hearings if no case submission made
70	When called on by the court to do so, the accused must indicate the names of the accused's witnesses (other than the accused) and the order in which those witnesses are to be called.
71	If accused intends to give evidence or call witnesses or both, court may grant leave to accused to give an opening address. Accused is not required to give evidence before any other witness is called on behalf of accused.
72	Evidential burden on accused for exception, exemption, proviso, excuse or qualification to suggest a reasonable possibility of the existence of facts that, if they existed, would establish the exception etc.

SECTION	SUBJECT MATTER
73-75	Prosecutor and accused (in that order) may give closing addresses with leave of the court after the close of all evidence. Court may grant leave to prosecutor to the prosecutor to make a supplementary address if the accused asserts facts in a closing address which are not supported by any evidence. The court may limit the length of all such closing addresses.
77-78	Criminal record of accused and proof thereof.
79-87	Procedure in case of non-appearance of informant or accused.

Section 356(5) of the CYFA provides that if the Court hears and determines summarily a charge against a child for an indictable offence, the Court may find the child not guilty of the offence charged but guilty of having attempted to commit the offence charged.

Although traditionally witnesses give *viva voce* evidence in summary hearings by attending in person in the court room and being questioned by the parties or their legal representatives, a number of statutory provisions do allow alternative arrangements in certain circumstances:

- Sections 42D to 42I of the Evidence (Miscellaneous Provisions) Act 1958 (Vic) provide for the appearance, the giving of evidence or making of a submission in a legal proceeding by audiovisual link or audio link by any person other than the accused in a criminal proceeding [see also s.37D and see Children's Court (Evidence – Audio Visual and Audio Linking) Rules 2008 [S.R. No.11/2008]. In *R v Cox & Ors (Ruling No.6)* {also known as *R v Cox, Sadler, Ferguson & Ferguson*} [2005] VSC 364 Kaye J summarized at [7] the principles on the application of s.42E which he considered were to be elucidated from the cases of *R v Kim* (1998) 104 A Crim R 233, *R v Weiss* [2002] VSC 15, *R v Goldman* [2004] VSC 165 & *R v Strawhorn* [2004] VSC 415. These principles are set out in paragraph 3.5.12.1 of these materials. See also *DPP v Finn (Ruling No.1)* [2008] VSC 303.
- If a witness is under 18 years of age or has a cognitive impairment, ss.366-368A of the CPA allow for the witness' evidence-in-chief to be by a pre-recorded audiovisual or audio recording in a criminal proceeding that relates wholly or partly to a charge for-
 - a sexual offence; or
 - an indictable offence which involves an assault on, or injury or a threat of injury to, a person; or
 - an offence against ss.68, 69 or 70AC of the Crimes Act 1958; or
 - any offences against ss.23 or 24 of the Summary Offences Act 1966 if those offences are related offences to an offence specified in paragraph (a), (b) or (c) despite whether any such related offences have been withdrawn or dismissed.

The trial judge has an "overriding obligation" to ensure that such procedures do not expose the accused to the risk of an unfair trial: *R v NRC* [1999] 3 VR 537 at 540. In *R v Lewis* [2002] VSCA 200 the Court of Appeal said that such recordings should not be admitted as exhibits in a trial but should simply be marked 'for identification'. See also *R v BAH* [2002] VSCA 164.
- Sections 353-358 of the CPA prohibit an accused who is not legally represented from cross-examining in person a protected witness in a criminal proceeding that relates (wholly or partly) to a charge for-
 - a sexual offence; or
 - an offence where the conduct constituting the offence consists of family violence within the meaning of the Family Violence Protection Act 2008.

A "protected witness" means the complainant, a family member of the complainant or of the accused or any other witness whom the court declares under s.355 to be a protected witness.
- Sections 359-365 of the CPA allow the Court to order – on the application of a party or on its own motion – alternative arrangements for any witnesses (including complainants) to give evidence in a criminal proceeding that relates (wholly or partly) to a charge for-
 - a sexual offence; or
 - an offence where the conduct constituting the offence consists of family violence within the meaning of the Family Violence Protection Act 2008; or
 - an offence against ss.17(1) or 19 of the Summary Offences Act 1966.

Under s.360 such arrangements may include but are not restricted to-

 - permitting the evidence to be given from a place other than the courtroom by closed-circuit television or other facilities that enable communication between that place and the courtroom;
 - using screens to remove the accused from the direct line of vision of the witness;

- (3) permitting a person, chosen by the witness and approved by the court for this purpose, to be beside the witness while the witness is giving evidence, for the purpose of providing emotional support to the witness;
- (4) permitting only persons specified by the court to be present while the witness is giving evidence;
- (5) requiring legal practitioners not to robe;
- (6) requiring legal practitioners to be seated while examining or cross-examining the witness.

Sections 339-352 of the CPA limit the evidence which can be adduced from a complainant in a criminal proceeding that relates (wholly or partly) to a charge for a sexual offence. Section 341 prohibits any questions as to the general reputation of the complainant with respect to chastity. Sections 342 prohibits – unless the court grants leave having regard to the matters in s.349 – any evidence as to the sexual activities (whether consensual or non-consensual) of the complainant other than those to which the charge relates. For an analysis of ss.342 & 349 see *R v ERJ* (2010) 200 A Crim R 270; [2010] VSCA 61 which was approved but distinguished by the Court of Appeal in *DPP v Roberts* [2012] VSCA 313.

10.3.3 'No-case' procedure

There is no difference between the Children's Court and the Magistrates' Court in the 'no-case' procedure in criminal cases. If, at the close of the prosecution case, "a submission is made that there is 'no case to answer', the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he *could* lawfully be convicted. That is really a question of law." See the unanimous judgment of Dixon CJ, Webb, Fullagar, Kitto & Taylor JJ in *May v O'Sullivan* (1955) 92 CLR 654 at 658, cited with approval in the judgment of Young CJ, Anderson & Gobbo JJ in *Attorney-General's Reference (No.1 of 1983)* [1983] 2 VR 410 at 414. In *May v O'Sullivan* the High Court continued (at p.658): "After the prosecution has adduced evidence sufficient to support proof of the issue, the defendant may or may not call evidence. Whether he does or not, the question to be decided in the end by the tribunal is whether, on the whole of the evidence before it, it is satisfied beyond reasonable doubt that the defendant is guilty. That is a question of fact." And later in *Attorney-General's Reference (No.1 of 1983)* the Full Court said (at p.416): "Where the same tribunal is judge of both law and fact the tribunal may be satisfied that there is a case for an accused to answer and yet, if the accused chooses not to call any evidence, refuse to convict upon the evidence. That this is the correct logical analysis appears clearly from *May v O'Sullivan*. There is no distinction between cases sought to be proved by circumstantial evidence and other cases."

In the High Court of Australia in *Doney v. The Queen* (1990) 171 CLR 207 at 214, the joint judgment of Deane, Dawson, Toohey, Gaudron & McHugh JJ enunciated a very low threshold 'no case to answer' test:

"It follows that, if there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty."

In *R v Cengiz* [1998] 3 VR 720 at 735 Harper AJA – applying *Doney v R* – held that "the judge must take the case away from the jury if and only if an inference consistent with innocence is not only open on the...evidence but is also an inference which cannot be rationally excluded". In *Attorney-General's Reference (No.1 of 1983)* [1983] 2 VR 410 at 415 the Full Court held that "if the Crown has led evidence upon which the accused *could* be convicted, a trial judge should not rule that there is no case to answer or direct the jury to acquit simply because he thinks that there could be formulated a reasonable hypothesis consistent with the innocence of the accused which the Crown has failed to exclude. In *R v Bond (Ruling No 15)* [2012] VSC 119 at [4] T Forrest J said that he had difficulty reconciling these two tests – between which he "perceive[d] to be tension" – but preferred and applied the test in *R v Cengiz*.

In the Supreme Court of Victoria in *R v Ellis* [2008] VSC 406 at [3], Coghlan J – a former Director of Public Prosecutions – criticized the test in *Doney*:

"Much criticism has been made of that test on the basis that it set a standard which is too low and does not provide sufficient basis for reasoned and appropriate judicial

intervention. There is much in that criticism. I do not, however, think that it would make any difference to the conclusion which I have reached in this case.”

In *R v Vella* [2007] VSC 585 at [22] Coghlan J somewhat grudgingly applied the *Doney* test:

“The test to be applied to a no case submission is well established. Although some disquiet has been expressed from time to time about the test being unfavourable to accused persons, the law continues to be that set out in *R v Doney*. I suppose the main thing to be said about *Doney* is the recognition of the primacy of the jury when deciding questions of fact. It is also one of the few remaining authoritative cases which were decided by all the members of the Court who sat.”

One further criticism of the test in *Doney v The Queen* appears in footnote 74 to the judgment of Callinan J in *Antoun v The Queen* [2006] HCA 2 where his Honour also appeared to draw a distinction between the practice in Magistrates’ Courts and that in the superior courts:

“In *Doney v The Queen*, this Court rejected the more robust approach to the contrary that has been adopted in the United Kingdom and which is allowed to Magistrates in committal proceedings in New South Wales...It is seriously open to question, in my opinion, whether it is in the public interest, having regard to the expense of criminal proceedings and the jeopardy to an accused, of permitting a tenuous, inherently weak or vague case to go to a jury, and whether, in view of the grant to Magistrates, but not to judges, of a power to end a criminal case before the time when a jury is to decide it, the approach in the United Kingdom or some like approach ought not to be adopted in this country.”

In speaking of “the grant to Magistrates, but not to judges, of a power to end a criminal case before the time when a jury is to decide it”, it may be that Callinan J was referring to the power described by O’Byrne J in *Benney v Dowling* [1959] VR 237 at 242:

“It is common practice both in courts of petty sessions and in trials before a jury that at the end of the case for the informant or prosecution, although the evidence as it stands might justify a conviction, for the magistrate or a jury, very often at the suggestion of the trial judge, to say that he or it does or do not require to hear any evidence for the defence and to acquit at that stage. That is a very convenient practice and I do not think that the passage [cited above] from *May v O’Sullivan* was intended to say that there is anything improper in such action.”

The reference by O’Byrne J in *Benny v Dowling* to “the suggestion of the trial judge” leading a jury to acquit at the end of the prosecution case has more recently been known as a “Prasad direction”. It was discussed by Kaye J in *DPP v Gillespie (Ruling No 2)* [2012] VSC 553 at [9]-[11] as follows:

[9] A *Prasad* direction of course derives its genesis from the judgment of King CJ in *Prasad* (1979) 23 SASR 161 at 163. In that case His Honour identified the long-standing principle that it is open to a jury at any stage after the close of the Crown case to return a verdict of not guilty. His Honour stated that in each case a trial judge has a discretion to inform the jury of that right after the close of the Crown case.

[10] In a subsequent decision of *Pahuja* (1987) 30 A Crim R 118 at 145 his Honour stated that, if such a direction is to be given, it must be put simply and shortly. His Honour stated, using his words, that there should only be a ‘passing glance’ at the law and a ‘brief reference’ to the features of the evidence which has led the judge to give that direction.

[11] Generally, for those reasons, trial judges are cautious in reaching the conclusion that a case is appropriate to give a *Prasad* direction.”

However, in *Director of Public Prosecutions Reference No 1 of 2017* [2019] HCA 9 the High Court held unequivocally that-

“The direction commonly referred to as the ‘Prasad direction’ is contrary to law and should not be administered to a jury determining a criminal trial between the Crown and an accused person.”

The rationale for this decision of Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon & Edelman JJ is summarised at [56]-[57] of their joint judgment:

"While the decision in *Prasad* anticipated the decision of this Court in *Doney*, Maxwell P was right to hold – *Director of Public Prosecutions Reference No 1 of 2017* (2018) 55 VR 551 at 579 [93] – that King CJ's obiter dictum does not cohere with the analysis in *Doney*. The practice of permitting the trial judge to direct an acquittal based upon the judge's assessment of the insufficiency of the evidence to support a conviction was rejected in *Doney* as wrongly "enlarging the powers of a trial judge at the expense of the traditional jury function": (1990) 171 CLR 207 at 215 per Deane, Dawson, Toohey, Gaudron and McHugh JJ. If there is evidence (even if tenuous or inherently weak or vague) that is capable of supporting a verdict of guilty, the matter *must* be left to the jury: *Doney v The Queen* (1990) 171 CLR 207 at 214-215 per Deane, Dawson, Toohey, Gaudron and McHugh JJ. This analysis does not sit readily with conferring on the trial judge a discretion, based upon the judge's assessment of the cogency of the evidence to support a conviction, to inform the jury that they may return a verdict of not guilty without hearing more. It is true that, in the circumstance of a *Prasad* direction, the jury and not the judge would make the decision as to whether the evidence was so unconvincing as not to provide a safe foundation for conviction. But...it is difficult to exclude the possibility that a jury might be influenced by what the judge said to them about the quality of the evidence and might take the judge's invitation to stop the trial as an authoritative pronouncement that the evidence is so unsatisfactory that it is appropriate for them to stop the trial on that basis. The exercise of the discretion to give a *Prasad* direction based upon the trial judge's estimate of the cogency of the evidence to support conviction is inconsistent with the division of functions between judge and jury and, when given over objection, with the essential features of an adversarial trial.

Moreover, to invite a jury to decide to stop a trial without having heard all of the evidence, without having heard counsel's final addresses, and without the understanding of the law and its application to the facts that only the judge's summing-up at the end of the trial can give them, is to invite the jury to decide the matter from a basis of ignorance which may be profound: *Seymour v The Queen* (2006) 162 A Crim R 576 at 595 [66]. If evidence taken at its highest is capable of sustaining a conviction, it is for the jury as the constitutional tribunal of fact to decide whether the evidence establishes guilt beyond reasonable doubt. A jury is not fully equipped to make that decision until and unless they have heard all of the evidence, counsel's addresses and the judge's summing-up. Anything less falls short of the trial according to law to which both the accused and the Crown are entitled."

If *Benney v Dowling* is still good law *post R v Williams* [1983] 2 VR 579 at 584 per Gobbo J and *post Doney v The Queen* and *post Director of Public Prosecutions Reference No 1 of 2017* – it seems to the writer that is a big if – there is no distinction between its applicability in the Magistrates' Court and in the Children's Court.

The writer agrees with the above criticisms of *Doney* insofar as far as they apply to summary hearings in the Magistrates' Court or the Children's Court. It has always seemed to the writer that the test of "no case to answer" in criminal proceedings cannot be reconciled with that in civil proceedings. Of the latter, Kaye J said in *Oakley and Anor v Insurance Manufacturers of Australia Pty Ltd* [2008] VSC 68 at [3]:

"The test which is applicable, where a judge is sitting without a jury, is less stringent. In such a case the judge may uphold a no case submission, notwithstanding that the evidence, on the view most favourable to the respondent party, could support a judgment in favour of the respondent party: see *Protean (Holdings) Limited (Receivers and Managers Appointed) and Ors v American Home Assurance Co* [1985] VR 187, 215 (Young CJ), 235-6 (Fullagar J), 238-9 (Tadgell J); *Jones v Dunkel* (1959) 101 CLR 298, 330-331 (Windeyer J); *Clarey v Permanent Trustee Co Limited and Anor* [2005] VSCA 128, [72]."

See also *The Queen v The Herald & Weekly Times Pty Ltd & Ors (Ruling No 2)* [2020] VSC 800 at [72]-[75] per John Dixon J.

The writer can see no logical reason why a less stringent test of "no case to answer" should not apply in non-jury criminal trials. Why should a judicial trier of fact apply an objective test in criminal proceedings but a subjective test in civil proceedings? There is no obvious answer.

For illustrations of the operation of the “no case to answer” principles, see *R v Martin (Ruling)* [2005] VSC 121 at [41]-[43] per Kaye J; *DPP v Federico* [2005] VSC 470 at [4] per Cummins J; *R v Faure & Goussis (Ruling No 2)* [2006] VSC 167 at [2] per Teague J; *R v Barnes* [2008] VSC 66 at [3]-[6] per Forrest J; *R v Mocenigo (Ruling No 4)* [2012] VSC 442 per Lasry J; *DPP v Gillespie (Ruling No 2)* [2012] VSC 553 per Kaye J; *R v Ray & Vella (Ruling No.3)* [2014] VSC 178 per T.Forrest J; *DPP v Byrne No.3* [2016] VSC 346.

In *R v Benbrika & Ors (Ruling No.27)* [2008] VSC 456 Bongiorno J discussed a number of Victorian & English cases in which the question arose whether in a joint trial one accused should be prohibited from arguing a no-case submission until after the course to be pursued by all other accused has been announced and any evidence to be led by any of them has been put before the jury. In order to clarify the procedure for joint hearings if a no case submission is made, s.69 of the CPA, read in conjunction with s.528(2) of the CYFA, provides as follows:

- (1) After the close of the case for the prosecution, an accused who wishes to make a submission that there is no case to answer must do so at that time.
- (2) If, after the Children’s Court has ruled on all no case submissions, charges against 2 or more accused remain to be determined, each accused must advise the court, in response to questioning under s.67 or s.68, which of the options referred to in s.66(b) [give evidence or call other witnesses or both] or s.66(c) [not give evidence or call other witnesses] the accused elects to take.

In *DPP v Singh* [2012] VSCA 167 the trial judge ruled following the close of the Crown case that the respondent had no case to answer on a charge of rape. The Crown sought to bring an interlocutory appeal in respect of the ruling. Bongiorno JA, with whom Almond AJA agreed, held that the Crown’s application was incompetent, saying at [8]:

“To construe a provision granting such a right of appeal as permitting an appeal in respect of a no case ruling would offend the fundamental principle that the Crown does not have a right of appeal from an acquittal.”

See also *R v Cheng* (1999) 48 NSWLR 616; *DPP (Vic) v Garde-Wilson* (2006) 15 VR 640; *R v Stone* (2005) 64 NSWLR 413; *R v Bufton (Ruling No 3)* [2019] VSC 396.

10.3.4 Sentence indication

There has traditionally been some unease about a court giving a sentence indication although in more recent years that has been a central feature of many contest mention hearings. In order to provide a statutory foundation for this practice, ss.60-61 of the CPA have been introduced.

Section 60 of the CPA provides that at any time during a proceeding for a summary offence or an indictable offence that may be heard and determined summarily, the Magistrates Court may indicate that, if the accused pleads guilty to the charge for the offence at that time, the court would be likely to impose on the accused-

- (a) a sentence of imprisonment that commences immediately; or
- (b) a sentence of a specified type.

Although the issue is arguable, the writer considers that the reference to “type of sentence” probably does not extend to “length of sentence”.

Section 61 sets out the effect of a sentence indication:

- (1) If a Magistrates’ Court gives a sentence indication under s.60 and the accused pleads guilty to the charge for the offence at the first available opportunity, the sentencing court must not impose a more severe type of sentence than the type of sentence indicated.
- (2) If the Magistrates’ Court gives a sentence indication and the accused does not plead guilty to the charge for the offence at the first available opportunity, the court that hears and determines the charge must be constituted by a different magistrate unless all parties otherwise agree.
- (3) A sentence indication given by one magistrate does not bind any other magistrate.
- (4) A decision to give or not to give a sentence indication is final and conclusive.
- (5) An application for a sentence indication and the determination of the application are not admissible in evidence against the accused in any proceeding.
- (6) Section 61 does not affect any right to appeal against sentence.

The writer believes that ss.60-61 are also applicable to the Children’s Court by operation of s.528(2) of the CYFA. However one practical difficulty with sentence indications in the Children’s Court is that

ss.410(1)(e) & 412(1)(e) of the CYFA require a pre-sentence report as a pre-condition to a YRC or YJC order and a pre-sentence report is almost never available at that stage of the proceeding.

In *Jeffrey v Schubert & Anor* [2012] VSC 144 the accused had requested the presiding Magistrate to give a sentence indication at the commencement of a committal proceeding involving charges of trafficking and possession of a drug of dependence which were capable of being heard and determined summarily but where the accused had not consented to summary jurisdiction. The Magistrate had refused to do so. At [5] J Forrest J held that the Magistrate was “correct to hold that she did not have the power to give a sentence indication absent the power to deal with the charges”. At [34] his Honour said:

“I do not accept the argument of Mr Jeffrey that the legislative purpose was so broad as to encompass a sentence indication where the Magistrates’ Court had no power to deal with the charge. Whilst I accept that the underlying purpose of s.60 and s.61 is to encourage a plea of guilty by permitting a sentencing indication, this can only occur where summary jurisdiction has been invoked.”

In *DPP v Shoan* [2007] VSCA 220 a magistrate had said that a plea of guilty would lead her to obtain an assessment of the applicant’s suitability either for an intensive corrections order or a community-based order. The prosecutor told the magistrate that the prosecution took the view that a community-based order was within the range of sentencing options that was open. The applicant instructed his barrister than on the basis of the magistrate’s sentencing indication he would plead guilty. He was sentenced to a 12 months community-based order. On appeal by the DPP a County Court judge allowed the appeal and sentenced the applicant to a term of 3 months’ imprisonment. Nettle JA impliedly approved the sentence indication process, saying at [34]:

“.....the point was well made in argument that the sentence indication scheme which operates in the Magistrates’ Court is unlikely to go far if the Director continues to make a practice of having a second go in cases where a sentencing indication is given and acted upon with the express or tacit approval of the prosecutor.”

10.3.5 Summary case conference

Since the commencement of the CPA, s.54 has added an additional step to the process path in certain cases in the Magistrates’ Court and the Children’s Court. Section 54(1) provides that a summary case conference is a conference between the prosecution and the accused for the purpose of managing the progression of the case including-

- (a) identifying and providing to the accused any information, document or thing in the possession of the prosecution that may assist the accused to understand the evidence available to the prosecution; and
- (b) identifying any issues in dispute; and
- (c) identifying the steps required to advance the case; and
- (d) any other purpose prescribed by the rules of court.

It appears that a summary case conference is a private conference between prosecution and defence which is not presided over by a judicial officer.

Section 54(2) of the CPA provides that if a preliminary brief is served, a summary case conference must be conducted before the charge is set down for a contest mention hearing or a summary hearing or a request for a full brief is made. However, this sub-section does **not** apply to proceedings in the Children’s Court, it and the related “Notice to appear” provisions in ss.21-26 of the CPA being expressly excluded by s.528(2)(b) of the CYFA.

Read in conjunction with s.528(2)(b) of the CYFA-

s.54(3) of the CPA permits the Children’s Court to direct the parties to attend a summary case conference;

s.54(4) allows a summary case conference to be conducted at any other time with the consent of the parties;

s.54(6) requires a summary case conference to be conducted in accordance with the rules of court, as to which see r.22 of the Magistrates’ Court Criminal Procedure Rules 2019; and

s.54(7) provides for the confidentiality of summary case conference proceedings unless all parties agree otherwise or except in a criminal proceeding for an offence alleged to have committed during, or in connection with, the summary case conference.

