

7. CRIMINAL DIVISION - GENERAL

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7.1 Jurisdiction of Criminal Division

When we refer to the jurisdiction of a court we are talking about its legal power to hear and determine a particular matter. Part 7.2 of the Children, Youth and Families Act 2005 (Vic) [No.96/2005] ('the CYFA') defines and delineates the jurisdiction of each of the three Divisions of the Children's Court of Victoria.

It is clear from s.1(c) of the CYFA that one of the main purposes of the Children's Court is to deal with children who have been charged with, or who have been found guilty of, offences.

Under s.516(1) of the CYFA, the Criminal Division of the Court has the following jurisdiction:

- (a) to hear and determine all charges against children for summary offences;
- (b) subject to s.356 of the CYFA, to hear and determine summarily all charges against children for indictable offences other than the following 7 offences ('the 7 death offences'):
 - ❶ murder;
 - ❷ attempted murder;
 - ❸ manslaughter;
 - ❹ child homicide;
 - ❺ homicide by firearm;
 - ❻ arson causing death [s.197A of the Crimes Act 1958];
 - ❼ culpable driving causing death [s.318 of the Crimes Act 1958];
- (c) to conduct committal proceedings into all charges against children for indictable offences;
- (d) to grant or refuse bail to, or extend, vary, or revoke the bail of, a child who is charged with an offence; and
- (e) subject to Chapter 5 of the CYFA, to deal with a breach of a sentencing order or variation of a sentencing order.

Section 516(3) of the CYFA provides that the above jurisdiction given by s.516(1) is additional to any other jurisdiction given to the Criminal Division by or under the CYFA or any other Act.

Section 20C of the Crimes Act 1914 (Cth) provides that a child or young person who, in a State or Territory, is charged with or convicted of an offence against a law of the Commonwealth may be tried, punished or otherwise dealt with as if the offence were an offence against a law of the State or Territory. In Victoria in 2004 & 2005 less than half a percent of offences dealt with by the Children's Court were Commonwealth offences. In *CDPP v TK* [2018] VChC 4 Stylianou M discussed the effect of s.20C on sentencing under the CYFA. Part of her Honour's detailed reasons are set out in section 11.1.13 of these Materials.

7.1.1 Classification of offences

In order to understand the jurisdiction of the Criminal Division of the Court, it is necessary to be aware that offences are classified into 2 categories:

- (i) summary offences (once called misdemeanours); and
- (ii) indictable offences (once called felonies).

A summary offence is an offence which can only be tried in a court of summary jurisdiction. Examples include most offences created by the Summary Offences Act 1966 (Vic), the Vagrancy Act 1966 (Vic) & the Road Safety Act 1989 (Vic).

An indictable offence is an offence which can be tried on indictment, that is by a judge & jury in the County Court or the Supreme Court. Examples include most common law offences (eg. affray, false imprisonment) and the majority of the offences created by the Crimes Act 1958 (Vic).

Sometimes the statutory provision creating an offence specifies whether the offence is indictable or summary. For example:

- the various offences of trafficking in a drug of dependence created by ss.71, 71AA, 71AB & 71AC of the Drugs, Poisons and Controlled Substances Act 1981 (Vic) [as amended] are defined as indictable offences;
- s.91 of the Crimes Act 1958 (Vic) which states that the offence of "Going equipped for stealing etc" is a summary offence.

Occasionally the statutory provision creating an offence specifies that the offence is indictable in some instances and summary in others: e.g. s.60B(2) of the Crimes Act 1958 (Vic) creating an offence of "Loitering near schools etc".

Sometimes the statutory provision is silent as to the classification of the offence. In that event, the relevant classification is determined by s.112 of the Sentencing Act 1991 (Vic) [No.49/1991] [as amended]:

- (1) An offence that is described in a provision of an Act (other than the Crimes Act 1958 or the Wrongs Act 1958), subordinate instrument or local law as being level 1, 2, 3, 4, 5 or 6 or as being punishable by level 1, 2, 3, 4, 5 or 6 imprisonment or fine or both is, unless the contrary intention appears, an indictable offence.
- (2) Any other offence under an Act (other than the Crimes Act 1958 or the Wrongs Act 1958), subordinate instrument or local law is, unless the contrary intention appears, a summary offence.
- (3) If an offence is described as being punishable in more than one way or in one of two or more ways, sub-section (1) applies even if only one of those ways is referred to in that sub-section.