10.3.6 Plea agreements

The overwhelming majority of young people plead guilty to one or more of the offences with which they have been charged. It is the writer's anecdotal view that less than 2% of hearings are contested in the Criminal Division of the Children's Court. Often the plea of guilty to certain charges arises from an agreement between the prosecutor and the legal representative for the offender. In *GAS v The Queen*; *SJK v The Queen* [2004] HCA 22 at [28]-[32], the High Court summarized the principles affecting such 'plea agreements':

1. It is the prosecutor alone who has the responsibility of deciding the charges to be preferred against an accused person: *Barton v The Queen* (1980) 147 CLR 75 at 94-95; *Maxwell v The Queen* (1996) 184 CLR 501 at 534; *Cheung v The Queen* (2001) 209 CLR 1 at 22 [47]. The judge has no role to play in that decision.
2. It is the accused person alone who must decide whether to plead guilty to the charge preferred. That decision must be made freely and may be made with the benefit of legal advice. The judge is not involved in that decision.
3. It is for the sentencing judge alone to decide the sentence to be imposed: *R v Olbrich* (1999) 199 CLR 270. For that purpose the judge must find the relevant facts: *Cheung v The Queen* (2001) 209 CLR 1 at 9-11 [4]-[10]. In the case of a plea of guilty, any facts beyond what is necessarily involved as an element of the offence must be proved by evidence or admitted formally (as in an agreed statement of facts) or informally (by a statement of facts from the bar table which was not contradicted). There may be significant limitations as to a judge's capacity to find potentially relevant facts in a given case: *R v Olbrich* (1999) 199 CLR 270 at 278 [15]. The instant appeal with its absence of evidence as to who killed the victim is an example.
4. As a corollary to the third principle, there may be an understanding between the prosecution and the defence as to evidence that will be led or admissions that will be made but that does not bind the judge except in the practical sense that the judge's capacity to find facts will be affected by the evidence and the admissions.
5. An erroneous submission of law may lead a judge into error and, if that occurs, the usual means of correcting the error is through the appeal process.

In *GAS v The Queen*; *SJK v The Queen* [2004] HCA 22 at [42]-[44] the High Court made some general observations about the way in which dealings between counsel for the prosecution and counsel for an accused person, on subjects which may later be said to have been relevant to the decision of the accused to plead guilty, should be recorded. The gist of those observations is that "[i]n most cases it will be desirable to reduce to writing any agreement that is reached in such discussions". It seems clear, however, that the High Court was referring specifically to plea agreements in the superior courts. In the Children's Court summary jurisdiction such 'plea agreements' are inevitably informal and oral. Given the pressure of work in the Children's Court it is highly unlikely that the High Court would have considered it desirable that plea agreements should be recorded in the same formal fashion as in the superior courts.

10.3.7 Withdrawal of guilty plea

It is extremely uncommon, although not unknown, for a child to seek to withdraw a guilty plea and to contest charges on which a plea was previously entered. The relevant law is set out in *R v Mokbel (Change of Pleas)* [2012] VSC 86 where the applicant had previously entered guilty pleas to a number of drug trafficking charges in the belief that certain evidence – obtained on execution of search warrants which it transpired had not been lawfully sworn – was admissible. In refusing to grant Mokbel leave to change his guilty pleas, Whelan J described the test at [259]-[261] as follows:

[259] "The general principles which apply on applications [to change plea] were not controversial. They are:

- (1) A plea of guilty may be withdrawn with the leave of the court at any time before sentence: *R v Plummer* [1902] 2 KB 339, 347, 349-50; *R v Foley* [1963] NSW 1270 ('*Foley*'); *Griffiths v The Queen* (1977) 137 CLR 293, 334.
- (2) The issue of whether leave should be granted is entirely a matter for the discretion of the court: *Foley* [1963] NSW 1270 and *R v Sagiv* (1986) 22 A Crim R 73, 80 ('*Sagiv*').

- (3) The test to be applied is whether a miscarriage of justice would occur if the leave sought was denied: *R v Middap* (1989) 43 A Crim R 362, 364 ('*Middap*') and *R v Boag* (1994) 73 A Crim R 35, 36-7 ('*Boag*'). In *Middap*, the expression used is 'would'. Counsel for Mokbel also used "would"...The use of 'would' and 'might' were discussed in *McGuire v DPP & Anor* [2001] VSC 11, [19]. 'Would' is the accepted term, but the existence of a consequence which 'might' occur is capable of being something that 'would' constitute a miscarriage of justice.

[260] Decided cases exemplify the circumstances in which the requisite miscarriage may be found, but they should not be used to confine them: *R v Moxham* (2000) 112 A Crim R 142, 145 ('*Moxham*'). Each case must be looked at on its own facts and a decision made whether justice requires that the course of granting leave to withdraw a guilty plea should be taken: *Sagiv* (1986) 22 A Crim R 73, 90 (Lee J).

[261] The applicant bears the burden of establishing that leave should be granted: *Boag* (1994) 73 A Crim R 35, 36-37, *R v Kouroumalos* [2000] NSWCCA 453, [21], *R v Marchando* (2000) 110 A Crim R 337, 338 [4]. Otherwise there is no presumption either in favour of or against the granting of leave: *Middap* (1989) 43 A Crim R 362, 364; and *Boag* (1994) 73 A Crim R 35, 37. In *R v Liberti* (1991) 55 A Crim R 120, 122, Kirby P (as he then was), in an oft-quoted passage, said: '... courts approach attempts at trial or on appeal in effect to change a plea of guilty ... with caution bordering on circumspection'. Examples of this passage being quoted can be found in *Boag* (1994) 73 A Crim R 35, 39 and *Moxham* (2000) 112 A Crim R 142, 144."

10.3.8 Duplicity, Uncertainty & Unanimity

In *R v Walsh* [2002] VSCA 98 at [40]-[42] Phillips & Buchanan JJA, with whom Ormiston JA agreed, discussed and illustrated the principles of duplicity, uncertainty and unanimity in relation to a charge:

"[40] As we apprehend it, a count is bad for duplicity if it charges more than one offence; on the other hand, if the count charges but one offence and evidence is lead of more than one instance of such offending, then the verdict, if against the accused, will be uncertain. This last is sometimes called latent uncertainty because it depends, not so much upon the terms of the count, as upon the case sought to be made by the Crown. Suffice it to refer in this connection to *Johnson v Miller* (1937) 59 CLR 467 and *R v Trotter* (1982) 7 A Crim R 8.

[41] In *Johnson v. Miller*, the defendant was charged in the Magistrates' Court in that he was the licensee of premises out of which certain persons were seen coming during prohibited hours. In line with the statute creating the offence, the complaint was amended to read 'a certain person' instead of 'certain persons', but the informant still sought to lead evidence that some thirty men were seen coming in or out of the premises between the times stated on the day in question. The magistrate held the complaint defective and dismissed it, a decision upheld in the High Court. Once amended to refer to only one person, the complaint conformed to the statute by charging only one offence (and so the charge was not bad for duplicity), but as the evidence led was of more than one person (and so of more than one offence) the complaint was tainted with uncertainty. Had the complainant been willing to confine the evidence to one of thirty, the uncertainty would have been removed; unconfined, the defendant was not properly apprised of 'the particular act, matter or thing alleged as the foundation of the charge': 59 CLR at 489 per Dixon J. (It may be observed in passing that that case gave rise to difficulty in part because the offence depended not upon any specific act or omission of the defendant himself but directly upon what in other circumstances would have been no more than evidence: 59 CLR at 482 per Dixon J.)

[42] In *Trotter*, the accused was charged with one count of indecent assault upon a boy but in the course of the trial the boy gave evidence of an assault in the bedroom and of an assault in the bathroom. The Crown made no election between the two and, when the jury found the accused guilty, the verdict was set aside on appeal on the ground that it was tainted with uncertainty. There was no way of knowing of which assault the jury had been persuaded; it might have been the first or the second or both, as each of the incidents relied upon, one in the bathroom and one in the bedroom, constituted, in itself, the offence as charged. Again there was no duplicity in the charge; the ambiguity arose out of the evidence. But in the course of the judgment the Court also said (7 A Crim R at 18) that it was -

'... impossible to know whether there was unanimity on the part of the jury in respect of one or other of the two acts of the indecent assault. All members of the jury might have been unanimous on the fact that the applicant had committed an indecent assault on [the boy], but some members of the jury might have arrived at that conclusion on the basis of the bathroom assault and others on the basis of the bedroom assault.'

See also *Mansbridge v Nichols & Anor* [2004] VSC 530 per Williams J at [49]-[60].

However a charge will not be duplicitous if it refers to one prohibited act having certain characteristics as opposed to more than one such act. See for instance *R v Ginies* [1972] VR 349 at 400 per Winneke CJ, Little & Barber JJ. The distinction was pointed out by Bray CJ in *Romeyko v Samuels* (1972) 2 SASR 529 at 552:

"The true distinction, broadly speaking, it seems to me, is between a statute which penalises one or more acts, in which case two or more offences are created, and a statute which penalises one act if it possesses one or more forbidden characteristics. In the latter case there is only one offence, whether the act under consideration in fact possesses one or several of such characteristics. Of course, there will always be borderline cases and if it is clear that Parliament intended several offences to be committed if the act in question possesses more than one of the forbidden characteristics, that result will follow."

10.3.9 "Representative" counts & "Rolled-up" counts

Where an accused faces a series of similar charges arising out of multiple related criminal incidents, the prosecution and defence may agree to proceed with a smaller number of charges on the basis that they are "**representative**" or "samples" of a larger and more systematic pattern of criminality: Fox and Freiberg, *Sentencing: State and Federal Law in Victoria*, 2nd ed. 1999, Oxford University Press South Melbourne. See e.g. *R v Nagy* [1992] 1 VR 637 where one count of importation of heroin was treated as representative of eight importations and *R v Corbett* (1991) 52 A Crim R 112 where 92 charges of medifraud were treated as representative of over 400 false statements. In *R v SBL* [1999] 1 VR 706 the Court of Appeal held that with agreed "representative" or "sample" counts, the sentencing judge is entitled to have regard to the whole picture presented by the offender's conduct in determining the sentence appropriate to be passed upon the counts to which the offender pleaded guilty. This practice does not contravene the rule against taking into account the commission of other offences as constituting circumstances of aggravation. At [69] Batt JA said:

"[T]he fact that a count is *agreed* to be a representative, specimen or sample count is an aggravating circumstance: *R v Wright* [Court of Appeal, unreported, 13/05/1974] at 9; *R v Godfrey* (1993) 69 A Crim R 318 at 322, which was approved by Allen J (with whom Handley JA agreed) in the New South Wales Court of Criminal Appeal in *R v Holyoak* (1995) 82 A Crim R 502 at 511; and *R v Kidd* [1998] 1 WLR 604...in which at 607 & 608 the Court of Appeal through the Lord Chief Justice insisted that the other offences, if not proved by verdict, must be admitted for them to be taken into account in sentencing."

Batt JA continued at [70], in a passage approved by the Court of Appeal in *R v GJN* [2005] VSCA 183 at [6]:

"Not only does the fact that a count is agreed to be representative preclude its being said in mitigation that the offence was isolated, it affirmatively enables the offence to be seen in its full circumstantial context. The offender is not, by a loading of the sentence, to be punished for the represented offences, but the sentence for the representative offence may reflect the fact that it, the offence counted, occurred in the wider context. Consistently with the view which I have expressed about agreed representative counts, regard may in the present case be had to the adverse effect upon the victims of the whole of the conduct which effect might not have been produced, or produced to the same extent, by the offences counted alone."

In *R v WDP* [2005] VSCA 16 Winneke P (with whom Charles & Buchanan JJA agreed) approved and applied the above dicta, noting at [8]: "These remarks reflect the practice in this State as to the manner of sentencing adopted by judges in respect of counts which are agreed to be 'representative'." See also *DPP v Muliaina* [2005] VSCA 13 at [9] & [15]; *R v Welsh* [2005] VSCA 285 at [32]-[34]; *R v Hunter* [2006] VSCA 9 at [2] & [31]. In *R v MKG* [2006] VSCA 131 at [10] Batt JA reiterated that "the fact that the three counts were representative counts constitutes an aggravating factor, as was

recognised in *R. v. SBL* [1999] 1 VR 706". However Nettle JA noted at [14]: "Despite what was said in *SBL*, views still differ as to whether the fact that a count is a representative count is properly to be regarded as an aggravating factor in the sentencing process."

In *R v RGG* [2008] VSCA 94 at [5] Ashley JA took a pragmatic view of the question of aggravation:

"The consequences for sentencing purposes of a count being a representative count were extensively discussed in *R v SBL* [1999] 1 VR 706. Whether or not the duration and circumstances of conduct represented by a count should be described as an aggravating circumstance, absence of a potential circumstance of mitigation and consideration of an offence 'in its full circumstantial context' is at least likely to lead to a heavier sentence than would otherwise be passed."

In that case at [25] Lasry AJA (with whom Ashley JA expressly agreed at [4] and Neave JA agreed in general) approved the 'whole picture' formulation referred to in *R v SBL* but also called for some level of detail of the overall conduct – including the frequency of occurrence – to be provided to a court sentencing on a representative count:

"In *R v Wright* [unreported, Court of Criminal Appeal, 13/05/1974] Nelson J noted that when the procedure of representative counts is adopted, '... there is nothing objectionable in the Court having regard to the whole picture presented by the accused's conduct in determining the sentence appropriate to be passed upon the counts to which he pleads guilty'. In approving the judgment of the Court in *Wright*, I consider this Court in *R v SBL* was both approving the practice of using representative counts and identifying the limits of the practice as was later pointed out, for example, in *R v Jones* [2004] VSCA 68 at [13] where Charles JA contrasted the exercise of the sentencing discretion on representative counts with 'rolled-up' counts. In my opinion, and here I accept a submission made on behalf of the appellant, when a sentence is imposed on a representative count it is appropriate and necessary for a sentencing judge to identify some level of detail of the conduct represented by the count on which sentence is to be passed so that the 'whole picture' can be seen. That would at least involve an indication of the number of other incidents involved or at least the frequency of occurrence, and the identification of the similarity of the incidents represented to the one charged."

In *R v LFJ* [2009] VSCA 134 Maxwell P & Kellam JA said at [8]:

"The proper approach to sentencing for representative counts has been considered by this Court on a number of occasions in recent times. In *DPP v CPD* [2009] VSCA 114 at [38], the Court referred to what had been said in *DPP v McMaster* (2008) 19 VR 191; [2008] VSCA 102 and in *The Queen v CJK* [2009] VSCA 58 and said:

'As recent decisions of this Court have made clear, the fact that a count is a representative count has a twofold relevance to sentencing. First, it is to be understood as the absence of a mitigating factor, in the sense that a plea of guilty to a representative count prevents the defendant from claiming 'any leniency that might have been permitted on the basis that the offence was an isolated event': *DPP v McMaster* (2008) 19 VR 191, 202 (Ashley JA); *The Queen v CJK* [2009] VSCA 58, [43] (Warren CJ) citing *DPP v EB* [2008] VSCA 127, [13] (Nettle JA). Secondly, the sentencing court must look at the conduct represented by the count in order to judge the offending in its full context, 'which is likely to bear upon matters such [as] extent of culpability, need for specific deterrence and prospects of rehabilitation.' *DPP v McMaster* (2008) 19 VR 191, 202."

In *R v AMP* [2010] VSCA 48 at [47] Neave & Redlich JJA said:

"It will often be appropriate to cumulate a greater proportion of the sentence imposed on a representative count than the proportion cumulated for a count which is not representative."

In *R v OAA* [2010] VSCA 155 at [21] Maxwell P & Weinberg JA said:

"The prosecution was not entitled to rely on the subject matter of count 1, which related to a specific incident itself the subject of a charge, as forming the basis upon which count 2 could be described as a 'representative count'. The essence of a 'representative count' is that the relevant acts cannot be sufficiently particularised by the prosecution so as to legitimately frame specific individual counts."

In *Justin Crouch (a pseudonym) v The Queen* [2019] VSCA 30 at [36] the appellant had pleaded guilty to three representative charges of indecent act with a child under 16 and one representative charge of incest, the complaint for each charge being his stepdaughter aged 9-11. He had also pleaded guilty to two representative charges of indecent act with a child under 16, being his step-daughter's friend aged 8-11. In dismissing an appeal against a sentence IMP10y3m/7y, Kyrou & Weinberg JJA set out at [36] a number of principles relating to sentencing for a representative charge:

- (a) "A representative charge is a charge for an offence which is representative of other instances of the same offence being committed by the offender in the same manner on other occasions, within the specified period of the offending. Where a representative charge is laid, the offender is charged for the offending the subject of that charge and is not separately charged for the other instances of the offending which are represented by that charge ('represented instances of offending').
- (b) The offender falls to be sentenced for the offending the subject of a representative charge but not for the represented instances of offending.
- (c) The represented instances of offending are not aggravating circumstances of the offending the subject of a representative charge: *Lord v The Queen* [2013] VSCA 80 [21] ('*Lord*').
- (d) The maximum penalty for the offence the subject of a representative charge applies to that charge. The represented instances of offending do not have the effect of increasing the maximum penalty. The sentence that is imposed for a representative charge must be just in all of the circumstances: *Sentencing Act 1991* s 5(1)(a). It cannot be disproportionate to the nature and gravity of the offence the subject of the representative charge: *Sentencing Act* s 5(2)(c). See *R v SBL* [1999] 1 VR 706, 724 [64] ('*SBL*').
- (e) The fact that a charge is a representative charge precludes any moderation in sentence that may have been warranted if the offending the subject of that charge had been an isolated incident: *SBL* [1999] 1 VR 706, 726 [70]; *DPP v CPD* (2009) 22 VR 533, 542 [38] ('*CPD*'); *Reid v The Queen* (2014) 42 VR 295, 308 [75] ('*Reid*'); *DPP v Walsh* [2018] VSCA 172 [19] ('*Walsh*'); *Bromley v The Queen* [2018] VSCA 329 [58] ('*Bromley*').
- (f) The fact that a charge is a representative charge enables the court to consider the offending the subject of that charge in its wider context: *SBL* [1999] 1 VR 706, 726 [70]; *CPD* (2009) 22 VR 533, 542 [38]; *Reid* (2014) 42 VR 295, 308 [75]; *Walsh* [2018] VSCA 172 [19]; *Bromley* [2018] VSCA 329 [58]. This includes the court's assessment of the nature and gravity of that offending, the offender's moral culpability for that offending and the impact of that offending on the victim: *Sentencing Act* s 5(2)(c), (d) and (daa). See *DPP v McMaster* (2008) 19 VR 191, 202 [49] ('*McMaster*'); *Lord* [2013] VSCA 80 [21].
- (g) The fact that a charge is a representative charge may inform the court's assessment of the weight to be given to sentencing considerations, such as denunciation, protection of the community, specific deterrence and the offender's prospects of rehabilitation: *Sentencing Act* s 5(1)(b), (c), (d) and (e). See *McMaster* (2008) 19 VR 191, 202 [49]; *Lord* [2013] VSCA 80 [21].
- (h) There is no rule that the sentence for an offence the subject of a representative charge must be higher than for the same offence that is not the subject of a representative charge. However, if all other things are equal, the considerations set out at (e)–(g) above may result in a higher sentence for a representative charge: *Beyer v The Queen* [2011] VSCA 15 [17]; *Bromley* [2018] VSCA 329 [59].
- (i) The number of represented instances of offending is relevant to the exercise of the sentencing discretion. As a matter of common sense, the considerations set out at (e)–(g) above are likely to warrant a higher sentence for a representative charge that is representative of 100 represented instances of offending, compared to a representative charge that is representative of two represented instances of offending. However, that does not mean that it is appropriate for a sentence to be increased in proportion to the number of represented instances of offending. That is because the court must impose a sentence for a representative charge that is just in all the circumstances and is not disproportionate to the nature and gravity of the offending the subject of that charge. The maximum penalty will also provide a yardstick for determining what is an appropriate sentence in all the circumstances."

A "**rolled-up**" count is a count which charges a number of instances of a particular offence. It follows that such a count would be bad for patent duplicity and would also offend the principles of uncertainty and unanimity. Accordingly it can only be heard by agreement with the defence and for a plea of guilty. In *R v Jones* [2004] VSCA 68 the Court of Appeal approved the use of "rolled-up" counts in certain circumstances and drew a clear distinction between a rolled-up count and a representative count. See also *R v Bullen* [2005] VSCA 206 at [4]; *R v DM* [2007] VSCA 155 at [21]-[25]. In *R v Jones* at [13] Charles JA, with whom Phillips JA & Bongiorno AJA agreed, said:

"I do not accept the submission that in sentencing on a rolled-up count the discretion is to be exercised in the same way as when a judge is sentencing on a representative count. It is of course correct that when sentencing on a representative offence the judge is not entitled to impose sentence in respect of other crimes: *R v SBL* [1999] 1 VR 706 at [69]-[70], *R v Holyoak* (1995) 82 A Crim R 502. But in my view, a rolled-up count is entirely different from a representative count...[R]olled-up counts are a collection of counts bundled together into a single count, a procedure which can only occur by agreement with the defence and only for the purpose of a plea of guilty. The practice is referred to in *Heath Indictable Offences in Victoria* 3rd ed., 1992 at 17 and appears to be based on the decision in *R v Coombes* [unreported, Court of Criminal Appeal of Victoria, 03/09/1979 per Young CJ]. The practice has been acknowledged in *R v Gary John Newham* [2000] VSCA 138 per Ormiston JA at [2], *R v Warren Edward Deakes* [2002] VSCA 136 esp. per Eames JA at [52]-[56], *R v Steven Mark O'Neill* [2003] VSCA 26 esp. per Phillips CJ in [5], and most recently in *R v Koukoulis* [2003] VSCA 22 by Ormiston JA. See and compare also *R v Carver* [unreported, Court of Appeal, 03/06/1996 per Callaway JA at 11-12]. If a rolled-up count were not included by agreement with the defence (demonstrated as here by the plea of guilty) the count would be vitiated for duplicity...The practice simplifies the task of the sentencing judge and works to the advantage of the prisoner. In the present case, for example, the filed-over presentment contained count 28, rolling up 24 discrete offences of theft which had appeared in separate counts on the original presentment. The use of rolled-up counts operates considerably to the advantage of an accused who intends to plead guilty. For in this case on the original presentment there were 24 counts of theft, for each of which the maximum sentence was ten years, providing a theoretical maximum sentence of 240 years. The compression of these counts into a single count of theft not only considerably eased the task of the sentencing judge, but may be thought by an appellant to give him a considerable benefit in return."

In *R v Beary* [2004] VSCA 229 at [11]-[14] Callaway JA, with whom Ormiston & Buchanan JJA agreed, discussed a conflict between the above dicta in *R v Jones* and an *obiter dictum* of Callaway JA in *R v Carver* [Court of Appeal, unreported, 03/06/1996] at 11-12. His Honour conceded that, on reflection, he was wrong in *R v Carver* and hence concluded that the practice explained by Charles JA in *R v Jones* was justified. At [14] his Honour accepted that it is not permissible to impose on a "rolled-up" count a penalty greater than the maximum available for a single count of the offence in question.

In *R v Shannon* [2005] VSCA 143 at [5]-[6] the Court of Appeal applied dicta from *R v Ralphs* [2004] VSCA 33 that, in circumstances where offences are charged as a "rolled up" count, the count does not qualify as a continuing criminal enterprise offence by virtue only of the rolled up value. By contrast, in *DPP v Starke* [2006] VSCA 61 at [8]-[9] the Court of Appeal distinguished between a single "continuous offence" and a "rolled up" count:

"A single offence of obtaining property by deception or theft may be constituted by numerous acts where those acts of obtaining property by deception are properly viewed as part of a single 'continuous' offence. The offence is 'continuous' because of the particular factual circumstances in which the offence was committed. [See] *R v Giretti* (1986) 24 A Crim R 112, 118 per Crockett J...A charge of this kind is of course, to be distinguished from a "rolled up count". A rolled up count aggregates numerous offences of a similar nature into one count. It is duplicious in nature and hence can only be employed with the consent of the accused: *R v Jones* [2004] VSCA 68 at [13]. It is often employed for convenience when a plea of guilty is made, in order to simplify the sentencing process."

In *Justin Crouch (a pseudonym) v The Queen* [2019] VSCA 30 at [37] Kyrou & Weinberg JJA stated:

“Unlike a representative charge, which alleges a single offence, a ‘rolled-up’ charge alleges more than one offence: *R v Jones* [2004] VSCA 68 [12]–[13]; *Reid* (2014) 42 VR 295, 307–8 [73]. Both types of charges can only be used with the agreement of the accused for the purposes of a guilty plea.”

See also *R v Fernandez* [2006] VSCA 38 [30 “rolled up” counts of deception]

For a general discussion of “rolled up” as opposed to “representative” charges see *DPP v Za Lian & Hlawnceu* [2019] VSCA 75 at [54]–[57] per Ferguson CJ, Kaye & Weinberg JJA.

10.3.10 Right to a fair trial - Stay of proceedings

The law relating to “the right to a fair trial” in criminal proceedings has been stated and developed by the High Court of Australia in a number of cases including *Barton v R* (1980) 147 CLR 75; *Jago v District Court of NSW* (1989) 168 CLR 23; *Glennon v R* (1992) 173 CLR 592; *Williams v Spautz* (1992) 174 CLR 509, 518 & 520; *Dietrich v R* (1992) 177 CLR 292; *Carroll v R* (2002) 213 CLR 635; *PNJ v The Queen* [2009] HCA 6. See also *R v Rich (Ruling No.1)* [2008] VSC 119; *R v Rich (Ruling No.2)* [2008] VSC 141; *Mokbel v DPP (Vic) & Ors* [2008] VSC 433; *R v Wells* [2010] VSCA 100.

In *R v Benbrika and ors (Ruling No. 20)* [2008] VSC 80 Bongiorno J, applying the principles developed in the aforementioned cases, held that the conditions of incarceration and transportation of the accused were having such effect on their psychological and physical health that a fair trial could not be held in the absence of a change in those conditions. Accordingly, his Honour granted a conditional stay of the trial pending recommended changes in the conditions of incarceration and travel of the accused which he considered necessary to remove the unfairness currently affecting the trial. In doing so his Honour noted at [23] that “the ordinary disinclination of a court to facilitate an application which will have the effect of fragmenting the criminal process gives way here to the imperative of determining whether a current trial is being conducted unfairly to the accused”.

In *Hermanus (a pseudonym) v The Queen* (2015) 44 VR 335; [2015] VSCA 2 Maxwell P & Priest JA refused leave to appeal against the refusal of the trial judge to stay permanently a number of charges of sexual abuse against a child complainant which occurred nearly 40 years before and in circumstances where the original complaint to police had been lost. Their Honours held that there was no irremediable prejudice and that a forensic disadvantage warning was sufficient. At [39]–[40] & [44] Priest JA (with whom Maxwell P agreed) said:

[39] “Authority establishes that a court should stay an indictment if, in all the circumstances, the continuation of the proceedings would involve unacceptable injustice or unfairness, or if the continuation of the proceedings would be so unfairly and unjustifiably oppressive as to constitute an abuse of process: *Walton v Gardiner* (1993) 177 CLR 378, 392 (Mason CJ, Deane and Dawson JJ). See also *Jago*; *R v Glennon* (1992) 173 CLR 592; *Dupas v The Queen* (2010) 241 CLR 237; *R v Edwards* (2009) 255 ALR 399 (*‘Edwards’*). A permanent stay will only be granted in circumstances which are rare or exceptional: *Williams v Spautz* (1992) 174 CLR 509, 529; *Jago*.

[40] As I have said, the trial judge derived guidance from *FJL* [2014] VSCA 57. The following propositions may, I think, be drawn from the judgment of Osborn JA (with whom Redlich JA and Sifris AJA agreed) and the cases there cited:

- First, the exercise of the power to stay must be exceptional since it results in effect in a refusal to exercise jurisdiction. The primary responsibility for deciding whether criminal proceedings should be maintained lies with the Executive and not with the Court: *FJL*, [17]. See also *Jago*, 61 (Deane J), 76 (Gaudron J).
- Secondly, in cases involving delay, to justify a permanent stay of criminal proceedings there must be a fundamental defect which goes to the root of the trial of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences. The accused must demonstrate that the delay is such that any trial is necessarily unfair so that any conviction would bring the administration of justice into disrepute: *FJL*, [18]. See also *Jago*, 33–4 (Mason CJ); *TS v R* [2014] NSWCCA 174, [1] (Leeming JA), [61]–[64] (Bellew J).
- Thirdly, circumstances that the court should consider in determining an application for a stay include, the length of the delay; reasons given by the prosecution to explain or

justify the delay; the accused's responsibility for and past attitude to the delay; proven or likely prejudice to the accused; and the public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime: *FJL*, [19]. See also *Jago*, 61 (Deane J). The critical factors are on the one hand the proven or likely prejudice to the accused, and on the other, the public interest in the prosecution and conviction of the guilty: *FJL*, [21].

- Fourthly, in order to justify a stay, it is the probability of unacceptable unfairness – rather than the possibility – that is critical: *FJL*, [22]. See also *Edwards*, 403 [23].
- Fifthly, a trial will not necessarily be unacceptably unfair even where relevant documents, recordings or other kinds of evidence have been lost or destroyed, or witnesses have died, so that the jury will be called upon to determine issues of fact on less than all of the relevant material which might bear upon the issues thrown up for determination: *FJL*, [23]. See also *Edwards*, 405 [31].
- Sixthly, the trial judge may avoid obstacles to a fair trial by evidentiary rulings — including by the exclusion of evidence which is technically admissible, but which might operate unfairly against the accused — and by directions to the jury designed to counteract any prejudice that the accused might otherwise suffer: *FJL*, [25]-[26]. See also *Jago*, 47 (Brennan J), 77-8 (Gaudron J).

...

[44] The law contemplates...that even in cases of very long delay, it remains possible for an accused to receive a trial which is not unacceptably unfair, despite the trial being attended to some extent by unfairness, prejudice or forensic disadvantage."

In *Davin Carson (a pseudonym) v DPP* [2019] VSCA 4 Maxwell P & Forrest JA dismissed an appeal against a decision of Judge Ryan refusing a permanent stay of a large number of charges of child sex abuse, including multiple charges of buggery with a person under 14, of indecent assault and of common assault involving 20 complainants who were pupils at a rural secondary school at a time between January 1971 and December 1976 when the applicant was the headmaster of that school. The application was based on a combination of factors, namely the extremely long delay, the associated forensic disadvantage in challenging the evidence of the complainants and the applicant's ill health. It was common ground that the applicable principles were set out in the judgment of Priest JA in *Hermanus (a pseudonym) v The Queen* (2015) 44 VR 335; [2015] VSCA 2 at [40]. In upholding the refusal to grant a stay, Maxwell P & Forrest JA said at [7]:

"[S]uch forensic disadvantage as the applicant could identify was moderate in all the circumstances, and his Honour was right to conclude that it could be adequately addressed by a forensic disadvantage direction. Given the objective seriousness of the charges, the public interest in their being prosecuted was a very significant factor in the exercise of the discretion."

In *Stocks v Johns (No.2)* [2019] VSC 854 Croucher J allowed an appeal against a decision of a judicial registrar to stay the appellant's civil action for damages for personal injury arising out of a motor vehicle collision pending the finalisation of the respondent's application for leave to appeal and possible retrial in relation to her criminal convictions for recklessly causing serious injury in circumstances of gross violence and criminal damage arising out of same collision. At [58] his Honour referred to the cases of *McMahon v Gould* (1982) 7 ACLR 202; *Philippine Airlines v Goldair (Aust.) Pty Ltd & Ors* [1990] VR 385; *Yuill v Spedley Securities Ltd (in liq)* (1992) 8 ACSR 272; *DPP (Cth) v Jo* (2007) 176 A Crim R 17; *Lee v NSW Crime Commission* (2009) 75 NSWLR 581; *Zhao & Anor v The Commissioner of the Australia Federal Police* (2014) 43 VR 187; *Flegg v Hallett* [2015] 1 Qd R 191; *Commissioner of the Australian Federal Police v Zhao & Anor* (2015) 255 CLR 46; and *Crespin v Francis & Anor* [2016] VSC 277. In particular his Honour cited and applied the following dicta of J Forrest J in *Crespin's Case* at [26]-[27]:

"In my opinion, the High Court and the Court of Appeal have made it clear that where a civil proceeding creates a real risk of prejudice to the defence for the criminal charges — which I infer to be one that is not fanciful or remote — then the applicant should, absent a dominant contradictory consideration, be entitled to a stay of the proceeding.

Moreover...there should be a focus in an application such as this on the risk of prejudice (and whether it is real) to the accused in the criminal trial in determining whether to grant a stay or not."

In refusing to stay the civil proceedings Croucher J held at [63] that the risks of prejudice to Ms Johns' legitimate interests in protecting her right to silence in the criminal proceedings and preserving her associated privilege against self-incrimination were not great – were in reality fanciful – and that the prejudice to Mr Stocks in delaying his civil action was quite significant. This led his Honour to hold that the interests of justice required that the civil action should be allowed to take its usual course, at least for the moment.

See also *Raphael Shannon (a pseudonym) v The Queen* [2019] VSCA 27; *CDPP v Brady & Ors* [2016] VSC 334; *Tony Strickland (a pseudonym) & Ors v Commonwealth Director of Public Prosecutions* [2018] 93 ALJR 1, [2018] HCA 53; *CDPP v Brady and Ors (costs)* [2019] VSC 397; *DPP v Lenny Terrell (a pseudonym)* [2019] VSCA 306, esp at [42]-[54]; *Jethro Morton (a pseudonym) v The Queen* [2020] VSCA 49; *Leigh Milner (a pseudonym) v DPP (Cth)* [2020] VSCA 207; *DPP v Walker & Simmons (Ruling No.2)* [2020] VSC 519.

10.3.11 Abuse of process for DPP to present directly to circumvent summary hearing

Another striking example of the granting of a permanent stay to avoid unfairness to an accused is to be found in the judgment of the Court of Appeal in *Lisha Maya (a pseudonym) v DPP* [2019] VSCA 117. The applicant LM had been charged with intentionally causing injury, alternatively recklessly causing injury to her 2 year old son. These offences are triable summarily. Charges were filed in the Magistrates' Court and summary jurisdiction was granted. Two separate applications by the prosecutor to transfer the matter to the committal stream were refused. No review of these decisions was sought. Instead a direct indictment was filed in the County Court under s.159 of the CPA in respect of the same charges.

Underlying the prosecution applications for uplift was the fact that the defence of mental impairment had been raised. If that defence succeeded the only option open to the Magistrates' Court was to discharge LM under s.5(2) of the CMIA. The County Court, by contrast, had three options available: unconditional discharge, noncustodial supervision order and custodial supervision order: see ss.23, 24 & 26 of the CMIA. The prosecution position was that the matter was too serious for LM simply to be discharged having regard to the injuries sustained by the child, the age of the child, the aggravating features of the offence and the applicant's alleged post-offence conduct.

In granting the application and holding that the County Court proceedings should be permanently stayed, Maxwell P, Beach & Weinberg JJA, after referring to a number of cases including *Barton v The Queen* (1980) 147 CLR 75, 94-6, *R v Lorkin* (1995) 15 WAR 499, *Jell; Ex Parte Attorney-General* [1991] 1 Qd R 48 and *Question of Law Reserved on Acquittal* (1996) 66 SASR 450, held at [53] & [61]:

[53] "We are satisfied, on the basis of the authorities set out above and in accordance with general principle, that for the present proceeding on indictment to go ahead in the County Court would work an unacceptable unfairness to LM. It would also have the consequence of circumventing, at the instance of the prosecuting authority, the lawful invocation of the summary jurisdiction of the Magistrates' Court, and that Court's exercise of its own statutory authority to grant a summary hearing."

[61] "...it would be wrong in principle for the County Court to proceed with a trial of charges in respect of which another court — the Magistrates' Court — has assumed jurisdiction in exercise of its own statutory authority to do so. It is, of course, the Director who has purported to invoke the County Court's jurisdiction but, in our view, it would be improper for that Court to allow its processes to be used to circumvent the jurisdiction of the Magistrates' Court. There having been no challenge to the legal validity of the grant of a summary hearing, that grant must now be treated as unimpeachable."

10.3.12 Joinder or severance of charges or cases

Statute law on multiple charges and/or multiple accused

1. Sections 193 & 194 of the Criminal Procedure Act 2009 (Vic) ['the CPA'] are headed "**Order for separate trial**" and "**Order for separate trial – sexual offences**" respectively. However, those sections only apply to criminal trials in the County & Supreme Courts.
2. Under Part 3 of the CPA headed "**Summary hearing**" and Division 1 headed "**Joint or separate hearing of charges**", CPA/ss.56-58 provide:

56 Multiple charges on single charge-sheet or multiple accused named on single charge-sheet

- (1) If a charge-sheet contains more than one charge, the charges must be heard together unless an order is made under section 58.
- (2) If a charge-sheet names more than one accused, whether in the same charge or separate charges, the charge or charges against all accused must be heard together unless an order is made under section 58.
- (3) A separate charge-sheet must be filed against each accused.

57 Joint hearing of charges on separate charge-sheets

On the application of the prosecutor or the accused, the Magistrates' Court may order that any number of charges in separate charge-sheets be heard together.

58 Order for separate hearing

- (1) If a charge-sheet contains more than one charge, the Magistrates' Court may order that any one or more of the charges be heard separately.
 - (2) If a charge-sheet names more than one accused, the Magistrates' Court may order that charges against a specified accused be heard separately.
 - (3) The Magistrates' Court may make an order under subsection (1) or (2) if the court considers that—
 - (a) the case of an accused may be prejudiced because the accused is charged with more than one offence in the same charge-sheet; or
 - (b) a hearing with co-accused would prejudice the fair hearing of the charge against the accused; or
 - (c) for any other reason it is appropriate to do so.
 - (4) The Magistrates' Court may make an order under subsection (1) or (2) before or during the hearing.
 - (5) If the Magistrates' Court makes an order under subsection (1) or (2), the prosecutor may elect which charge is to be heard first.
 - (6) The procedure on the separate hearing of a charge is the same in all respects as if the charge had been set out in a separate charge-sheet.
 - (7) If the Magistrates' Court makes an order for a separate hearing under subsection (1) or (2), the court may make any order for or in relation to the bail of the accused that the court considers appropriate.
3. CPA/ss.56-58 also apply to summary hearings in the Criminal Division of the Children's Court by operation of CYFA/s.528(2)(b).
 4. Although CPA/ss.193 & 194 do not directly apply to the Children's Court, the case law on those sections and the predecessor sections are likely to bear some relevance to summary hearings in the Children's Court, albeit with the very real distinction that the trier of fact in the Children's Court is a judicial officer, not a lay jury person.
 5. In CPA/Schedule 1, rule 5 provides:

5 Joinder of charges

- (1) A charge-sheet or indictment may contain charges for related offences, whether against the same accused or different accused.
- (2) If more than one offence is charged in a charge-sheet or indictment, the particulars of each offence charged must be set out in a separate, consecutively numbered paragraph.
- (3) A charge-sheet or indictment may contain, as an alternative charge to a course of conduct charge, a charge of a relevant offence of the kind covered by the course of

conduct charge and alleged to have been committed within the period to which the course of conduct charge relates.

- (4) In the circumstances set out in subclause (3), for the purposes of section 220 an acquittal on the course of conduct charge does not constitute a previous acquittal in relation to the alternative charge.
 - (5) A charge-sheet or indictment must not contain both a course of conduct charge and a charge for an offence against section 47A of the **Crimes Act 1958**.
 - (6) In this clause, **course of conduct charge** has the same meaning as in clause 4A.
6. The two questions to be determined on severance are-
 - whether the joinder of the offences complies with rule 5 of Schedule 1 [see above]; and
 - whether the judicial officer should exercise his or her discretion under CPA/s.58 to order severance [either of charges or of accused or both].
 7. These two questions must be considered separately and may not be merged into a single issue: *R v Renzella* (unreported, VSCA, 07/08/1997).
 8. Where evidence is cross-admissible, there will usually be no point in ordering separate trials: *De Jesus v R* [1986] HCA 65; *R v Bright* (2014) 45 VR 744.
 9. Major principles relevant to the exercise of judicial discretion on severance are discussed below. See also *R v TJB* [1998] 4 VR 621, 630-1 per Callaway JA.

Principles on severance of charges

10. Exercising a discretion to sever charges on a charge-sheet requires a judicial officer to strike a balance between the interests of the accused in avoiding an unnecessary appearance of prejudice due to one judicial officer hearing evidence on one charge that may be inadmissible on another and the public interest in the efficient allocation of judicial resources, consistency of verdicts, convenience of witnesses and finality of litigation (*R v Reid* [1999] 2 VR 605; *R v Demirok* [1976] VR 244; *Ludlow v Metropolitan Police Commissioner* [1971] AC 29; *R v PHW* [2004] VSC 411; *R v Oliver* (1984) 57 ALR 543).
11. Notwithstanding the balance referred to in [10], **the fundamental consideration in determining whether charges should be severed or joined is to ensure that the hearing is fair**. The court must order separate trials even in the absence of an application if that is necessary to avoid a miscarriage of justice: *R v Reid*; *R v Demirok* [1976] VR 244; *Le Huynh v The Queen* [2020] VSCA 222 at [33]-[54].
12. The judicial officer should also consider whether the accused may be unfairly prejudiced in his or her defence to certain charges due to the joinder of other charges: *R v AB & Baker (Ruling No 1)* [2008] VSC 106; *R v Smart* [1983] 1 VR 265; *R v Reid*; *R v D* [1999] VSCA 148; *R v Brown* [1990] VR 820. In *Re Murdoch (Ruling No.2)* [2019] VSC 882 the accused was presented on a joint indictment that charged him in relation to two separate criminal events: event 1 involved a home invasion and infliction of life threatening injuries on female victim 1; event 2 involved a home invasion and fatal attack on female victim 2. Applying dicta of the High Court in *IMM v The Queen* (2016) 257 CLR 300, Jane Dixon J allowed the joinder, holding that the probative value of the challenged coincidence evidence was very significant for each case whereas the prejudice to the accused could be ameliorated once appropriate strong directions are given by the trial judge.
13. Provided the offences are related offences, the informant may join offences where the accused bears an onus of proof with offences where the accused does not bear an onus of proof. This will not be enough by itself to justify ordering separate trials even though it may place pressure on the accused to give evidence: *R v McLean* (2000) 2 VR 118.
14. While the Crown case as alleged must be assumed to be true for the purpose of assessing whether joinder is permissible, the court when deciding severance is entitled to take into account the strength of the evidence which establishes the connection between the offences. Weak or tenuous evidence in support of the existence of a connection may provide a foundation for

ordering severance even if joinder is otherwise justified: *DPP v Preston (Ruling No 2)* [2015] VSC 396, [27].

Principles on multiple accused

15. **The interests of justice normally require that all child co-accused are dealt with in the one hearing.** A joint trial will reduce the risk of inconsistent verdicts. Prejudice associated with inadmissible material can usually be cured by the judicial officer giving appropriate directions – a process less fraught in summary hearings where the judicial officer is directing himself or herself than in jury trials: see *Webb & Hay v R* (1994) 181 CLR 41; *R v Gibb v McKenzie* [1983] 2 VR 155; *R v Demirok*; *R v Oliver*; *Bembo v The Queen* [2019] VSCA 308 at [130]-[147].
16. **The general rule in favour of joint trials will be displaced where this course will deny an accused a fair trial:** *R v Oliver*; *R v Patsalis* [1999] NSWSC 649; *R v Cox & Ors* [2005] VSC 255.
17. One example of cases where this general rule will be displaced is where there will be significant evidence which implicates an accused but is irrelevant and highly prejudicial in the trial of the other accused: see *R v Gibb & McKenzie*; *R v Jones & Waghorn* (1991) 55 A Crim R 159.
18. A joint trial is not contra-indicated simply because one or more accused intends to implicate a co-accused (a ‘cut-throat defence’) unless the evidence which is led is so prejudicial that a fair trial for all accused would be impossible: see *R v Ignjatic* (unreported, NSWCCA, 06/07/1993), *R v Patsalis*; *R v Gibb & McKenzie*; *R v Grondkowski & Malinowski* [1946] KB 369; *Bembo v The Queen*.
19. Where several accused are charged as co-conspirators, they should not be tried together if the evidence against one or more is substantially different from the evidence against the others: *R v Darby* (1982) 148 CLR 688; *R v Brown* [1990] VR 820.

10.3.13 Transfer of proceedings from Supreme or County Court to Children’s Court

Sections 168 & 168A of the Criminal Procedure Act 2009 empower the Supreme Court and the County Court to transfer back to the Children’s Court a proceeding for a charge for an indictable offence that may be heard and determined summarily at any time except during trial provided that certain pre-conditions are met. See *PT v DPP* [2019] VCC 836 – discussed in section 10.1.4 – where Judge Gamble refused to transfer back to the Children’s Court a case involving an offence of aggravated home invasion – a Category A serious youth offence – allegedly committed by PT when he was 17y9m old.

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10.4 *Doli incapax*

**"When I was a child, I talked like a child, I thought like a child, I reasoned like a child.
When I became a man, I put childish ways behind me."
St Paul of Tarsus (1 Corinthians 13:4)**

10.4.1 The principle of age incapacity - The so-called rebuttable presumption

If a child is aged between 10 & 13 inclusive at the time of the commission of an alleged offence, the common law has imposed a further onus - flowing from the so-called presumption of *doli incapax* - on the prosecution. In Archbold's Criminal Pleading Evidence & Practice (1993) vol. 1 par. 1-96, in a passage referred to and applied by Lord Lowry in *C v DPP* [1995] 2 All ER 43 at 48, the author has described this onus as follows:

"At common law a child under 14 years is presumed not to have reached the age of discretion and to be *doli incapax*; but this presumption may be rebutted by strong and pregnant evidence of a mischievous [disposition]...Between 10 and 14 years a child is presumed not to know the difference between right and wrong and therefore to be incapable of committing a crime because of lack of *mens rea*...Wrong means gravely wrong, seriously wrong...evil or morally wrong".

The onus on the prosecution to rebut the presumption of *doli incapax* - or, as now stated, to prove the requisite *doli capax* - is equally applicable to summary hearings and to trials in superior courts.

10.4.2 Earlier Australian authorities

In *R (a child) v Whitty* (1993) 66 A Crim R 462 [Supreme Court of Victoria], Harper J dismissed an appeal against a decision by a magistrate finding a 12 year old guilty of theft of a pair of track suit pants by putting the pants up her dress and walking out of the store without paying. In his judgment, his Honour traced the *doli incapax* doctrine through various English and Australian cases and then formulated a relevant test:

"'No civilised society', says Professor Colin Howard in his book entitled *Criminal Law* (Law Book Company, 4th ed., 1982, p.343), 'regards children as accountable for their actions to the same extent as adults.' In this respect, at least, the State of Victoria must be accounted civilised...The wisdom of protecting young children against the full rigour of the criminal law is beyond argument. The difficulty lies in determining when and under what circumstances that protection should be removed. Under the common law, it could not be called in aid of an accused person aged 14 years or over, but a child under that age is presumed not to have reached what the lawyers call 'the age of discretion'. By a combination of the statutory provision and the common law, the present position in Victoria is that a child of 10 or more but under 14 is presumed not to know the difference between right and wrong and therefore to be incapable of committing a crime because of the lack of *mens rea*'. (See Archbold, Criminal Pleading Evidence & Practice, 42nd ed., 1985, par.1-37.)

Although the presumption is rebuttable, the burden of rebutting it is of course on the prosecution. (*J M v Runeckles* (1984) 79 Crim App R 255 at 258, per Mann J). In order to discharge that burden, the prosecution must show that when the child committed the act in question, he or she knew that what was being done was not merely wrong but seriously wrong. (*R v Gorrie* (1919) 83 JP 136, per Salter J; *Runeckles* at p.259, per Mann J). In the last-mentioned case, again at p.259, Mann J added the comment that a court 'has to look for something beyond mere naughtiness or childish mischief' and the other judge who heard the case, Robert Goff LJ, said the same thing at p.260:

'The point is that it is not enough that the child realised that what he or she was doing was naughty or mischievous. It must go beyond childish things of that kind. That, as I understand it, is the real point underlying the presumption that a child under the age of 14 had not yet reached the age of discretion, because children under that age may think that what they are doing is nothing more than mischievous. It would not be right for a child under that age to be convicted of a crime, even if they had committed the relevant *actus reus* and had the relevant *mens rea* specified in the statute, unless they appreciated that what they were doing was seriously wrong and so went beyond childish activity of that kind.'

Other courts have framed the test in slightly different terms. In a passage which was subsequently quoted with approval by W B Campbell J in *R v B* [1979] Qd R 417 at p.425, Lord Parker LCJ said in *B v R* (1958) 44 Crim App R 1 at 3:

'It has often been put in this way, that in order to rebut the presumption, guilty knowledge must be proved and the evidence to that effect must be clear and beyond all possibility of doubt or, as it has also been put, there must be strong and pregnant evidence that he understood what he did.'

One of the leading Australian cases on this point is *R v M* (1977) 16 SASR 589. In that case, a child of 12 was charged with murder, the victim having been hit several times over the head with a brick. In her charge to the jury, the trial judge included the following passage:

'[I]f you are not satisfied beyond reasonable doubt when John hit Chris over the head with a brick and caused his death he knew what he was doing was wrong in the sense of what ordinary people would disapprove of, then he is entitled to be acquitted of any offence.'

The accused in that case was convicted: he appealed. In giving his reasons for dismissing the appeal, Bray CJ deprecated the use of the word 'disapprove' in the passage I have quoted from the charge. It was, he thought, too weak. He added, however, at pp.591-2:

'[T]he jury would not have been misled into thinking that it was sufficient if the appellant knew that ordinary people would regard hitting the victim several times on the head with a brick as something in the same category as failing to wash his hands before meals, put his clothes away or thank his host after being entertained.'

The test, the Chief Justice said, was that laid down by the High Court in *Stapleton v R* (1952) 86 CLR 358, that is whether the accused knew that what he was doing was wrong according to the ordinary principles of reasonable people. The High Court in *Stapleton's Case* consisted of Sir Owen Dixon CJ and Webb & Kitto JJ. In a joint judgment, they adopted, at p.375, a passage from Pope's 'Treatise on the Law and Practice of Lunacy' as admirably setting out the true view:

'[I]n a reasonable system of law, that person only will be criminally responsible who, at the moment of committing a criminal act, is capable of remembering that the act is wrong, contrary to duty, and such as in any well-ordered society would subject the offender to punishment. It is by a reference, such as this, to principles of general morality rather than to the enactments of positive law that the courts of this country have been content to test criminal responsibility in individual cases. That ignorance of the positive law cannot be pleaded as an excuse for crime, is a maxim necessary to the safety of society, and sufficiently near the truth for practical purpose. It would, therefore, be misleading to raise the issue of capacity or incapacity to know that a particular act is contrary to the law of the land. But a judge may, without fear of misleading, direct the jury that the accused is not responsible for his criminal acts if he has not the mental capacity to know that the particular act is wrong, or, in other words, if he cannot distinguish between right and wrong in regard to the particular act; and this is accordingly the form commonly adopted in practice.'

It seems to me [said Harper J] that this test is helpful in deciding whether a child between the ages of 10 and 14 knew that what he or she was doing was wrong. **If a child is capable of understanding that the act in question is such as in any well-ordered society would subject the offender to punishment, then in my opinion the child has the requisite degree of understanding."**

In *F (A Child)* (1998) 101 A Crim R 113, the Queensland Court of Appeal held-

- (at pp.117-8) - Evidence of surrounding circumstances, including conduct closely associated with the act constituting the offence or conduct constituting the commission of another offence, may be considered for the purpose of proving the relevant capacity of the accused in relation to the offence charged. Such conduct may include asserting a false alibi, rendering a victim incapable of identifying the accused or preventing a victim from summoning assistance. *L v DPP* [1996] 2 Cr App R 501; *A v DPP* [1997] 1 Cr App R 27 considered.

- (at p.121) - The Crown is permitted to negative the presumption of *doli incapax* by evidence of previous dealings by the accused with the police of the kind sought to be proved in the instant case, and also of previous convictions if probative of capacity, even though the evidence of those dealings would not answer the description of similar fact evidence or be admissible on some other basis: *C (A Minor) v DPP* [1996] AC 1; *G v DPP* [QBD, unreported, 14/10/1997]; *R v B, R v A* [1979] 1 WLR 1185; 3 All ER 460; (1979) 69 Cr App R 362; *M* (1977) 16 SASR 589; *Harris, Kirby and Johnson* [Court of Criminal Appeal NSW, unreported, 18/07/1986], considered and followed. However, in some cases, which will be rare, the court may exclude such evidence because its prejudicial effect will exceed its probative value.

10.4.3 Demise of *doli incapax* in England

It is fair to say that in England in the 1990s there was a ground-swell of opinion against the continuation of the presumption. C aged 12 and another boy were seen by police officers using a crowbar to tamper with a motor cycle in a private driveway. C ran away but was caught and arrested. The motor cycle was found to be damaged and C was charged with interfering with a motor vehicle with the intention to commit theft. When C was brought before the youth court it was submitted on his behalf that the prosecution had not rebutted the presumption that he did not know that the act was seriously wrong. The magistrates held that it was to be inferred from the fact that he had run away and that the motor cycle was damaged that C knew what he had done was seriously wrong. C was convicted and fined. On appeal the Divisional Court, holding that the *doli incapax* presumption is inappropriate in modern times and that it is unreal and contrary to commonsense to require the prosecution to prove that a child understood the wrongfulness of his or her act where an act of obvious dishonest or grave violence was in question, ruled that the presumption was outdated and should be treated as no longer good law: see *C v DPP* [1994] 3 All ER 190; [1994] 3 WLR 888. The House of Lords unanimously upheld C's further appeal, holding that the presumption was still part of English law. The headnote in *C (A Minor) v DPP* [1996] 2 All ER 43, based on the principal speech of Lord Lowry (at pp.51 & 62), reads as follows:

"The presumption that a child between the ages of 10 and 14 was *doli incapax* and the rules that the presumption could only be rebutted by clear positive evidence that the child knew that his act was seriously wrong, and that evidence of the acts amounting to the offence itself was not sufficient to rebut the presumption, were still part of English law. Accordingly, the prosecution was required to prove, according to the criminal standard of proof, that a child defendant between the ages of 10 and 14 did the act charged and that when doing that he act he knew it was a wrong act as distinct from an act of mere naughtiness or childish mischief, and the evidence to prove the child's guilty knowledge could not be mere proof of the doing of the act charged, however horrifying or obviously wrong that act might have been. It followed that the Divisional Court had been wrong not to apply the presumption. The appeal would therefore be allowed and the case remitted with a direction to dismiss the charge against the appellant."

In relation to the test itself Lord Lowry said (at p.57):

"I agree that the phrase 'seriously wrong' is conceptually obscure, and that view is confirmed by the rather loose treatment accorded to the *doli incapax* doctrine by the textbooks, but, when the phrase is contrasted with 'merely naughty or mischievous', I think its meaning is reasonably clear."

And (at pp.62-3):

"The cases seem to show, logically enough, that the older the defendant is and the more obviously wrong the act, the easier it will generally be to prove guilty knowledge. The surrounding circumstances are of course relevant and what the defendant said or did before or after the act may go to prove his guilty mind. Running away is usually equivocal, as Laws J said it was in the present case, because flight from the scene can as easily follow a naughty action as a wicked one. There must, however, be a few cases where running away would indicate guilty knowledge, where an act is either wrong or innocent and there is no room for mere naughtiness. An example might be selling drugs at a street corner and fleeing at the sight of a policeman."

However, the endorsement by the majority of their Lordships of the *doli incapax* presumption was less than enthusiastic. Lord Jauncey of Tullichettle said (at p.45):

"The presumption has been subject to weighty criticism over many years by committees, by academic writers and by the courts...I add my voice to those critics and hope that Parliament may once again look at the presumption, perhaps as a larger review of the appropriate methods in a modern society of dealing with youthful offenders."

Lord Bridge of Harwich said (at p.46): "In today's social conditions the operation of the presumption...may give rise to anomalies or even absurdities...[T]his is pre-eminently an area of the law in which Parliament alone is competent to determine the direction which any reform of the law should take." Lord Ackner said (at p.46): "I have considerable sympathy with the criticisms...of the law as it now stands and would hope that Parliament will provide an early opportunity for its review." And Lord Lowey said (at p.63): "I believe the time has come to examine further a doctrine which appears to have been inconsistently applied and which is certainly capable of producing inconsistent results" and His Lordship went on to discuss several solutions. Only Lord Browne-Wilkinson (at p.64) declined to criticise: "The matter having been considered by the government as recently as 1990 and the decision not to introduce any changes in the law taken, I cannot think it is appropriate for the courts at this stage to change the law by judicial decision. I prefer to express no view of my own as to what the law should be."

The English Parliament had the last word, providing in s.34 *Crime and Disorder Act* 1998:

"The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished."

10.4.4 History of the presumption - The principle re-stated by the Victorian Court of Appeal

In *R v ALH* (2003) 6 VR 276; [2003] VSCA 129 the Victorian Court of Appeal has trenchantly disapproved the modern English criticism - and ultimate abolition - of the *doli incapax* principle. The Court's reasoning is as applicable to the CYFA as to its predecessors. In a powerful judgment, with which Callaway & Batt JJA agreed, Cummins AJA traced the history of the principle and concluded that its abolition in Australia would be "a retrograde action".

The *doli incapax* principle arose for analysis in *R v ALH* in somewhat unusual circumstances. This was an application for leave to appeal against convictions imposed in December 2000 on four counts of indecent assault and three counts of rape. All seven counts were 'between dates' counts. The victim was the applicant's younger sister. The seven offences had occurred over a 2½ year period from February 1988 (at the earliest) to July 1990 (at the latest) when the victim was 12 to 15 years of age and the applicant was 13 to 16 years of age. At the earliest date on count 1 the applicant was 13 years 2 months of age and the earliest date on count 4 was 12 days before he became 14 years of age. So, as Cummins AJA said at [75], on four of the seven counts the trial judge "should have instructed the jury (albeit briefly) on incapacity. This is because the question of incapacity arose as a matter of law."

Cummins JA disapproved the traditional notion of a presumption, preferring instead to re-state the principle as an extension of the concept of *mens rea*, stating at [74]:

"I consider that the traditional notion of presumption is inappropriate. I consider that the better view is that the prosecution should prove beyond reasonable doubt, as part of the mental element of the offence, that the child knew the act or acts were seriously wrong. Such a requirement is consonant with humane and fair treatment of children. It is part of a civilized society."

Callaway JA agreed at [19]. Batt JA agreed at [24]. The principle being thus stated, it logically followed that:

- "proof of the acts themselves may prove requisite knowledge if those acts establish beyond reasonable doubt that the child knew that the act or acts themselves were seriously wrong": per Cummins AJA at [74];
- "the act or acts constituting the offence, in conjunction with the child's age, may be sufficient on their own to discharge the onus": per Callaway JA at [20].

The contrary view that evidence to prove the child's guilty knowledge could not be mere proof of the doing of the act charged was held to be unduly restrictive. And so, the decision of the House of Lords in *C (A Minor) v. DPP* [1996] AC 1 was disapproved on a second ground. **However, in *RP v The Queen* [2016] HCA 53 at [9] the High Court has described *R v ALH* as "wrong" on this issue.**

The rationale for the above conclusions, together with a detailed historical analysis, is set out in the judgment of Cummins AJA at [70]-[74]:

[70] "The principle of age incapacity – traditionally expressed as a presumption – is part of the common law of Australia. It was stated with characteristic elegance and erudition by Bray C.J. in *R v M* (1977) 16 SASR 589. It is a principle of great antiquity. [A.W.G. Kean, *The History of the Criminal Liability of Children* (1937) 53 Law Quarterly Review 364]. The enactment of Aethelstan [VI, I, 1] stated that robbers above the age of twelve ought not be pardoned. The Eyre of Kent stated that 'an infant under the age of seven years, though he be convicted of felony, shall go free of judgment because he knoweth not of good and evil': (1313-4) S.S. Vol.24, 109. In 1338 the Year Book stated:

'And it was said by the ancient law that no one shall be hanged within the age, nor shall suffer judgment of life or limb. But before Spigurnel it was found that an infant within age killed his companion, and then concealed himself, and thereupon he was hanged; for he said that by the concealment he could discern between good and evil, *quia malitia supplet aetatem*.' [12 Lib. Ass. F. 37 pl. 30; Y.B. 12 Edw. III 626 (R.S.); the Latin means 'malice supplements age'].

It was not until as late as 1588 that a clear age below which liability did not apply was fixed. Lambard's *Eirenarcha* when first published in 1581 did not state an age. However the third edition, published in 1588, stated that there can be no conviction of

'...an infant under the age of twelve years, unless it may be by some evident token appear, that he had understanding of good and evil ...'

In the seventeenth century, the age of discretion became fixed at fourteen. Kean, following Maitland in a droll if not post-modern observation states (at 370):

'The reason for this is that Coke dogmatised the results of the Middle Ages and subsequent lawyers took his word. Hale accepted the fourteen-line; his statement that absolute immunity ceases at seven removed any doubt which may have existed.'

Parish registers for the registration of baptisms began in the time of Henry VIII and were regulated by a canon of 1603. An abortive attempt at civil registration was made in 1653 by the Long Parliament. Kean concludes (at p.370):

'Finally, Coke's account of the law was accepted, and restated by Hale, and the lines were fixed at seven and fourteen. They remained unchanged until 1933, when the *Children and Young Persons Act* raised the age of which there can be no criminal responsibility from seven to eight.'

[71] To complete the story in England, judicial and academic views in the twentieth century waxed and waned according to theories of criminal justice from the retributive to the therapeutic. Then as the century neared its close, in 1994 Laws J in *C (a minor) v Director of Public Prosecutions* [1994] 3 WLR 888; [1996] AC at 4, in a judgment agreed in by Mann L.J. and later said by Lord Lowry to be a 'bold and imaginative judgment' {[1996] 1 AC at 40} held that the presumption of *doli incapax* was 'unreal', 'divisive and perverse', and 'is no longer part of the law in England.' [[1996] AC 4 at 9, 11 & 13 respectively]. An appeal from that decision (a Divisional Court of the Queen's Bench Division) was upheld and the decision reversed by the House of Lords in *C (a minor) v Director of Public Prosecutions*: [1996] AC 1. Their Lordships, having subjected the presumption to sustained and critical analysis, held that the presumption was a rule of the common law. They held that it could only be abrogated by statute and that the time had come for parliamentary investigation, deliberation and legislation in relation to it. Then by section 34 *Crime and Disorder Act* 1998 it was provided:

'The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished.'

In England the principle of ancient lineage was no more.

[72] In my respectful view, abolition in Australia of the principle of age incapacity would be a retrograde action. Children should be protected by the mantle of the criminal law, not oppressed by it. The time of Aethelstan although not illuminated by the insights of modern developmental psychology well understood the humanity and justice of protecting children from the full rigor of the criminal law. The wisdom of such protection is manifest. Harper J in *R (a child) v Whitty* (1993) 66 A Crim R 462 (a decision favourably noticed by Lord Lowry in *C (a minor) v. D.P.P.* at 40) cited with evident approval a passage from

Professor Colin Howard's Criminal Law [4th edition, 1982, p.343]: 'No civilised society regards children as accountable for their actions to the same extent as adults.' The ancient sense of justice and modern cognitive psychology come together properly to protect children in their development to adulthood. The "intermediate zone" {[1996] AC 1 at 26 per Lord Lowry} between 10 and 14 years is one of significant psychological, moral and personal development in children. The law should not be blind to its quality and character.

[73] A number of asserted defects and anomalies in the law of age incapacity were raised in the second half of the twentieth century, judicially, by commissions and academically, from an article by Professor Glanville Williams in 1954 [*The Criminal Responsibility of Children*, 1954 *Criminal Law Review* 493] to the judgment of Lord Lowry in 1995. Some of the criticisms are infected by the therapeutic theory of criminal justice whereby the coercive dealing with children as criminals is held *a priori* to be a benefit to them. Thus, as Professor Williams said (at p.495): '... at the present day the 'knowledge of wrong' test stands in the way not of punishment, but of educational treatment.' A number of criticisms go merely to procedural matters which can be resolved without abolition of the principle of age incapacity. The one anomaly I consider of real substance is the prohibition developed by the common law upon use of the mere facts of the offence as evidence capable of proving requisite knowledge in the child that the act or acts were seriously wrong.

[74] I consider that the anomalies forcefully stated by Laws J in *D.P.P. v. C.* and reviewed by Lord Lowry in *C (a minor) v. D.P.P.* have come about not because of a flawed basal entity (the principle of age incapacity) but because of flawed development of it. If the perceived common law requirement that mere proof of the act charged cannot constitute evidence of requisite knowledge were removed, the substance of the anomalies would disappear. That requirement doubtless is founded upon the danger of circular reasoning. But proper linear analysis could have regard to the nature and incidents of the acts charged without being circular. What is required is the eschewing of adult value judgments. Adult value judgments should not be attributed to children. If they are not, there is no reason in logic or experience why the proof of the act charged is not capable of proving requisite knowledge. Some acts may be so serious, harmful or wrong as properly to establish requisite knowledge in the child; others may be less obviously serious, harmful or wrong, or may be equivocal, or may be insufficient. I consider that the correct position is that proof of the acts themselves may prove requisite knowledge if those acts establish beyond reasonable doubt that the child knew that the act or acts themselves were seriously wrong. Further, I consider that the traditional notion of presumption is inappropriate. I consider that the better view is that the prosecution should prove beyond reasonable doubt, as part of the mental element of the offence, that the child knew the act or acts were seriously wrong. Such a requirement is consonant with humane and fair treatment of children. It is part of a civilised society."

Though concurring with the analysis of Cummins AJA on this issue, Callaway JA briefly stated his own conclusions at [19]-[20]:

[19] "It was said [by counsel for the applicant] that, if the jury had been directed that they must be satisfied that the applicant was *doli capax*, there was insufficient evidence on which they could decide that issue in favour of the Crown. When the *doli capax* rule is understood in the manner explained by Cummins AJA at [74], that contention cannot be sustained. It was open to the jury to be satisfied beyond reasonable doubt that the applicant was *doli capax*. The standard is beyond reasonable doubt. There is no useful analogy with insanity or mental impairment, where an affirmative burden of proof lies on the accused, or with procedural or jurisdictional questions. See, for example, *Wendo v R.* (1963) 109 CLR 559 and *Thompson v R.* (1989) 169 CLR 1. It is unnecessary for me to decide whether it was inevitable that [the jury] would be so satisfied. They were entitled to take into account not only his age but also the acts constituting the offences. It was unnecessary for there to be additional facts so long as the criminal standard was satisfied. The decision of the House of Lords in *C v. Director of Public Prosecutions* [1996] AC 1 at 38E-39F is, with respect, unduly restrictive.

[20] To speak of a 'presumption' that a child under 14 is *doli incapax* accords with long usage, but it obscures the simplicity of the common law rule properly understood. The language of the presumption is widely eschewed in s.4N of the *Crimes Act 1914* (Cth) and s.7.2 of the *Criminal Code* (Cth). Sections 4N(2) and 7.2(2) correctly state the common law. In the case of an accused person of or over the age of 14, the Crown does not have to prove that he or she knew that his or her conduct was seriously wrong. The question does not arise. In the case of an accused person under that age, but not under the age of 10, the Crown does have to prove such knowledge. That is all that is meant by the presumption. It is like other rebuttable presumptions that do no more than indicate on whom the burden of proof of a particular fact lies. When it is understood in that way, there is no circularity or inconsistency in saying that the act or acts constituting the offence, in conjunction with the child's age, may be sufficient on their own to discharge the onus. The authorities to the contrary are wrong in principle and should not be followed. [I doubt that this point was in issue between the parties in *R v CPH* (unreported, NSW Court of Criminal Appeal, 18/12/1996). The main focus of the judgments is on knowledge that the conduct is seriously wrong, not just naughty or disapproved of by adults.] The absurdities to which they lead are illustrated by the English cases after *C v DPP*: see Sir John Smith's commentaries on *A v DPP* and *H v DPP* in [1997] Crim LR 126-127 & 129."

In *DPP v Peter Martin (a pseudonym)* [2016] VSCA 219 a differently constituted Court of Appeal, dealing with *doli incapax* in a very different context, reintroduced by way of *obiter dicta* the concept of *doli incapax* as a presumption, the concept rejected by its predecessor in *R v ALH* (2003) 6 VR 276 at [74]. *Martin's Case* involved an interlocutory appeal by the Crown against the ruling of a County Court judge that 'uncharged acts' of sexual misconduct by the respondent as an 11-13 year old child were inadmissible as 'context or background evidence in a trial of charges of later sexual offending against the same victim. In allowing the appeal Redlich, Weinberg & McLeish JJA held:

- At [22] & footnote 1: "Throughout the period of these 'uncharged acts', the respondent was aged between 11 and 13. Accordingly, had...the respondent faced at least some of these uncharged acts as specific counts, the issue of *doli incapax* would have arisen. That issue would have been central to whether criminal responsibility could be sheeted home to the respondent, given his age at the time. In Victoria, there is a rebuttable presumption that a child aged at least 10 but less than 14 is incapable of committing a criminal act. There is an irrebuttable presumption that a child aged less than 10 is incapable of committing an offence."
- At [29] & footnote 5: "The test for rebuttal of the presumption of *doli incapax* was laid down in these terms [namely that the Crown would have to satisfy the jury that whatever it was the respondent may have done when he was aged less than 14, he was fully aware at that time that his conduct was 'seriously wrong'] by the House of Lords in *C (a minor) v DPP* [1991] AC 1. See also *R v ALH* (2003) 6 VR 276.
- At [110]: "The [*doli incapax*] presumption did not apply to evidence of other sexual misconduct led as context only. The relevance of the respondent's acts was to be viewed from the perspective of the victim, and not through the prism of the respondent's criminal responsibility."

10.4.5 The principle stated and applied by the High Court of Australia

In *RP v The Queen* (2016) 259 CLR 641; [2016] HCA 53 the appellant had been tried by judge alone in the District Court of NSW on two counts of aggravated indecent assault of his brother (offences 1 & 4) and two counts of sexual intercourse with his brother, a child aged under 10 years (offences 2 & 3). The appellant was aged 11y6m at the time of offences 2 & 3 and 12y3m at the time of offence 4. His brother was 4y9m younger. After a trial where the evidence was wholly documentary the appellant was acquitted of offence 1 but was found guilty of offences 2, 3 & 4 and was sentenced (as an adult) to 2y5m imprisonment with a non-parole period of 10 months. On appeal, the NSW Court of Criminal Appeal quashed the conviction on count 4 but upheld the conviction and sentence on counts 2 (unanimously) & 3 (by majority). The High Court allowed the appeal, quashed the convictions in respect of counts 2 & 3 and entered verdicts of acquittal.

In *Martin's Case* the characterization by the Victorian Court of Appeal of *doli incapax* as a presumption was *obiter dicta*. In *R v ALH* its characterization as a *mens rea* issue was the *ratio decidendi* of the case. In the re-statement of the *doli incapax* principle in both judgments in *RP v The Queen* the High Court has resolved this dilemma by unambiguously adopting the historical view of *doli incapax* as a presumption:

- At [4] per Kiefel, Bell, Keane & Gordon JJ: “The common law presumes that a child under 14 years lacks the capacity to be criminally responsible for his or her acts. The child is said to be *doli incapax*. The sole issue for the trial judge’s determination was whether the prosecution had rebutted the presumption that the appellant was *doli incapax*...The trial judge was satisfied that the circumstances surrounding the commission of the offence charged in count two proved beyond reasonable doubt that the appellant knew that his conduct was seriously wrong and therefore that the presumption was rebutted in relation to that offence. His Honour acted on trial counsel’s concession in holding that it logically followed that the presumption was rebutted in relation to the offences charged in counts three and four.”
- At [38] per Gageler J: “*Doli incapax* – incapacity for crime – is a common law presumption in the same way as innocence is a common law presumption. To establish that a child under the age of 14 years has committed an offence in a jurisdiction in which the common law presumption continues to apply, the prosecution must prove more than the elements of the offence. The prosecution must prove beyond reasonable doubt that the child understood that the child’s conduct which constituted the offence was seriously wrong by normal adult standards. That understanding cannot be inferred from the fact that the child engaged in the conduct which constituted the offence; it must be proved by other evidence. That other evidence might be or include evidence of the circumstances or manner of the conduct. That other evidence might also be or include evidence of the development or disposition of the child.”

The rationale for the presumption is set out in the joint judgment of Kiefel, Bell, Keane & Gordon JJ at [8]:

[8] “The rationale for the presumption of *doli incapax* is the view that a child aged under 14 years is not sufficiently intellectually and morally developed to appreciate the difference between right and wrong and thus lacks the capacity for mens rea: Hale, *The History of the Pleas of the Crown*, (1736), vol 1 at 25-28; *C (A Minor) v Director of Public Prosecutions* [1996] AC 1; *R v ALH* (2003) 6 VR 276; *BP v The Queen* [2006] NSWCCA 172. The presumption of *doli incapax* at common law is irrebuttable in the case of a child under seven years. From the age of 7 years until attaining the age of 14 years it is rebuttable: the prosecution may adduce evidence to prove that the child is *doli capax*.”

A brief history of the presumption is discussed in the joint judgment at [10], together with a reference at [11] to the judgment of Bray CJ in *R v M* (1977) 16 SASR 589.

A discussion of what suffices to rebut the presumption is set out in the joint judgment at [9] & [12], in the course of which one significant aspect of *R v ALH* is described as “wrong”:

[9] “The age at which a child is capable of bearing criminal responsibility for his or her acts has been raised by statute in New South Wales. Under s.5 of the *Children (Criminal Proceedings) Act* 1987 (NSW) (‘the Act’), there is a conclusive presumption that no child under the age of 10 years can be guilty of an offence. The Act does not otherwise affect the operation of the common law presumption of *doli incapax*. From the age of 10 years until attaining the age of 14 years, the presumption may be rebutted by evidence that the child knew that it was morally wrong to engage in the conduct that constitutes the physical element or elements of the offence. Knowledge of the moral wrongness of an act or omission is to be distinguished from the child’s awareness that his or her conduct is merely naughty or mischievous: *C (A Minor) v Director of Public Prosecutions* [1996] AC 1 at 38; *BP v The Queen* [2006] NSWCCA 172 at [27]-[28]. **This distinction may be captured by stating the requirement in terms of proof that the child knew the conduct was ‘seriously wrong’ or ‘gravely wrong’:** *R v Gorrie* (1918) 83 JP 136; *C (A Minor) v Director of Public Prosecutions* [1996] AC 1 at 38; *Archbold: Criminal Pleading: Evidence & Practice*, (1993), vol 1 at 52 [1-96]. **No matter how obviously wrong the act or acts constituting the offence may be, the presumption cannot be rebutted merely as an inference from the doing of that act or those acts:** *R v Smith (Sydney)* (1845) 1 Cox CC 260 per Erle J; *C (A Minor) v Director of Public Prosecutions* [1996] AC 1 at 38; *BP v The Queen* [2006] NSWCCA 172 at [29]; *R v T* [2009] AC 1310 at 1331 [16] per Lord Phillips of Worth Matravers. **To the extent that the decision of the Court of Appeal of the Supreme Court of Victoria in *R v ALH* ((2003) 6 VR 276 at 298 [86]; see also at 280-281 [19], 281 [24]) suggests a contrary approach it is wrong.** The prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child’s development is

such that he or she knew it was morally wrong to engage in the conduct. This directs attention to the child's education and the environment in which the child has been raised: *B v R* (1958) 44 Crim App R 1 at 3-4 per Lord Parker CJ; *C (A Minor) v Director of Public Prosecutions* [1996] AC 1 at 8 citing *F v Padwick* [1959] Crim L R 439 per Lord Parker CJ." [emphasis added]

[12] "What suffices to rebut the presumption that a child defendant is *doli incapax* will vary according to the nature of the allegation and the child. A child will more readily understand the seriousness of an act if it concerns values of which he or she has direct personal experience. For example, a child is likely better able to understand control of his or her own possessions and the theft of others' property compared to offences such as damaging public property, fare evading, receiving stolen goods, fraud or forgery. Answers given in the course of a police interview may serve to prove the child possessed the requisite knowledge. In other cases, evidence of the child's progress at school and of the child's home life will be required. It has been said that the closer the child defendant is to the age of 10, the stronger must be the evidence to rebut the presumption; conversely, the nearer the child is to the age of 14, the less strong need the evidence be to rebut the presumption: *R (A Child) v Whitty* (1993) 66 A Crim R 462 at 465; *DK v Rooney* unreported, Supreme Court of NSW, 3 July 1996 per McInerney J. The difficulty with these statements is that they are apt to suggest that children mature at a uniform rate. The only presumption which the law makes in the case of child defendants is that those under 14 are *doli incapax*. Rebutting that presumption directs attention to the intellectual and moral development of the particular child. Some 10-year-old children will possess the capacity to understand the serious wrongfulness of their acts while other children aged very nearly 14 years old will not."

Offence 2 occurred when the appellant had been left in charge of the complainant and two younger siblings when their father was at work. The complainant and another brother were fighting over who could play with the brother's "stuff" and the appellant locked the complainant in a room as punishment. He subsequently went into the room and said "if you wanna come out, you gotta let me do this to ya". He put a condom on his penis and threw the complainant on a bed, pulled his pants and underpants down and commenced anal intercourse. The complainant was crying and protesting, saying "no, [RP], no". The appellant put his hand over the complainant's mouth but when he heard the sound of an adult returning to the home, he withdrew his penis and said "don't say nothin'". Offence 3 occurred a few weeks later at the father's workplace when the appellant exposed his penis to the complainant, pulled his pants down and had had anal intercourse with him for 2-3 minutes until the appellant heard their father returning to the office. Offence 4 occurred when the complainant and appellant were watching a DVD while their father was out of the room. The appellant put his hand on the complainant's penis outside his clothing and rubbed it for approximately 5 minutes until the complainant said that he was "starting to get sick of this".

A Job Capacity Assessment Report of the appellant prepared when he was 17 years old referred to an IQ test where he obtained a score of 70-79 placing him in the "borderline range of intellectual functioning". He was described as having "moderate difficulties in social/occupational functioning" and as requiring supervision in daily activities. He was placed on a disability support pension. An IQ test conducted on the appellant when he was aged 18 in order to determine his fitness to plead in relation to other charges resulted in an overall score at the top of the borderline disabled range, placing him in the 8th percentile of functioning. The psychologist was left with the impression that the appellant's educational and social deprivation may have contributed to his low scores, together with his "innate limitation". The psychologist reported that the appellant's "upbringing appears to have been marked by a measure of turmoil and dysfunction". He described the appellant as "a fairly naïve and sophisticated young man, whose emotional and behavioural control may at times fluctuate, and who may at times tend to be overwhelmed by events." He added that there were "some fairly unsatisfactory aspects of [RP's] upbringing (exposure to violence, possibly being the victim of molestation, exposure to family law type disputes etc), which have probably contributed to [RP's] difficulties in coping with the vicissitudes of life."

In finding that the *doli incapax* presumption had not been rebutted, the High Court held, *inter alia*:

- At [30]: "There is a deal more force to the appellant's [argument] that it is open to doubt, in the absence of evidence to the contrary, the reasoning capacity of an 11-year-old to comprehend not only that another is unwilling to go along with his wishes, but also that it is morally wrong to impose those wishes in violation of the personal autonomy of another. This, it is submitted, is particularly

so in respect of another prepubescent child over whom, by virtue of the fraternal relationship, the older child is in a position to exert some physical authority.”

- At [32-33]: “[T]he appellant is presumed in law to be incapable of bearing criminal responsibility for his acts. The onus was upon the prosecution to adduce evidence to rebut that presumption to the criminal standard. The trial judge found the appellant was of ‘very low intelligence’ and possessed a lesser appreciation of the seriousness of his conduct. The prosecution did not adduce any evidence apart from the circumstances of the offences to establish that, despite these deficits, the appellant’s development was such that he understood the moral wrongfulness of his acts. It is common enough for children to engage in forms of sexual play and to endeavour to keep it secret, since even very young children may appreciate that it is naughty to engage in such play. The appellant’s conduct went well beyond ordinary childish sexual experimentation, but this does not carry with it a conclusion that he understood his conduct was seriously wrong in a moral sense, as distinct from it being rude or naughty.”
- At [35]: “The conclusion drawn below that the appellant knew his conduct, in having sexual intercourse with his younger sibling, was seriously wrong was based on the inferences that he knew his brother was not consenting and that he must have observed his brother’s distress. It cannot, however, be assumed that a child of 11y6m understands that the infliction of hurt and distress on a younger sibling involves serious wrongdoing. While the evidence of the appellant’s intellectual limitations does not preclude a finding that the presumption had been rebutted, it does point to the need that, despite those limitations, he possessed the requisite understanding.”
- At [36]: “In relation to...counts 2 & 3, there was no evidence about the environment in which the appellant had been raised or from which any conclusion could be drawn about his moral development. The circumstance that at the age of 11y6m he was left at home along in charge of his younger siblings does not so much speak to his asserted maturity as to the inadequacy of the arrangements for the care of the children, including the appellant. No evidence of the appellant’s performance at school as an 11-year-old was adduced. In the absence of evidence on these subjects, it was not open to conclude that the appellant, with his intellectual limitations, was proved beyond reasonable doubt to have understood that his conduct...in engaging in sexual intercourse with his younger brother was seriously wrong in a moral sense.”

In *Johnson v The Queen* [2018] HCA 48 the appellant was tried in South Australia in March 2015 on an information that charged him with 5 counts of sexual offences against his sister, VW. He is 2y10m older than VW. The first count alleged an indecent assault which occurred when he “was aged 11 or 12 years and was, by law, presumed to be *doli incapax*: see *RP v The Queen* (2016) 259 CLR 641; [2016] HCA 53. The second count alleged carnal knowledge which occurred when he was aged 17 years. The remaining counts charged offences alleged to have taken place when he was an adult: the persistent sexual exploitation of VW occurring over a period when he was aged 18 or 19 years and 2 counts of rape, the first of which was alleged to have occurred when he was aged 28 years and the second around a year later.

The prosecution adduced evidence from VW of the appellant’s other alleged misconduct against her from when she was three years old until the end of the period of the alleged offending. Three incidents were alleged to have occurred before the commission of the first offence – the bath incident, the implements shed incident and the bedroom incident. The appellant was aged between 6 and 9 or 10 years at the date of these incidents. A purpose of adducing this evidence was to rebut the presumption of *doli incapax*.

The appellant gave evidence denying that he had engaged in any sexual conduct with VW. The jury returned verdicts of guilty on each count. The Court of Criminal Appeal of the Supreme Court of South Australia allowed the appellant’s appeal in relation to the first and third counts, holding that the evidence adduced in support of the first count was incapable of rebutting the presumption that the appellant was *doli incapax*. Their Honours held that the evidence adduced in support of the third count was “simply too sparse” for the jury to agree upon any two occasions on which a particularised act of sexual exploitation (penile vaginal intercourse) occurred. The verdicts on counts one and three were quashed. However, the Court rejected the contention that the joinder of counts one and three had occasioned a miscarriage of justice in the trial of the remaining counts. Their Honours concluded that the evidence adduced in relation to counts one and three was admissible on the trial of each other count as “relationship evidence”, a shorthand reference to evidence of other sexual misconduct adduced for one or more of the contextual purposes explained in *R v Nieterink* (1999) 76 SASR 56 and by the High Court in *Roach v The Queen* (2011) 242 CLR 610; [2011] HCA 1211. The appeal against the convictions on the remaining counts was dismissed.

The High Court dismissed the appellant's further appeal, holding that with the exception of the earliest act, the bath incident, the Court of Criminal Appeal was right to hold that the whole of the evidence of the other sexual misconduct was admissible on the trial of each of the remaining counts. Given the course of the trial, the wrongful admission of the evidence of the bath incident did not occasion a miscarriage of justice. The Court of Criminal Appeal was also right to reject the contention that the joinder of count one or three occasioned a miscarriage of justice.

10.5 Effect of therapeutic treatment order or similar voluntary treatment on criminal proceedings

The Family Division of the Children's Court has power under CYFA/s.248 to make a therapeutic treatment order ['TTO'] in respect of a child aged 10-17 at the time the order is made if the Court is satisfied-

- (a) that the child has exhibited sexually abusive behaviours [not defined in the CYFA]; and
- (b) that the order is necessary to ensure the child's access to, or attendance at, a therapeutic treatment program ['TTP'].

10.5.1 Mandatory adjournment

Under s.352 of the CYFA, if the Secretary of the Department of Health & Human Services reports to the Criminal Division of the Court under s.351 that a TTO has been made in respect of a child and the Court has not yet made a finding in the criminal proceedings in which the child is an accused, the Court **must adjourn** the criminal proceedings for a period not less than the period of the TTO.

Under s.352A of the CYFA, if a TTO has been made in respect of a child, the Court may require the Secretary to report to the Criminal Division at the time or times specified by the Court on the child's progress and attendance at the therapeutic treatment program. The Court may make such requirement when adjourning criminal proceedings under s.352 or at any other time during the period of the TTO when the Court is exercising the jurisdiction of the Criminal Division in relation to the child. The Court may direct the Secretary to provide a copy of the report to the child and the prosecutor. This new provision, operating from 29/03/2019, appears to give the Criminal Division of the Court an implied power to conduct judicial monitoring of the progress of a child on a TTO just as s.249(2)(ba) appears to give the Family Division a similar implied power of judicial monitoring [see section 5.23.2].

Section 353 provides that if criminal proceedings are adjourned under s.352, the Secretary must report to the Criminal Division on the completion of the TTO or on the revocation of the TTO. The report must set out details of the child's participation in and attendance at the TT program under the order. The Court may direct the Secretary to provide a copy of the report to the child and the prosecutor.

If criminal proceedings against a child have been adjourned pending the completion by the child of a TTP under a TTO, s.258(2) requires the Secretary to seek the advice of the Therapeutic Treatment Board before applying to the Family Division to revoke the TTO. If the TTO is revoked, s.354(1) empowers the Court, on the application of the Secretary, to re-list the adjourned case at short notice if it considers it appropriate to do so.

Sections 354A(1) & 354A(2) give the Criminal Division of the Court powers similar to s.352 of adjourning criminal proceedings for an accused child-

- who is *aged 10-17 when he or she appears as an accused in a criminal proceeding* in the Court; and
- who has exhibited sexually abusive behaviours that would justify referring the matter to the Secretary under s.349(2); and
- where the Court has not yet made a finding in the criminal proceeding; and
- where the Court is satisfied that the child has attended and participated, is attending and participating or will attend and participate voluntarily in an appropriate therapeutic treatment program (not pursuant to a TTO).

The italicized words in the first dot point are ambiguous. Do they mean aged 10-17 when he or she first appears as an accused or do they bear their literal meaning of when he or she appears at any time as an accused? A comparison with the equivalent TTO provision in s.354 would suggest the former is more likely to have been the intention of Parliament.

The significant difference between s.352 and 354A(2)(a) is that the Court **must** adjourn the criminal proceedings under s.352 where the child is on a TTO but only **may** adjourn the criminal proceedings under s.354A(2) where the therapeutic treatment program is voluntary.

10.5.2 Hearing of adjourned case

Under s.354(4) of the CYFA, if the Criminal Division of the Court is satisfied that a child accused has attended and participated in a TTP under a TTO, it must discharge the child without any further hearing of the related criminal proceedings.

In *Victoria Police v HW* [2010] VChC 1 the child the subject of a TTO had earlier been charged with very serious sexual offending which occurred when he was 13 years of age. The child had been attending and participating in the TTP under a TTO. However, as the therapeutic treatment had not been completed by the end of the TTO the Department of Health & Human Services had filed an application to extend the TTO and – with the consent of the child – the TTO had been extended. Counsel for the child submitted that s.354(4) is clear and that once a child has attended and participated in the TTP under the TTO it must discharge the child even though there was an application for extension before the Family Division. The police prosecutor submitted that the Court must look at the rationale for TTO's and that given that the child is still in need of therapeutic treatment the criminal proceedings ought be adjourned until the period of the extended TTO is completed and the Court is advised of the child's compliance with the TTO. At [17]-[18] Judge Grant preferred the police submission:

“Given the purpose of a TTO, parliament would not have intended that a child be discharged on serious criminal offences in circumstances where the child was considered to require on-going treatment by way of an extension of the TTO...

The only way of interpreting s.354(4), consistent with the clear purpose of the Act, is to recognise that the words ‘attend and participate in the therapeutic treatment program’, mean attend and participate in the program until the TTP is completed. If, as in this case, the TTO has been extended for a period, the appropriate order on the associated criminal proceedings is to adjourn those proceedings for a period that is not less than the period of extension of the order.”

Subsequent to Judge Grant's decision – as and from 01/03/2016 – s.354(4A) provides that for the purposes of s.354(4), the Court must have regard to-

- (a) the child's attendance record; and
- (b) the nature and extent of the child's participation; and
- (c) whether or not the child's participation was to the satisfaction of the therapeutic treatment provider; and
- (d) the opinion of the therapeutic treatment provider as to the effectiveness of the treatment.

Section 354(5) provides that if the child is not discharged under s.354(4), the Court may determine what (if any) further proceedings in the Criminal Division in respect of the child are appropriate.

Sections 354A(3) to 354A(5) give the Criminal Division of the Court powers similar to s.354 of discharging the accused after satisfactory completion of a voluntary therapeutic treatment program and of determining what (if any) further proceedings in the Criminal Division in respect of the child are appropriate if the child is not discharged.

10.5.3 Privilege against self-incrimination

Section 251 of the CYFA provides that any statement made by a child when participating in a therapeutic treatment program under a TTO or voluntarily in an appropriate therapeutic treatment program is not admissible in any criminal proceeding in relation to the child.

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10.6 Unfitness to be tried & Mental impairment

- A BACKGROUND** The *Crimes (Mental Impairment and Unfitness to be Tried Act) 1997* (Vic) ('the CMIA') has been in operation since 18/04/1998. The purposes of the CMIA [s.1] are–
- (a) to define the criteria for determining if a person is unfit to stand trial;
 - (b) to replace the common law defence of insanity with a statutory defence of mental impairment;
 - (c) to provide new procedures for dealing with people who are unfit to stand trial or who are found not guilty because of mental impairment.

The question of whether a person is unfit to be tried focuses on the person's mental capacity at the time of the trial. The question of whether a person is mentally impaired focuses on the person's mental capacity at the time of the alleged offence. The two questions sometimes overlap and are sometimes mutually exclusive. See [2010] VSC 517 at [29].

The CMIA did not originally confer jurisdiction on the Children's Court to determine a child's fitness to be tried. In *CL (a minor) v Tim Lee and Ors* [2010] VSC 517 at [77] Lasry J held–

"[A] Magistrate sitting in the Children's Court or Magistrates' Court has no jurisdiction to deal with issue of fitness to plead once it is raised, assuming the issue is genuinely raised...[N]either the CMIA, the *Children, Youth and Families Act 2005* (Vic) ['the CYFA'] or the common law provide any basis to invest jurisdiction on a Children's Court Magistrate to deal with fitness to plead issues."

At [67] Lasry J also disapproved the decision of Levine M in *R v NL* [Children's Court of Victoria, unreported, 06/03/2009] that the Children's Court had an inherent power – not a power conferred by the CMIA – to determine the issue of fitness to plead, particularly in circumstances that would be an abuse of court process. In *CL, a minor (by his litigation guardian) v Director of Public Prosecutions (on behalf of Tim Lee) & Ors* [2011] VSCA 227, the Court of Appeal refused leave to appeal from the decision of Lasry J.

By contrast, at [25] Lasry J held that the effect of s.5 of the CMIA – which provides that the defence of mental impairment applies in the Magistrates' Court to summary offences and to indictable offences tried summarily – read in conjunction with s.528 of the CYFA was that the statutory defence of mental impairment was available to a Children's Court accused in the same way as to an adult accused in the Magistrates' Court. However, by virtue of s.5(2) of the CMIA, the only consequence of a finding by a Magistrate that an accused was not guilty because of mental impairment was that the court had to discharge the accused unconditionally.

- B AMENDMENTS TO THE CMIA** In an omnibus Act entitled *Criminal Organisations Control and Other Acts Amendment Act 2014* (Vic) [No.55 of 2014]–

- ✳ Part 5A amended the CMIA to create a new statutory regime for proceedings in the Children's Court involving issues of mental impairment and/or unfitness to be tried as well as appeals from those proceedings.
 - ✳ Part 5 made some consequential amendments to the CMIA generally.
- These provisions – largely intended to fill jurisdictional gaps partly identified by Lasry J – commenced on 31/10/2014. This paper summarizes this regime for a hearing in the Children's Court, a regime that comprises Part 5A and ss.39, 40(1) & 47 of the CMIA. See topic **W** below for a summary of temporary COVID-19 amendments to the CMIA in operation.

C APPLICATION OF THE CMIA TO THE CHILDREN'S COURT|CMIA-s.5A

Section 5A provides a 3-limbed definition of the application of the CMIA to the Children's Court–

- (1) If the Children's Court has jurisdiction under s.516 of the CYFA to hear and determine an indictable offence, the Children's Court may determine in accordance with Part 5A–
 - (a) the fitness of an accused to stand trial for the offence; and
 - (b) a defence of mental impairment raised to the offence.
- (2) The defence of mental impairment as provided for in s.38ZA of the CMIA and the presumption in s.38ZB(1) [see topic **M** below] apply to summary offences and to indictable offences heard and determined summarily in the Children's Court.

- (3) If the Children's Court finds a child not guilty because of mental impairment of a summary offence, the Children's Court must discharge the child.

It follows from s.5A(1) that the Children's Court does not have jurisdiction to determine the fitness of a child accused to stand trial for a summary offence. Presumably the court would have to deal with the summary charge (if not withdrawn) as if the child had pleaded not guilty but it is hard to see how a trial could proceed in a way that is procedurally fair to a child who is indeed unfit to stand trial.

D CONSTITUTION OF CHILDREN'S COURT|CMIA-s.38(1)

If the question of the fitness of a child to stand trial arises or the defence of mental impairment is raised in a proceeding in the Children's Court, the court must be constituted as follows—

- (a) if the offence is punishable by level 2 imprisonment (25 years maximum), by the President or, if the President is unavailable, a magistrate nominated by the President; or
- (b) in any other case, by the President or a magistrate.

If fitness to stand trial or mental impairment is first raised during a hearing before a magistrate, the matter must be transferred for hearing before the President or, if the President is unavailable, a magistrate nominated by the President

E WHEN IS A CHILD UNFIT TO BE TRIED?|CMIA-s.38K

Section 38K(1) of the CMIA provides that a child is unfit to stand trial for an indictable offence if, because the child's mental processes are disordered or impaired, the child is or, at some time during the hearing in the Children's Court, will be—

- (a) unable to understand the nature of the charge; or
- (b) unable to enter a plea to the charge; or
- (c) unable to understand the nature of the hearing (namely that it is an enquiry as to whether the child committed the offence); or
- (d) unable to follow the course of the hearing; or
- (e) unable to understand the substantial effect of any evidence that may be given in support of the prosecution; or
- (f) unable to give instructions to his or her legal practitioner.

A child is not unfit to stand trial only because he or she is suffering from memory loss: s.38K(2).

Section 38K is drafted in similar terms to s.6 (applicable to adult accused) and to the former common law principles set out in the decision of Smith J in *R v Presser* [1958] VR 45 at 48 where his Honour also noted:

"Where he has counsel he needs to be able to do this through his counsel by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not, of course, be conversant with Court procedure and he need not have the mental capacity to make an able defence; but he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any."

In *Kirk Reese (a pseudonym) v Victoria Police* [2020] VChC 6, the accused, profoundly deaf since birth, had also been assessed with ADHD, autism, mild cerebral palsy and a global intellectual delay with a full scale IQ of 50 which falls within the extremely low range. KR is non-verbal and communicates through sign, although he is not Auslan proficient. Ms Jane Lofthouse, neuropsychologist, who assessed KR on 21 December 2018 found that his general intelligence fell within the 'moderately intellectually disabled' range where he would score better than or equal to less than 1% of his peers. KR was charged with four offences: (1) false imprisonment, (2) sexual assault, (3) recklessly causing injury and (4) detention of a person for a sexual purpose. These charges arose from an incident at KR's residential unit on 18 August 2018 when he was 17 years old. The victim was Ms Y, employed as a residential support worker at that unit. Judge Chambers, having regard to the expert opinion evidence of Ms Lofthouse and consultant forensic psychiatrist Dr Panduaruangi, found KR unfit to stand trial on the charges pursuant to s.38K(1) of the CMIA. At [4]-[5] Judge Chambers said:

[4] “In summary, both experts found that KR’s mild intellectual disability and autism spectrum disorder led to ‘impaired mental processes’ [see s.38K(1)] that are likely to be permanent and that, because of his cognitive impairment, he was unfit to stand trial on the charges. In Dr Panduarangi’s assessment, KR ‘*did not display any understanding of the nature of the charges he was facing*’, would be unable to ‘*rationaly enter a plea*’, did not ‘*understand the nature and purpose of a trial*’ and would be unable to ‘*meaningfully instruct his lawyers*’. Ms Lofthouse reached the same conclusions.

[5] Having found KR unfit to stand trial, and that he was unlikely to become fit into the future, the CMIA requires the Children’s Court to hold a special hearing [see s.38R(3)(a)], the purpose of which is to determine whether, on the evidence available, KR is either not guilty of the offence or is not guilty of the offence because of mental impairment or committed the offence charged (or an alternative offence) [see s.38V].”

In *R v Dellamarta* [2020] VSC 745 Taylor J held that an adult accused was fit to be tried under the provisions of s.6 of the CMIA which are very similar in effect to s.38K(1). Discussing the relevant legal principles her Honour held *inter alia*-

- [11]-[13] “A person is presumed to be fit to stand trial. That presumption may be rebutted. The question of a person’s fitness to stand trial is a question of fact to be determined on the balance of probabilities. The party raising the question bears the onus of proof: s.7(4)...[T]he question of the accused’s fitness involves a two-step enquiry. First, does the accused currently suffer from at least one of the delineated incapacities in s.6(1) of the Act, or will do at some time during the trial. Second, is that incapacity or those incapacities caused by the accused’s disordered or impaired mental processes.”
- [19] “The focus of a fitness inquiry is on the ability of an accused to meet the minimum threshold of the criteria. This was highlighted in *R v Rivkin* (2004) 59 NSWLR 284 where post-conviction evidence established that during the trial the accused had an undiagnosed frontal lobe tumour which caused a frontal lobe dysfunction. As a result, the accused suffered poor judgment and irrationality as well as inappropriate and disinhibited behaviour. It also caused significant reduction in the accused’s short-term memory and capacity for new learning. The court held that a reduction in an accused’s ability to meet the *Presser* requirements did not render that accused unfit so long as the minimum requirements were met. In particular, that an accused may have met those requirements in a better way was held to be irrelevant”.
- [20]-[21] “The particular trial facing the accused is also relevant. The court must consider the complexity of the charge and whether the accused is represented by counsel: *R v Hayles* (2018) 131 SASR 186, [40]...The assistance of counsel is also relevant to the assessment of whether an accused will be able to understand and follow the processes of the trial. That criterion does not extend to a requirement that an accused can understand the law under which he or she is tried or have the capacity to make an able defence.”
- [23]-[26] “The High Court in *The Queen v Ngatayi* approved the *Presser* formulation: (1980) 147 CLR 1 at p.9. The majority...held that Smith J in *Presser* was correct in finding that an accused need not have the capacity to make an able defence.

‘If the accused is able to understand the evidence, and to instruct his [or her] counsel as to the facts of the case, no unfairness or injustice will generally be occasioned by the fact that the accused does not know, and cannot understand, the law. With the assistance of counsel he [or she] will usually be able to make a proper defence.’

In that case the accused admitted killing the deceased. In issue was whether his state of intoxication was such that he was incapable of forming murderous intent. His counsel argued that he was incapable of understanding the distinction between an act of killing accompanied by such intent and one where no such intent had been formed. The majority stated at p.10:

‘In the present case there is no reason to doubt that the applicant understood the nature of the proceedings and the nature of the evidence. He was capable of giving evidence as to the circumstances out of which the charge arose, including evidence that he was drunk when he stabbed White. ... The fact that the applicant could not understand the law under which he was tried did not mean that he was not able to make a proper defence with the assistance of counsel.’

Similarly, in *Hayles* the court held at [38] that the minimum requirements that an accused must be able to follow the evidence and respond rationally to the charge does not require that an accused must be able to understand how his or her intention may be inferred from the evidence. Nor does the test require an accused to be able to participate in forensic or tactical decision making.

In *R v Dunne* [2001] WASC 263, it was held that an accused need not have a complete understanding of the evidence but rather the capacity to instruct his or her counsel as to the facts of the case.”

In *Dellamarta’s Case* although the parties agreed with the general legal principles as to fitness, there was some disagreement as to the minimum content of each of the four s.6(1) criteria in issue. These – said to arise from the accused’s impaired mental processes consequent upon her mild intellectual disability – were her ability–

1. to exercise the right to challenge jurors or the jury;
2. to follow the course of the trial;
3. to understand the substantial effect of any evidence that may be given in support of the prosecution and
4. to give instructions to legal practitioners.

At [97]-[98] her Honour concluded that the accused had not rebutted the presumption that she is fit to stand trial with respect to any of the four s.6(1) criteria in issue. It followed that the accused is fit to stand trial.

F PRESUMPTIONS, STANDARD OF PROOF ETC RE FITNESS|CMIA-s.38L

Section 38L of the CMIA provides–

- (1) A child is presumed to be fit to stand trial.
- (2) The presumption is rebutted only if it is established on an investigation under this Division [as to which see topic **F** below] that the child is unfit to stand trial.
- (3) The question of a child’s fitness to stand trial is a question of fact to be determined on the balance of probabilities.
- (4) If the question of a child’s fitness to stand trial is raised by the prosecution or the defence, the party raising it bears the onus of rebutting the presumption of fitness.
- (5) If the question is raised by the Children’s Court, the prosecution has carriage of the matter, but no party bears any onus of proof in relation to it.
- (6) If the defence intends to raise the question of a child’s fitness to stand trial, the defence must give reasonable notice to the prosecution.

G QUESTION OF FITNESS TO STAND TRIAL OR MENTAL IMPAIRMENT ARISING IN A COMMITTAL PROCEEDING|CMIA-ss.38M, 38ZC

If the question of a child’s fitness to stand trial arises in a committal hearing for an indictable offence–

- (a) the committal proceeding must be completed in accordance with Chapter 4 of the **Criminal Procedure Act 2009**; and
- (b) the child must not be discharged only because the question has been raised; and
- (c) if the child is committed for trial, the question must be reserved for consideration by the trial judge.

A child must not be discharged only because the defence of mental impairment has been raised.

H INVESTIGATION OF QUESTION OF FITNESS TO STAND TRIAL|CMIA-ss.38N, 38O

If it appears to the Children’s Court at any time after a charge-sheet has been filed against a child that there is a real and substantial question as to the fitness of the child to stand trial, s.38N(1) requires the court to reserve that question for investigation. If a hearing has been commenced and it then appears to the court that there is a real and substantial question as to the fitness of the child to stand trial, s.38N(2) requires the court to adjourn or discontinue the hearing and proceed with an investigation into the question. The investigation must be completed as soon as possible after the question is reserved and in any event within 3 months: s.38O.

The question of fitness may be raised more than once in the same proceeding: s.38N(3).

I ORDERS PENDING INVESTIGATION INTO FITNESS TO STAND TRIAL|CMIA-s.38P

BAIL, REMAND ETC Pending an investigation into fitness, s.38P empowers the Children's Court–
(a) to bail the child;
(b) to remand the child in custody if no practical alternative [CMIA/s.38J(1) but note that a s.47 certificate is required per CMIA/s.38J(2) – see topic **P** below]; and/or
(d) to make any other order the court thinks appropriate.

CHILDREN'S COURT CLINIC ETC Section 38P(c) also empowers the court to order–
(i) that the child undergo an examination by a registered medical practitioner or registered psychologist [this will usually be via the Children's Court Clinic]; and
(ii) that the results of the examination be put before the court.

J PROCEDURE ON INVESTIGATION INTO FITNESS TO STAND TRIAL|CMIA-s.38Q

It is clear from s.38P(c) & s.38Q(1)(b) that the investigation procedure is not purely adversarial but gives the court options to make its own enquiry. Section 38Q(1) provides that on an investigation–

- (a) the court must hear any relevant evidence and submissions put to the court by the prosecution or the defence; and
- (b) if of the opinion that it is in the interests of justice to do so, the court may–
 - (i) call evidence on its own initiative; and
 - (ii) require the child to undergo an examination by a registered medical practitioner or registered psychologist [presumably usually via the Children's Court Clinic]; and
 - (iii) require the results of any such examination to be put before the court.

Nothing in s.38Q(1) prevents the application of Part 3.10 of the **Evidence Act 2008** ["Privileges"] to an investigation, for the purposes of which the investigation is taken to be a criminal proceeding.

The writer is not aware of any case law relating to the procedure on an investigation under s.38Q into a child's unfitness to be tried. The case law in relation to the procedure for an investigation into an adult's fitness to be tried under the very similar s.11 includes–

- *R v Langley* (2008) 19 VR 90; [2008] VSCA 81 per Lasry AJA (with whom Buchanan & Dodds-Streeton JJA agreed), especially at [23]-[24]: "The determination of the fitness of a person to stand trial is not itself a trial. It is designated by the Act as an 'investigation'...On a proper interpretation of [s.11] alone the role of a trial judge in this procedure is significantly different and intended to be more investigative than would be the case during a conventional criminal trial. However, these provisions are not mandatory..."
- *Madafferi v The Queen* [2017] VSCA 302: The Court of Appeal (Priest, Hansen and Coghlan JJA) set out the approach to be taken by a trial judge when a real and substantial question arises at trial as to an accused person's fitness to be tried, holding at [6]:

"[The CMI Act] requires a trial judge to reserve the question of 'the fitness of the accused to stand trial' for investigation under the CMI Act if at any time after an indictment has been filed 'it appears to the court before which the accused is to be tried that *there is a real and substantial question* as to the fitness of the accused to stand trial'. Therefore, if an issue had been raised by either party in the applicant's trial as to his fitness to be tried, and the judge had considered that there was a real and substantial question as to the fitness of the applicant to stand trial, the trial judge would have erred if he had failed to take the steps contemplated by the CMI Act. And if, neither defence nor prosecution having raised the issue, it appeared to the judge that there was a real and substantial issue as to the applicant's fitness to be tried **, but the judge failed to reserve the question for investigation under the CMI Act, the judge would have erred. ** For example, in *Kesavarajah v The Queen* (1994) 181 CLR 230, during his charge to the jury, various matters came to the trial judge's attention which again raised the question of the applicant's fitness to be tried, including a note of the applicant's to the effect that he was receiving instructions from aliens, was the incarnation of Lord Vishnu and had just returned to Earth."

- *Camurtay v The Queen* [2020] VSCA 221 per Priest, Niall & Weinberg JJA especially at [81] where the Court set out the above dicta from *Madafferi v The Queen* and at [86] where Priest JA said that "there were two points in particular at which it should have occurred to a

judge dealing with the applicant's case that there was a 'real and substantial question as to the fitness of the [applicant] to stand trial'."

If the Children's Court finds that the child is presently unfit to stand trial, that is not the end of the investigation. In that event, the court must—

- determine on the balance of probabilities whether or not the child is likely to become fit to stand trial within the next 6 months [s.38Q(3)(a)]; and
 - if so, specify the period by the end of which the child is likely to be fit to stand trial [s.38Q(3)(b)].
- For these purposes, the court may call further evidence on its own initiative.

K WHAT HAPPENS AFTER AN INVESTIGATION INTO FITNESS? [CMIA-s.38R, 38S, 38T]

IF CHILD FIT TO STAND TRIAL NOW [CMIA-s.38R(1)] The summary hearing must be commenced or resumed in accordance with usual criminal procedures as soon as possible and in any event within 3 months.

IF CHILD NOT FIT TO STAND TRIAL NOW BUT LIKELY TO BECOME FIT WITHIN 6 MONTHS

- **ADJOURN [CMIA-s.38R(2)]** The court must adjourn the investigation for the period specified under s.38Q(3)(b) and may—
 - (a) bail the child; or
 - (b) remand the child in custody if no practical alternative [CMIA/s.38J(1) but note that a s.47 certificate is required per CMIA/s.38J(2)]; or
 - (c) make any other order the court thinks appropriate.
- **ABRIDGE [CMIA-s.38S]** At any time during this period of adjournment the child or the prosecutor may apply for an abridgment of the adjournment period or – if of opinion that the child will not become fit to stand trial by the end of 6 months after the first finding of unfitness – for an order that the court proceed to hold a special hearing. The application must be accompanied by a report on the mental condition of the child by a registered medical practitioner or registered psychologist. On hearing the application the court must—
 - (a) dismiss the application; or
 - (b) if satisfied that the child has become fit to stand trial, order that the hearing commence or resume as soon as possible; or
 - (c) if satisfied that the child will not become fit to stand trial by the end of the period of 6 months after the first finding of unfitness, order that the court hold a special hearing [see topic **L** below] as soon as possible and in any event within 3 months.
- **AT END OF ADJOURNMENT [CMIA-s.38T]** The child is presumed to be fit to stand trial unless a real and substantial question of fitness is raised again. If it is so raised, the court must hold a special hearing as soon as possible and in any event within 3 months and may bail or remand the child or make any other appropriate order for the safe custody of the child.

IF CHILD NOT FIT TO STAND TRIAL AND NOT LIKELY TO BECOME FIT WITHIN 6 MONTHS [CMIA-s.38R(3)] The court must hold a special hearing as soon as possible and in any event within 3 months and may bail/remand or make any other appropriate order for the safe custody of the child.

The equivalent provision in relation to adult accused is s.12(5) which requires the judge to hold a special hearing within 3 months if the judge has determined that the accused is not likely to become fit within the next 12 months. In *R v Fairest, Fields & Toohey (Rulings-Fitness to be tried)* [2016] VSC 329 the three adult accused were charged with murder. The deceased was allegedly pushed off a balcony and fell to his death. All three accused and the deceased were deaf. Two of the accused were intellectually disabled and the third was of borderline intelligence and autistic. Each accused was found (by a separate jury) to be unfit to stand trial. Croucher J determined on the balance of probabilities that each accused was unlikely to become fit within the next 12 months and directed that the Court hold a special hearing within the next 3 months.

L SPECIAL HEARING WHEN CHILD FOUND UNFIT TO BE TRIED [CMIA-ss.38V-38Z]

PURPOSE [CMIA-s.38V] The purpose of a special hearing is to determine whether, on the evidence available, the child—

- (a) is not guilty of the offence; or
- (b) is not guilty of the offence because of mental impairment [see topic **M** below]; or
- (c) committed the offence charged or an offence available as an alternative.

PROCEDURE|CMIA-s.38W A special hearing is to be conducted as nearly as possible as if it were a hearing and determination of a charge for an offence. This means that in contrast with an investigation into fitness to stand trial, a special hearing is essentially an adversarial process. At a special hearing–

- (a) the child must be taken to have pleaded not guilty to the offence; and
- (b) the child may raise any defence that could be raised if the special hearing were a hearing of the charge, including the defence of mental impairment; and
- (c) the rules of evidence apply; and
- (d) subject to s.524 of the CYFA the child must be legally represented; and
- (e) any alternative finding that would be available if the special hearing were a hearing and determination of the charge is available to the court.

FINDINGS|CMIA-s.38X The following findings are available at a special hearing–

- (a) not guilty of the offence charged (i.e. not guilty on the merits);
- (b) not guilty of the offence because of mental impairment;
- (c) if satisfied beyond reasonable doubt, that the child committed the offence charged or an offence available as an alternative.

In *Kirk Reese (a pseudonym) v Victoria Police* [2020] VChC 6 at [8], Judge Chambers found KR not guilty on the merits of charges 3 & 4 (recklessly causing injury and detention of a person for a sexual purpose) but not guilty because of mental impairment of charges 1 & 2 (false imprisonment & sexual assault)

EFFECT OF FINDING THAT CHILD COMMITTED THE OFFENCE OR AN ALTERNATIVE|CMIA-ss.38Y, 38Z

- ✪ [s.38Y(3)] This is a qualified finding of guilt and a bar to further prosecution in respect of the same circumstances but does not constitute a basis in law for any conviction for the offence.
- ✪ [s.38Y(4)] If the court makes a finding under s.38X(1)(c), the court must–
 - (a) declare that the child is liable to supervision under Div.5 → this does not end the process because the court cannot immediately make a supervision order [see topic **N** below]; or
 - (b) order the child to be released unconditionally → this ends the process.
 - **BAR ON DECLARING A CHILD LIABLE TO SUPERVISION|CMIA-s.38Y(5)** The court must not declare a child liable to supervision unless it considers the declaration is necessary in all the circumstances including–
 - (a) whether adequate supervision is available in the community; and
 - (b) whether and to what extent the child has complied with community supervision; and
 - (c) whether a declaration is required for the protection of the community.
 - **BAR ON ORDERING A CHILD TO BE RELEASED UNCONDITIONALLY|CMIA-s.38Y(6)** The court must not order a child to be released unconditionally unless satisfied that, if necessary, the child is receiving appropriate treatment or support for his/her mental health or disability.
- ✪ [s.38Z] Following the making of a declaration that a child is liable to supervision and pending the making of a supervision order, the court may bail or remand the child or make any other appropriate order [see also topic **P** below].

M DEFENCE OF MENTAL IMPAIRMENT|CMIA-ss.5A, 38ZA-38ZD

The statutory defence of mental impairment introduced by the CMIA abrogates the common law defence of insanity: see s.25(1).

For material on the defence of mental impairment in relation to adults as defined in ss.20 & 21 of the CMIA & related case law see <https://www.judicialcollege.vic.edu.au/eManuals/CCB/19084.htm>.

ELEMENTS OF THE DEFENCE|CMIA-s.38ZA(1) The defence is established for a child charged with an offence [not limited to an indictable offence] if, at the time of engaging in conduct constituting the offence, the child was suffering from a mental impairment that had the effect that–

- (a) he or she did not know the nature and quality of the conduct; or
- (b) he or she did not know that the conduct was wrong (that is, he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong).

This definition is in identical terms to s.20 which defines mental impairment for an adult even though developmentally a child is not just a small adult.

In *R v Fitchett* (2009) 23 VR 91; [2009] VSCA 150 the Court of Appeal allowed an appeal by a mother who had been found guilty in the Supreme Court of the murder of her two children aged 11 & 9. Although rejecting the appellant's submission that the verdict of guilty was unreasonable having regard to the evidence, the Court held that the learned trial judge had erred by failing to explain to the jury, in accordance with s.22(2)(a) of the CMIA, the **legal** consequences of the findings that may have been made by the jury. In their joint judgment ordering a new trial, Buchanan, Vincent & Ashley JJA noted, *inter alia*:

- At [14]: Sections 20 & 21 reflect the longstanding common law position with respect to the defence of insanity under the M'Naughton Rules as they have been understood in Australia following the interpretation adopted by Dixon J in *R v Porter* (1933) 55 CLR 182.
- At [28]-[32]: The requirement that the consequences be explained to the jury of a finding of not guilty by reason of mental impairment was introduced in the 1997 Act. Prior to that time any reference to the consequences would have been regarded as improper and possibly productive of a miscarriage of justice. The jury's task has traditionally been confined to determining whether the prosecution has established its case beyond reasonable doubt and as they have no part whatever to play in any subsequent sentencing process, no mention is ordinarily made of such matters. However, in *R v Weise* [1969] VR 953 Barry J indicated his concern that the absence of knowledge of the outcome could be equally dangerous and result in injustice in cases raising the defence of insanity. This approach was expressly rejected by the High Court in *R v Lucas* (1970) 121 CLR 171. The Attorney-General, introducing the MIUT Act in the Legislative Assembly, did not explain the rationale of s.22(2)(a). Nevertheless, an assumption can reasonably be made that the legislature was concerned that in the absence of any information as to the processes that would follow a finding of not guilty by reason of mental impairment, some jury members might be reluctant to hand down an exculpatory verdict, perceiving that it could result in the immediate release of a disturbed and dangerous person when as a practical proposition in most cases, that would almost certainly not be the case. In other words, the provision was intended to adopt the approach favoured by Barry J in *R v Weise*.

In *R v Sebalj* [2003] VSC 181 at [14] Smith J held:

"The term 'a mental impairment' should not be construed as changing the common law but construed as referring to the concept of 'a disease of the mind' used in the common law defence of insanity."

In so holding, his Honour adopted the same approach as had the High Court in *R v Falconer* (1990) 171 CLR 30 confirming that a "disease of the mind" is synonymous with mental illness.

In *R v R* [2003] VSC 187 Teague J – although purporting to follow *R v Falconer* – appears to have gone somewhat further in holding that intellectual disability combined with deafness constituted a mental impairment.

In *R v Gemmill* [2004] VSCA 72 the Court of Appeal discussed the conflicting opinions of two psychiatrists in the context of the criteria of "being unable to reason" for the purposes of the defence of mental impairment. The accused, who had been suffering from and was being treated for a major depressive illness, was found by a jury not to be suffering from "a mental impairment" at the time of the killing of his wife.

In *R v Martin (No. 1)* [2005] VSC 518 Bongiorno J held that the defence of mental impairment does not apply if the accused is suffering from a drug-induced psychosis without an associated mental illness. His Honour considered that a drug-induced psychosis is usually a temporary disorder or disturbance of an otherwise healthy mind caused by other factors.

See also *DPP v Taleski* [2007] VSC 183 in which Cavanough J adopted the reasoning in *Sebalj* and *Martin (No. 1)*; *DPP v Al-Salami* [2016] VSC 353 (consent mental impairment); *DPP v CB* [2019] VSC 677 (consent mental impairment: 17 year old accused charged with attempted murder).

PRESUMPTIONS, STANDARD OF PROOF ETC|CMIA-s.38ZB, 38ZC(1)

- An accused is presumed not to have been suffering from a mental impairment until the contrary is proved. This provision reflects the former common law presumption of sanity: see *Sodeman v R* (1936) 55 CLR 192; *R v Porter* (1933) 55 CLR 182.

- The question of mental impairment may be raised at any time during a hearing by the defence or, with the leave of the court, by the prosecution. The CMIA does not envisage the issue being raised by the court on its own motion [cf. fitness to stand trial – see topics **F** & **J** above].
- The party raising the defence bears the onus of rebutting the presumption.
- If the defence intends to raise the question of mental impairment, the defence must give reasonable notice to the prosecution.
- The question of whether an accused was suffering from a requisite mental impairment is a question of fact to be determined on the balance of probabilities.

PROOF OF THE ELEMENTS OF MENTAL IMPAIRMENT

Summarised from www.judicialcollege.vic.edu.au/eManuals/CCB/19084.htm

The defence of mental impairment is not established simply by proving that the accused suffered from a mental impairment that had one of the requisite effects. The Court must also be satisfied that the accused engaged in the “conduct constituting the offence”: ss.20(1) & 38ZA(1). It is clear from the definition of ‘conduct’ in s.3(1) that the prosecution must at least prove, beyond reasonable doubt, that the accused committed the act or omission which constitutes the offence charged. It is unclear whether the prosecution must also prove any of the other elements of the charged offence, such as the requisite *mens rea*. A number of not entirely consistent approaches have been taken in this difficult area of the law. These may be summarised as follows:

- **ORIGINAL HIGH COURT APPROACH:** It is assumed without discussion that the prosecution is required to prove all of the elements of the offence charged: see e.g. *Sodeman v R* (1936) 55 CLR 192; *R v Porter* (1933) 55 CLR 182. This approach does not address the difficulties that arise if the presence of a mental illness prevents the prosecution from proving that the accused had the requisite mental state. It is possible that the accused would be entitled to a complete acquittal in such circumstances. This approach appears to have been adopted by Nettle JA in the case of *R v Fitchett* (2009) 23 VR 91; [2009] VSCA 150 but the issue was not addressed on the appeal.
- **THE STILES’ APPROACH:** In *R v Stiles* (1990) 50 A Crim R 13 the 21 year old applicant who suffered from schizophrenia was found not guilty of manslaughter on the ground of insanity and was confined at Governor’s pleasure. The primary issue raised by him was self-defence. Refusing leave to appeal the Court of Criminal Appeal (Crockett, Murphy & Cummins JJ) held:

“The proper approach is not circular but linear. The jury in the first place must consider whether the offence is proved. If it is not, the accused should be acquitted, not found guilty on the ground of insanity. An accused must not lose a chance of acquittal of the offence charged by virtue of being insane. In considering whether the offence has been proved, the jury must in the first place act upon the presumption that the accused was of sound mind. The question of insanity only arises if the jury, assuming the accused was of sound mind, would find the offence proved beyond reasonable doubt: see *Porter* (1936) 55 CLR 182 at 185 per Dixon J (as he then was) and *Perkins* [1983] WAR 184 at 188 per Burt CJ (a decision upon the *Criminal Code* (WA) but stating relevant principle).”

This approach was also adopted by Judge Cannon in *DPP v Soliman* [2012] VCC 658 and in a number of NSW single judge decisions including *R v Grant* [2009] NSWSC 833 and *R v Tarantello* [2011] NSWSC 383.

- **THE HAWKINS’ APPROACH:** In *Hawkins v R* (1994) 179 CLR 500 the 16 year old appellant was charged with murdering his father under the *Tasmanian Criminal Code*. The prosecution case was one of premeditated murder. The defence case was that the appellant entered the pine plantation intending to commit suicide in his father’s presence and that at the last moment, in a disturbed state of mind, he turned the rifle from himself towards his father and pulled the trigger without having the specific intention necessary to establish the crime of murder. The High Court held at [18]:

“In principle, the question of insanity falls for determination before the issue of intent. The basic questions in a criminal trial must be: what did the accused do and is he criminally responsible for doing it? Those questions must be resolved...before there is any issue of the specific intent with which the act is done. It is only when those basic questions are answered adversely to an accused that the issue of intent is to be addressed. That issue can arise only on the hypothesis that the accused’s mental condition at the time when the incriminated act was done fell short of insanity”.

This approach where the accused is charged with an offence that requires proof of a specific intent has been followed in a number of cases (see, e.g., *R v Toki* [2003] NSWCCA 125; *R v Minani* (2005) 63 NSWLR 490; *Garrett v R* [1999] WASCA 169; *Ward v R* (2000) 118 A Crim R 78 per Kennedy, Wallwork and Scott JJ). However, the writer considers that too literal an application of this approach can lead to a situation in which an accused is deprived of a complete acquittal. A number of other judgments have highlighted difficulties with the *Hawkins'* approach and have sought to limit its application (see, e.g., *Ward v R* (2000) 118 A Crim R 78 per Wheeler J; *R v Nolan* WA CCA 22/5/97; *Stanton v R* (2001) 24 WAR 233).

- **OTHER APPROACHES:** Three other approaches are summarised in paragraph 41 of the Judicial College material.

EFFECT OF ESTABLISHING THE DEFENCE OF MENTAL IMPAIRMENT|CMIA-s.38ZA(2), 38ZD

- ✧ **FINDING|CMIA-s.38ZA(2)** If the defence of mental impairment is established, the child must be found not guilty by reason of mental impairment. → However, this does not immediately end the process in every instance.
- ✧ **CONSEQUENCE OF FINDING IF SUMMARY OFFENCE|CMIA-s.5A(3)** The court must discharge the child.
- ✧ **CONSEQUENCE OF FINDING IF INDICTABLE OFFENCE|CMIA-s.38ZD(1)** If a child is found not guilty because of mental impairment of an indictable offence heard and determined summarily in the Children's Court, the court must–
 - (a) declare that the child is liable to supervision under Div.5 → this does not end the process because the court cannot immediately make a supervision order [see topic **N** below]; or
 - (b) order the child to be released unconditionally → this ends the process.
- **BAR ON DECLARING A CHILD LIABLE TO SUPERVISION|CMIA-s.38ZD(2)** [Same wording as CMIA-s.38Y(5)] The court must not declare a child liable to supervision unless it considers the declaration is necessary in all the circumstances including–
 - (a) whether adequate supervision is available in the community; and
 - (b) whether and to what extent the child has complied with community supervision; and
 - (c) whether a declaration is required for the protection of the community.

In *Kirk Reese (a pseudonym) v Victoria Police* [2020] VChC 6 at [13]-[14], Judge Chambers declared that KR was liable to supervision, having accepted that such a declaration was necessary having regard to the above criteria in s.38ZD(2). The issue she had then to determine is whether KR should be subject to a custodial supervision order (**CSO**) or a non-custodial supervision order (**NCSO**).
- **BAR ON ORDERING A CHILD TO BE RELEASED UNCONDITIONALLY|CMIA-s.38ZD(3)** [Same wording as CMIA-s.38Y(6)] The court must not order a child to be released unconditionally unless satisfied that, if necessary, the child is receiving appropriate treatment or support for his/her mental health or disability.

N DISPOSITION OF CHILD DECLARED TO BE LIABLE TO SUPERVISION|CMIA-Div.5

SUPERVISION ORDER|CMIA-s.38ZH If the court declares that a child is liable to supervision under Div.5, the court must make a supervision order in respect of the child. The purpose of the supervision order is to ensure that the child receives treatment, support, guidance and assistance for his/her mental impairment or other condition or disability. There are two types of supervision orders–

- ✧ **NON-CUSTODIAL SUPERVISION ORDER [NCSO]|CMIA-ss.38ZH(5)(b)** This order releases the child on conditions decided by the court and specified in the order.
- ✧ **CUSTODIAL SUPERVISION ORDER [CSO]|CMIA-ss.38ZH(3), (5)(a) + (7)** This order – which commits the child to “custody”, defined as “detention in a youth justice centre or a youth residential centre” – has an additional purpose of protecting the child or the community while the child receives the requisite treatment, support, guidance and assistance. It cannot be made unless the court finds there is no practicable alternative and the order is required for the protection of the child or the community. The court has no power to include conditions on a custodial supervision order, these being determined administratively within the custodial setting.

REPORT & CERTIFICATE A PRE-CONDITION TO MAKING A SUPERVISION ORDER|CMIA-s.38ZH(6)

The court must not make a supervision order of either type unless it has received–

- (a) a report under Div.6 as to supervision [see topic **O** below]; and
- (b) a certificate under s.47 stating that the facilities or services necessary for the supervision order are available [see topic **P** below].

It is expected that the report and certificate will be provided to the court as a single package.

DURATION OF SUPERVISION ORDER|CMIA-s.38ZH(4), 38ZI

- A supervision order is initially for a term not exceeding 6 months. → However this does not end the process.
- The court must direct that the matter be brought back to court for review at the end of the period specified by the court [see topic **Q** below]. It appears that this direction for review must be given by the court even if the supervision order cannot extend beyond the review date. [This may be a consequence of parliamentary counsel adapting similar provisions relating to adults for whom supervision orders can only be made for an indefinite term.]
- The term of the supervision order may be extended more than once by a maximum of 6 months per extension. However, the total period of the order (including custodial and non-custodial supervision orders) may not exceed 12 months if child was aged 10-14 at the time the supervision order was made or 24 months if child or person was aged 15-21 at the time the supervision order was made.
- Within the bounds of the above regime, a child may be subject to a custodial supervision order only for as long as is required for the protection of the child or the community [s.38ZH(4)].

CSO OR NCSSO – THAT IS THE QUESTION

In *Kirk Reese (a pseudonym) v Victoria Police* [2020] VChC 6, the major issue for Judge Chambers was whether KR should be subject to a **CSO** or a **NCSSO**. There is a significant and unfortunate distinction between an adult placed on a **CSO** and a child placed on a **CSO**. Under s.26(3) an adult on a **CSO** is committed to an *appropriate place*, defined by s.3 to mean a designated mental health facility, a residential treatment facility or a residential institution. Section 26(4) prohibits a **CSO** committing an adult to *prison* unless there is no practicable alternative. By contrast, a child placed on a **CSO** is detained in a *youth justice centre or a youth residential centre*, there being no youth-specific equivalent to an *appropriate place* for children. Ultimately, at [94], Judge Chambers posed the key question as follows:

“The critical task for me is to assess whether, in the context of the statutory provisions [principally ss.38ZD, 38ZH, 39 & 40] the **CSO** proposed by DHHS will ensure the safety of members of the community whilst also *ensuring* that KR receives the treatment, support, guidance and assistance for his mental impairment and disabilities. Having regard to the evidence of DJC, when considered in the context of Ms Maxwell’s recommendations, I am not satisfied that a **CSO** would achieve that statutory purpose.”

Her Honour came to the view that a **NCSSO** was preferable to a **CSO** essentially for four reasons, set out at [95]-[100]:

1. The custodial environment at Parkville would be far more restrictive than that recommended by Ms Maxwell to manage KR’s behaviours. Whilst isolated in his room there are significant and grave risks for KR’s safety.
2. Whilst detained under a **CSO** the services proposed would not ensure that KR receives the treatment, support, guidance and assistance KR requires for his mental impairment and other disability.
3. While the risk of KR continuing to engage in maladaptive behaviours is significant, there are some key additional services that have been introduced over the past 12 months through NDIS funding to assist in the management of his behaviours.
4. The principle of parsimony expressed in s.39 [see topic **I** below] requires that the least restrictive alternative to a **CSO** should be pursued, particularly for a child: see also *Richards (a pseudonym) v The Queen [No.2]* [2017] VSCA 174 at [30]. Her Honour concluded: “As stated by the Court of Appeal in *NOM v Director of Public Prosecutions* (2012) 38 VR 618; [2012] VSCA 198 at [68]: ‘a supervision order is not a sentence or punishment but treatment’. There is no legislative justification for the imposition of a **CSO** for a child that will operate as a punishment, even if it operates to confine the child for the protection of the community.”

O REPORTS AS TO SUPERVISION & VICTIM IMPACT STATEMENTS|CMIA-Div.6

- [s.38ZR] If a court declares that a child is liable to supervision it must, before making a supervision order, order that a report as to supervision be submitted in respect of the child. The court must adjourn the hearing to enable the report to be prepared and may bail or remand the child or make any other appropriate order for the safe custody of the child in the meantime.
- [s.38ZS] DHHS must arrange to have prepared a report referred to in s.38ZR and file the report with the court that declared that the child is liable to supervision under Division 5. There is no power to request such a report from the Children's Court Clinic.
- [s.38ZT(1)] The report must set out-
 - (a) whether the child has a mental impairment or other condition or disability and, if so, specify the services available and appropriate for the child;
 - (b) the services currently being made available to the child, whether or not by a government department, and the child's compliance with those services;
 - (c) if the Children's Court so requests, the services that would be made available to the child if a custodial supervision order were to be made.
- [s.38ZT(2)] The author of a report may include a recommendation as to whether a non-custodial supervision order or a custodial supervision order is appropriate for the child.
- [s.38ZT(3)] If DHHS has issued a statement that the child has an intellectual disability within the meaning of the *Disability Act 2006*, the report must include a copy of this statement.
- [s.38ZU & 38ZV] Provisions as to filing of report with the court and access to reports.
- Although ss.38ZR-38ZV of the CMIA are expressed to apply to reports ordered for supervision order hearings, the writer can see no reason why the same regime ought not apply to reports ordered for variation, revocation or review proceedings.
- [s.38ZW] Before a court makes a supervision order or varies or revokes a supervision order, a victim of the offence may make a victim impact statement to the court for the purpose of assisting the court in determining any conditions it may impose on the supervision order.

P CERTIFICATE OF AVAILABLE SERVICES|CMIA-s.47

- [s.47(1)(ab)+(b)] The court must request DHHS to provide a certificate of available services if it is considering–
 - (i) imposing a supervision order on a child committing the child to custody in a YJC/YRC; or
 - (ii) imposing a supervision order on a child providing for the child to receive services in a YJC/YRC or from a disability services provider, from a mental health service provider within the meaning of the *Mental Health Act 2014* or from DHHS; or
 - (iii) that a child be placed in custody in a YJC/YRC [this means on remand].
- [ss.47(2) + 47(3)] The certificate must state whether there are facilities or services available for the custody, care or treatment of the person and if there are outline them. If there are not, the certificate may contain any other options that DHHS considers appropriate for the court to consider in making the proposed order.
- [ss.47(4) + 47(5)] The certificate must be provided to the court within 7 days after receiving the request or within such longer period as the court allows. The court may require *viva voce* evidence from the provider or a further certificate to clarify or expand on the original certificate. [When the court is intending to remand the child in custody (see topics J & K above), the court will need to have a s.47 certificate provided virtually immediately. The court has been advised that this will simply state that there is a remand bed available. What happens if there is not has not been explained.]

Q VARIATION, REVOCATION, REVIEW OF SUPERVISION ORDER|CMIA-ss.38ZN-38ZQ

- ☆ **APPLICATION TO VARY OR REVOKE SUPERVISION ORDER|CMIA-s.38ZN** An application to–
 - vary a custodial supervision order [note there is no application to revoke]; or
 - vary or revoke a non-custodial supervision order–
may be made by–
 - (a) the child [the court may order that a subsequent application by the child cannot be made until the next review];
 - (b) a person having the custody, care, control or supervision of the child [this probably means pursuant to the CMIA which would exclude a parent];
 - (c) the Chief Commissioner of Police.

- ⊛ **COURT'S POWERS ON APPLICATION OR REVIEW**[CMIA-ss.38ZO, 38ZP] The Children's Court has the same powers on an application to vary as it has on a review at the end of a period of a supervision order [as to which see topic **N** above]. However, the powers are different depending on whether the supervision order is custodial or non-custodial.

- **POWERS ON APPLICATION TO VARY OR REVIEW A CUSTODIAL SUPERVISION ORDER**
[CMIA s.38ZO]

[ss.38ZO(1) + 38ZO(2)] The Children's Court must–

- (a) confirm the order; or
- (b) vary the place of custody; or
- (c) vary the order to a non-custodial supervision order but only if satisfied that the safety of the child or members of the public will not be seriously endangered as a result of the release of the child on a non-custodial supervision order.

Section 38ZO(3) provides: "The Children's Court may direct that the matter be brought back to the court for further review at the end of the period not exceeding 6 months specified by the court."

There is no power in s.38ZO to vary the conditions of a custodial supervision order [cf. s.38ZP(1)(b) for a non-custodial supervision order]. This is because the court has no power to include conditions on a custodial supervision order, these being determined administratively within the custodial setting.

In *Danyl Hammond (a pseudonym) v Secretary to the Department of Health and Human Services; The Attorney-General of Victoria v DPP [No 2]* [2018] VSCA 356 the adult appellant had killed his de facto partner when psychotic. He had been diagnosed with a major depressive disorder with psychotic features. He had been charged with murder but on 10/12/2012 Coghlan J directed the entry of a verdict of not guilty due to mental impairment. On 01/03/2013 under s.26(2) of the CMIA Coghlan J ordered the applicant be subject to a custodial supervision order for a nominal term of 25 years. On 04/04/2017 Emerton J granted the applicant extended leave pursuant to s.57 for a period of 12 months. On 01/06/2018 under s.31 the applicant applied for variation of his custodial supervision order to a non-custodial supervision order, alternatively under s.57 for a further grant of extended leave. On 19/09/2018 Champion J refused the application for variation – which had been supported by the Secretary DHHS and the applicant's treating team but not supported by the Attorney-General – but granted the application for further extended leave: see *Re SC* [2018] VSC 642R. Holding that the primary judge was in error in his construction of s.32(2) [similar in effect to s.38ZO(2) for a child] and had failed to give proper effect to the principles in ss.39 & 40, the Court of Appeal allowed the applicant's appeal against the refusal of the variation sought and remitted the matter to another judge for reconsideration.

In *Re Friedman (a pseudonym)* [2019] VSC 251 Niall JA, in reviewing a non-custodial supervision order for an adult, was satisfied that the reviewee would not be likely to endanger himself or others if the order was revoked. Taking into account ss.31, 33, 39 & 40 of the CMIA his Honour revoked the non-custodial supervision order.

See *Re XY [No 2]* [2019] VSC 268 where Elliott J granted an adult applicant's application for a second period of extended leave under s.57 of the CMIA. See also *Re Toohey* [2020] VSC 660 where Taylor J confirmed on review an adult's custodial supervision order (which had been made by Jane Dixon J for a nominal period of 25 years [2017] VSC 632) and ordered a conditional grant of extended leave for a period of 12 months.

- **POWERS ON APPLICATION TO VARY, REVOKE OR REVIEW A NON-CUSTODIAL SUPERVISION ORDER**[CMIA-s.38ZP]

The Children's Court must–

- (a) confirm the order; or
- (b) vary the conditions of the order; or
- (c) vary the order to a custodial supervision order; or
- (d) revoke the order.

Unless the Children's Court revokes the order, it may direct that the matter be brought back to the court for further review at the end of the period not exceeding 6 months specified by the court.

- **TRANSFER OF SUPERVISION ORDER FOR REVIEW BY COUNTY COURT|CMIA-s.38ZQ**

The Children's Court may [not must] order that a supervision order made by the court be transferred to the County Court for review if the subject of the order is or will be of above the age of 19 years at the date specified by the Children's Court for review of the order. On review, the County Court may exercise all the powers of the Children's Court.

R NON-COMPLIANCE WITH NON-CUSTODIAL SUPERVISION ORDER, ARREST OF CHILD|CMIA-ss.38ZK-38ZM

- [s.38ZK] The supervisor of the child under a non-custodial supervision order, DHHS may apply to the court for a variation if it appears the child has failed to comply with the order. The court may order a warrant to arrest be issued if the child does not attend the hearing of the application. If satisfied of non-compliance by evidence on oath, whether orally or by affidavit, the Children's Court must–
 - (a) confirm the order; or
 - (b) vary the conditions of the order; or
 - (c) vary the order to a custodial supervision order.
- [s.38ZL] A child subject to a non-custodial supervision order may be apprehended without warrant by the supervisor, a police officer, an ambulance officer or a prescribed person if the apprehender reasonably believes that–
 - (a) the child has failed to comply with the order; and
 - (b) the safety of the child or members of the public will be seriously endangered if the child is not apprehended.
- [s.38ZM] The supervisor of the child under a non-custodial supervision order, DOHS or Department of Health may apply to the Children's Court for a warrant to arrest the child if it appears that the child–
 - (a) has failed to comply with the order; and
 - (b) is no longer in Victoria.
 If the court is satisfied by evidence on oath, whether orally or by affidavit, of the matters in ss.38ZM(1)(a) & (b), the court may issue a warrant to arrest the child.
- A child apprehended under ss.38ZL or s.38M must be released from detention within 48 hours unless an application is made under s.38K(1) for variation of the child's supervision order. The court must hear any such application as soon as possible.
- There are no powers under the CMIA to deal with non-compliance with a custodial supervision order. As the CMIA does not allow the court to attach conditions to a custodial supervision order, the only way a child can fail to comply is to abscond. The offences contained in Part 6.2 of the CYFA are applicable in the same way as they apply to a person lawfully detained in a YJC/YRC.

S AGE JURISDICTION|CMIA-s.38ZG

Except when a review is transferred to the County Court under s.38ZQ, provisions relating to the making, variation, revocation, breach, review or extension of supervision orders are heard in the Children's Court even if the subject of the order is no longer a child, provided he or she was a child when the proceeding for the offence was commenced in the Children's Court.

T PRINCIPLES ON WHICH COURT IS TO ACT|CMIA-s.39

In deciding whether to make, vary or revoke a supervision order or to remand a child in custody, the court must apply the principle that restrictions on a person's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community.

U MATTERS TO WHICH COURT IS TO HAVE REGARD|CMIA-s.40(1)

In deciding whether or not to make, vary or revoke a supervision order, the court must have regard to–

- (a) the nature of the child's mental impairment or other condition or disability; and
- (b) the relationship between the impairment, condition or disability and the offending conduct; and
- (c) whether the child is, or would if released be, likely to endanger himself/herself, another person or other people generally because of his/her mental impairment; and
- (d) the need to protect people from such danger; and

- (e) whether there are adequate resources available for the treatment and support of the person in the community; and
- (f) any other matters the court thinks relevant.

In *NOM v Director of Public Prosecutions* (2012) 38 VR 618; [2012] VSCA 198 the Court of Appeal (Redlich & Harper JJA and Curtain AJA) said at [47] & [58]:

[47] “Section 39 requires a value judgment informed by the competing considerations stated in the provision. Section 40(1) requires an evaluation of the applicant’s mental condition and progress and an assessment of risk against discrete but interrelated criteria. These assessments call for value judgments in respect of which there is room for reasonable differences of opinion. No particular opinion being uniquely right, the making of the order involves the exercise of a judicial discretion: *Norbis v Norbis* (1986) 161 CLR 513 at 518 per Mason & Deane JJ. The discretionary character of the decision is not displaced by the mandatory requirements that the judge ‘must apply’ the principle in s.39 or ‘have regard to’ the factors in s.40: *R v Hunt*; *Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329-330 per Gibbs CJ & Mason J; 334 per Murphy J; *Minister for Immigration and Citizenship v Khadgi* (2010) 190 FCR 248 at 270-1 [60]-[62] per Stone, Foster & Nicholas JJ; *In the Marriage of D A and C A Benedich* (1992) 16 Family LR 371 at 377 per Mushin J. See also Pearce and Geddes, *Statutory Interpretation in Australia*, 6th ed., (2006), [11.10]-[11.11].”

[58] “Endangerment is about the risk of harm. The gravity of the harm may be relevant to assessing the nature of the risk, but the probability of any risk, be it high or low, is the critical concept of endangerment. In the absence of any parliamentary guidance on the meaning of the word, this much is clear from the term’s ordinary and literal meaning. In the Oxford English Dictionary, the word ‘endanger’ means ‘to expose to danger or to cause danger to’. The current main sense of the word ‘danger’ is defined as ‘liability or exposure to harm or injury; the condition of being exposed to the chance of evil, risk, peril’. The ordinary meaning of endangerment entails the concept of chance or risk. The terms of s.40(1)(c) require a court to assess whether a person is ‘likely to endanger themselves or others’. This serves to emphasise that the focus is upon the extent of the chance, risk or peril of some harm materialising. If the harm or injury which is likely to result is substantial but the ‘chance’, ‘risk’ or ‘peril’ of it eventuating is minimal, then a person subject to a supervision order is not necessarily ‘likely to endanger’ himself or others under s.40(1)(c).”

The above dicta from *NOM v DPP* was cited with approval and applied by Priest & T Forrest JJA in *Danyl Hammond (a pseudonym) v Secretary to the Department of Health and Human Services; The Attorney-General of Victoria v DPP [No 2]* [2019] VSCA 356 at [39] & [48] and by Tinney J in converting a **CSO** to a **NCSO** with the consent of DHHS, the Attorney-General and the 54 year old subject and on the basis of unchallenged medical evidence in *Re RD* [2020] VSC 788.

V APPEALS|CMIA-Part 5A

The following provisions provide a right of appeal to the County Court or the Supreme Court if the Children’s Court was constituted by the President:

- [s.38U] Appeal by child against a finding of unfitness to stand trial
- [s.38ZE] Appeal by child against finding of not guilty because of mental impairment
- [s.38ZF] Appeal by DPP against an order for unconditional release under s.38ZD(1)(b)
- [s.38ZJ] Appeal by child, DPP, A-G, DOHS or DH against supervision order

W TEMPORARY COVID-19 AMENDMENTS

By omnibus acts entitled **COVID-19 Omnibus (Emergency Measures) Act 2020** (Vic) & **COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Act 2020** (Vic), s.120(1) of the CMIA is inserted to provide that until 25 April 2021 the court may decide any issue (other than a prescribed issue) or may determine any of the following matters (other than a prescribed matter) entirely on the basis of written submissions and without the appearance of the parties-

- (e) a review of a supervision order under s.38ZI(2); or
- (f) an application under s.38ZN for a variation of a custodial supervision order or a variation or revocation of a non-custodial supervision order; or
- (g)(h) a further review of a supervision order under s.38ZO(3) or s.38ZP(2).

10.7 Court diversion of child offender

The Police Cautioning Programme described in chapter 7.4 provides a police-initiated mechanism for the diversion of child offenders from the Court process altogether. However, if a charge has been laid against a child accused the following diversion program is available to the Children's Court in appropriate circumstances. Participation in a diversion program does not affect the incurring of demerit points under the Road Safety Act 1986 or regulations made under that Act [s.356B(2)].

A OFFENCES FOR WHICH DIVERSION IS NOT AVAILABLE

Under s.356B(1) diversion is not available if the charge relates to-

- (a) an offence punishable by a minimum or fixed sentence or penalty, including cancellation or suspension of a licence or permit to drive a motor vehicle and disqualification under the Road Safety Act 1986 or the Sentencing Act 1991 from obtaining such a licence or permit or from driving a motor vehicle on a road in Victoria but not including the incurring of demerit points under the Road Safety Act 1986 or regulations made under that Act; or
- (b) an offence against s.49(1) of the Road Safety Act 1986 not referred to in paragraph (a).

B PURPOSES OF DIVERSION

Diversion is a brief intervention informed by research which shows that over-intervening with low risk offenders can increase the risk of reoffending. It is tailored to the child's individual circumstances and proportionate to the offence(s) before the Court. The intervention aims to build on a child's existing relationships and interests to promote positive change. Section 356C provides that the following purposes are to guide the operation of the diversion program:

- (a) a child should be diverted away from the criminal justice system where possible and appropriate;
- (b) the risk of stigma being caused to a child by contact with the criminal justice system should be reduced;
- (c) a child should be encouraged to accept responsibility for unlawful behaviour;
- (d) a child's offending should be responded to in a manner that acknowledges the child's needs and assists with rehabilitation;
- (e) a child should be provided with opportunities to strengthen and preserve relationships with family and other persons of importance in the child's life;
- (f) a child should be provided with ongoing pathways to connect with education, training and employment.

C PRE-CONDITIONS FOR DIVERSION

- The prosecutor must consent [s.356D(3)(a)]. Under s.356F, a prosecutor must consider the following matters when determining whether to consent to an adjournment for diversion:
 - (a) the availability of suitable diversion programs;
 - (b) the impact on any victim;
 - (c) the child's failure to complete any previous diversion program;
 - (d) the alleged level of involvement of the child in the offending;
 - (e) any other matter that the prosecutor considers relevant.
- The child must consent [s.356D(3)(b)].
- The child must acknowledge to the Court responsibility for the offence [s.356E(1)(a)]. Such acknowledgement by a child is inadmissible as evidence in a proceeding for that offence and does not constitute a plea [s.356E(2)].
- Section 356D(2) provides that the Court may refuse to accept a plea of guilty from a child in a criminal proceeding for an offence, or may allow a child to withdraw such a plea, if:
 - (a) there has been no application for an adjournment under s.356D(1); and
 - (b) the Court considers it necessary to consider the appropriateness of diversion; and
 - (c) the Court has not heard any evidence in the proceeding; and
 - (d) in the case of a withdrawal of a plea, the Court is satisfied that the prosecutor does not object to diversion.

A plea withdrawn under s.356D(2) is inadmissible as evidence in a proceeding for that offence and does not constitute a plea [s.356E(3)].
- The child must consent to the Court adjourning the proceeding for the purpose of the child participating in a diversion program [s.356E(1)(b)].

D ADJOURNMENT TO UNDERTAKE DIVERSION PROGRAM

Section 356D(1) provides that at any time before taking a formal plea from a child in a criminal proceeding for an offence, the Court may, on its own motion or on application by the child or the prosecutor, adjourn the proceeding for a period not exceeding 4 months to enable the child to participate in and complete a diversion program. Section 356D(4) requires the Court, as far as practicable, to consider the following matters when determining the type of diversion program to be ordered:

- (a) the seriousness and nature of the offending;
- (b) the seriousness and nature of any previous offending;
- (c) the impact on any victim;
- (d) the interests of justice and any other matter the Court considers appropriate.

In considering these matters the Court may inform itself in any way it considers appropriate [s.356D(5)] provided that the Court observes the rules of natural justice [s.356K].

E MATTERS TO CONSIDER IN DETERMINING THE TYPE OF DIVERSION PROGRAM

Section 356G(1) provides that the Court, as far as practicable, must consider the following matters when determining the type of diversion program to be ordered:

- (a) the diversion program should not be more punitive than the sentence that would have been imposed had the child been found guilty;
- (b) the diversion program should be achievable by the child and measureable;
- (c) the personal characteristics and circumstances of the child;
- (d) the desirability of maintaining a child's engagement in education, training and employment;
- (e) the diversion program should be culturally appropriate;
- (f) the impact on any victim;
- (g) the appropriateness of a restorative approach;
- (h) any other matter the Court considers appropriate.

In considering these matters the Court may inform itself in any way it considers appropriate [s.356G(2)] provided that the Court observes the rules of natural justice [s.356K]. Either party may suggest conditions for the diversion program which the Court may adopt or not adopt as it sees fit. The Court may also formulate its own conditions.

F THE CHILDREN'S COURT YOUTH DIVERSION SERVICE [CCYDS]

The CCYDS is operated state-wide by the Department of Justice and Regulation. Its coordinators attend all scheduled sittings of the Criminal Division of the Children's Court to-

- conduct same day assessments following a judicial officer's referral;
- advise the Court on the suitability of the child for diversion; and
- report back to the Court on a child's compliance with a diversion program.

If the Court decides that a child is at least *prima facie* a suitable candidate for diversion, it stands down or occasionally adjourns the case to allow the CCYDS to speak to the child, the child's family, the child's legal representative and the prosecutor and to draw up a proposed diversion program. This program may or may not ultimately be accepted in whole or in part by the presiding judicial officer. CCYDS' coordinators manage risks identified through assessments and engage supports to help the child successfully complete the diversion program.

The CCYDS works closely with the Education Justice Initiative [EJI], run in partnership between the Court and the Department of Education and Training. In 2018-19 the EJI provided assistance to 829 individual young persons at the 22 Children's Courts and all Koori Children's Courts serviced by the EJI across Victoria.

G EXTENSION OF ADJOURNMENT FOR DIVERSION PROGRAM

Section 356H empowers the Court to adjourn the proceeding for a further period not exceeding 2 months if it considers it to be appropriate.

H CONCLUSION OF DIVERSION PROGRAM

- Section 356I(1) provides that if a child completes a diversion program to the satisfaction of the Court-
 - (a) no plea to the charge is to be taken, or if a plea to the charge was withdrawn under s.356D(2) no further plea to the charge is to be taken; and

- (b) the Court must discharge the child without any finding of guilt; and
 - (c) the fact of participation in the diversion program is not to be treated as a finding of guilt except for the purposes of-
 - (i) Division 1 of Part 3 and Part 10 of the *Confiscation Act* 1997; and
 - (ii) section 9 of the *Control of Weapons Act* 1990; and
 - (iii) section 151 of the *Firearms Act* 1996; and
 - (iv) Part 4 of the *Sentencing Act* 1991; and
 - (d) the fact of participation in the diversion program and the discharge of the child is a defence to a later charge for the same offence or a similar offence arising out of the same circumstances.
- Section 356I(2) provides that if a child does not complete a diversion program to the satisfaction of the Court and the child is subsequently found guilty of the charge, the Court must take into account the extent to which the child complied with the diversion program when sentencing the child.

I INCOMPATIBILITY OF DIVERSION AND LICENCE CANCELLATION/SUSPENSION

While it follows from s.356B(1) of the CYFA that diversion is available in the Children's Court on a charge which is not punishable by a fixed sentence or penalty, it is the writer's view that if diversion is granted on such a charge, the Children's Court has no power to impose a discretionary cancellation or suspension of the child's driver licence or permit. In the first place, despite the words "or the Sentencing Act 1991" in s.356B(1)(a), s.4 of the Sentencing Act makes it clear that ss.89 & 89A of that Act do not apply to the Children's Court. In the second place, the general power of suspension or cancellation of a driver licence or permit contained in s.28 of the RSA has as a pre-condition to its exercise that the court "convicts a person of, or is satisfied that a person is guilty of, an offence against this Act or of any other offence in connection with the driving of a motor vehicle". But diversion does not involve either a conviction for an offence or a finding by the court that the child is guilty of the offence. Under s.356E(1)(a) the pre-condition for diversion is not a plea of guilty by the child. It is merely an acknowledgement by the child "of responsibility for the offence". And s.356E(2) specifically states that such acknowledgement does not constitute a plea.

J SECRETARY HAS NO POWER TO ISSUE A NEGATIVE ASSESSMENT UNDER WORKING WITH CHILDREN ACT 2005 WHERE CHARGES DEALT WITH BY DIVERSION

In *GHJ v Secretary to the Department of Justice and Community Safety (No 2)* [2019] VSC 411 the plaintiff had sought a working with children check pursuant to the Working with Children Act 2005 because he had volunteered in activities involving children. In December 2017, when he was 17 years old, the plaintiff with charged with two counts of 'Transmit Objectionable Material'. The Children's Court ordered that the charges be dealt with by a youth diversion order. Following the plaintiff's completion of the youth diversion program, the charges were discharged by the Court and a note 'Diversion completed' accompanied the order. The Secretary subsequently issued a negative notice. Ginnane J held that the plaintiff was entitled to a declaration that the Secretary had no power to refuse to give him an assessment notice under the Working with Children Act 2005. Underpinning his Honour's decision was his view at [35] that ss.1A & 17(3) of the Act, whether taken separately or jointly, do not empower the Secretary to issue a negative notice to a person whose application does not fall within categories A, B or C in ss.12-14 respectively.

K STATISTICS

THE DIVERSION STATISTICS ARE FOR CALENDAR YEARS RATHER THAN FINANCIAL YEARS	
2017	1404 diversions (involving 1356 young people) were ordered. Of these 94% were successfully completed. By comparison there were 2355 cases in which sentencing orders were made. 64% of those granted diversion were aged 15-17. The gender split was 69% male and 31% female. A total of 88% were born in Australia and of these 13% identified as Aboriginal or Torres Strait Islander or both.
2018	1408 diversions were ordered, of which 94% were successfully completed. By comparison there were 2071 cases in which sentencing orders were made. 67% of those granted diversion were aged 15-17. The gender split was 69% male and 31% female. A total of 88% were born in Australia and of these 12% identified as Aboriginal or Torres Strait Islander or both.

2019

1595 diversions were ordered. By comparison sentencing orders were made in 1628 cases. 73% of those granted diversion were aged 15-17. The gender split was 71% male and 29% female. 11% identified as Aboriginal or Torres Strait Islander or both. 40% of the diversion orders involved dishonesty or property offences and 33% offences against the person (other than family violence and sex offences).

10.8 The “ROPES” Program

“A commitment NOT a task”

Leading Senior Constable Mick O'Meara APM (Victoria Police State Ropes Program Co-ordinator)

Another form of Court diversion is provided by the “ROPES” program. Usually this is a stand-alone program but occasionally it is used as a component of a diversion program under s.59 of the CPA.

10.8.1 The program

The ROPES program is a joint venture between Victoria Police, the Children's Court of Victoria and municipal youth workers. It is the brainchild of Senior Constable Mick O'Meara, from whose 2007 Report the material in this section is taken. One of the program's primary objectives is to turn a young offender's negative contact with police and courts into a positive outcome. The program brings together the young offender and the police informant in a series of physical challenges requiring true trust and co-operation, designed to break down the barriers between them and to help each to see things from the other's perspective.

10.8.2 The target group & eligibility criteria

The ROPES program is targeted at young persons aged between 12 & 17 - and hence falling within the jurisdiction of the Children's Court of Victoria - who have little or no criminal history. The young persons must have agreed to participate in ROPES and must either have been cautioned under the Police Cautioning Program or referred to the program from one of the following Children's Courts: Melbourne, Collingwood NJC, Ringwood, Sunshine, Wonthaggi, Geelong, Frankston, Broadmeadows, Heidelberg, Dandenong, Sale, Bairnsdale or Bendigo. Additionally, some young people who have been displaying anti-social behaviour patterns are also accepted into the program even though they have not yet come within the criminal justice system.

The eligibility criteria for a young person to be accepted on to the ROPES program are as follows:

- The young person must be aged between 12 & 17 at the time of the commission of the offence or the engagement in anti-social behaviour.
- The offence must be triable summarily.
- The informant must deem the young person to be a suitable candidate for the ROPES program.
- The young person must admit the offence.
- The young person must have received no more than 2 past cautions or is appearing before the Children's Court for the first time.
- The young person has not previously participated in the ROPES program.
- The offence is not one punishable by a minimum or fixed sentence and/or penalty, including cancellation or suspension of a driver licence or permit.
- The young person and the parents/guardian agree to the young person participating.
- If the young person has been charged, the presiding judicial officer deems the ROPES program as suitable and adjourns the case to enable the young person to participate in the program.

10.8.3 The aims & objectives of the program

The aim of the ROPES program is to demonstrate to young people that although they have offended and have been apprehended by police, they do not have to go down the path of continual anti-social behaviour or criminal activity. The program is designed to share trust, respect and co-operation between police and young persons. Its objective is to create a new level of understanding between police, the Children's Court and the young people involved that is not based on a negative punitive experience but rather is based on positive behaviour change.

Where possible the police member who had the original contact with the young person is asked to attend the course. The continuity of interaction between the young person and the police officer

facilitates one of the key objectives of the program – ownership of their actions – and helps the young person to form a positive opinion of the police member with whom they may previously have had a negative interaction. Where it is not possible for that member to participate, a pool of volunteer members is called upon to make up the required police numbers. At no time is the police member treated differently from the young person. Both are required to form a partnership and attempt the activities while relying on each other to be successful as the activities are structured to be too difficult to be achieved by an individual. The emphasis is on encouragement and trust between the young person and the police member and vice versa.

10.8.4 The content of the program

To achieve the objective of the ROPES program the young persons and police informants complete a full day program at the Cliffhanger Rock Climbing Centre (or similar alternative) on a low ROPES and high ROPES course supervised by experienced and qualified instructors and outdoor education specialists. The components of the program are as follows:

- Introduction and Icebreakers.
- Low Rock Climbing Walls Course.
- Discussion session on teamwork, being part of community, “Choice and Chances”, “Avoiding the adult jurisdiction” and the results of actions and consequences.
- Lunch.
- High Rock Climbing Course.
- Presentation of certificates.

The program is not easy. It requires teamwork, encouragement and trust. In most instances ROPES gives the young people involved a better understanding of their own latent abilities to achieve what they thought was not possible. To do this they must place their trust in a police member to achieve a common goal. Joint discussion groups on police and community responsibilities reinforce the assistance that police can give young persons in dealing with home or school issues. It is believed that this form of interaction with police assists young persons in making decisions not to engage in further anti social or criminal behaviour. The program also involves follow-up with any issues raised by the young persons and contact is made with the appropriate youth agencies and family counsellors.

10.8.5 The consequence of a positive completion of the program

If a young person performs satisfactorily in the ROPES program, a certificate of satisfactory completion will be given to him or her and sent to the court. If the presiding judicial officer in the Children’s Court is satisfied with a defendant’s performance in ROPES, he or she will discharge the defendant without requiring the defendant to re-attend at court, without taking a formal plea or hearing a summary or evidence and without making any finding as to the young person’s guilt. This means not only that the young person will not have a criminal conviction but also that the young person will not have a finding of guilt recorded against him or her in respect of the offence. In this regard the philosophy of the program is similar to the adult diversion program.

At the conclusion of the course the young participants are encouraged to contact their respective police members for any matter they may need advice or assistance with in the future.