7.1.2 Age of 'child' for hearing of a charge

"We have not passed that subtle line between childhood and adulthood until we move from the passive voice to the active voice - that is, until we have stopped saying 'It got lost' and say 'I lost it'."
Harris S., "On the Contrary" (1962), chapter 7.

Prior to 01/07/2005 the Children's Court did not have criminal jurisdiction in respect of an offence committed by a person who had turned 17. Article 1 of the United Nations Convention on the Rights of the Child - to which Australia is a signatory - defines a child as a person under the age of 18 unless the relevant national law specifies an earlier age of majority. Because of the exception, the Victorian age of majority for criminal proceedings prior to 01/07/2005 was not in breach of the UN Convention but was not in accord with its spirit. In its joint report "*Seen and Heard: Priority for Children in the Legal Process*", the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission recommended: "The age at which a child reaches adulthood for the purposes of the criminal law should be 18 years in all Australian jurisdictions." [Recommendation 196: see paragraphs 18.21-18.22 of report].

As and from 01/07/2005 the Children's Court has been given criminal jurisdiction in respect of 17 year olds. The new definition of 'child' picks up the Australian Law Reform Commission's recommendation and has brought Victorian law into line with the UN Convention. In the case of a person who is alleged to have committed an offence, s.3(1) of the CYFA now provides that 'child' means "a person who at the time of the alleged commission of the offence was under the age of 18 years but of or above the age of 10 years but does not include any person who is of or above the age of 19 years when a proceeding for the offence is commenced in the Court".

"Proceeding" means any matter in the Court, including a committal proceeding, but does not include the exercise by a registrar of any jurisdiction, power or authority vested in the registrar as registrar under Schedule 3, the Children and Young Persons Infringement Notice System {CAYPINS} [s.3(1) of the CYFA].

Section 6 of Criminal Procedure Act 2009 (Vic) ['the CPA'], read in conjunction with s.528 of the CYFA, defines when a criminal proceeding is commenced in the Children's Court.

7.1.3 No criminal responsibility of a child under 10

It follows from the above definition of 'child' that a child aged under 10 cannot commit a criminal offence in Victoria. This is reinforced by s.344 of the CYFA which states: "It is conclusively presumed that a child under the age of 10 years cannot commit an offence." A similar presumption applies in England: see s.16(1) of the Children and Young Persons Act 1963 (Eng).

By comparison the minimum age of criminal responsibility in Canada is 12 and in many European countries ages ranging from 12 (Greece & Netherlands) to 14 (Germany) to generally 18 (Belgium & Luxembourg). In New Zealand criminal proceedings cannot be commenced against a child who has committed an offence under the age of 14 except that this age is reduced to-

- 10 where the offence is murder or manslaughter;
- 12 where the offence has a maximum penalty of at least 14 years' imprisonment or where the offence has a maximum period of at least 10 years and the child is a previous offender as defined.

7.1.4 Transfer of the hearing of a charge to or from Magistrates' Court

Mandatory transfer to Magistrates' Court: Section 516(4) of the CYFA imposes an obligation on the Children's Court to discontinue a proceeding for the hearing of a charge and order that the hearing be transferred to the Magistrates' Court if before or during the proceeding it appears to the Children's Court that the accused is not a 'child' within the meaning of s.3(1). If a proceeding is transferred, the Children's Court in the meantime may:

- permit the accused to go at large; or
- grant the accused bail; or
- remand the accused in prison or a police gaol or under s.49 of the Magistrates' Court Act.

Mandatory transfer from Magistrates' Court: Section 585(1) of the CYFA imposes the reverse obligation on the Magistrates' Court, namely to discontinue a proceeding for the hearing of a charge and order that the hearing be transferred to the Children's Court if before or during the proceeding it appears to the Magistrates' Court that the accused is a 'child' or was a 'child' when the proceeding for the offence was commenced in the Magistrates' Court. If a proceeding is transferred, the Magistrates' Court in the meantime may:

- permit the accused to go at large; or
- grant the accused bail; or
- remand the accused in a remand centre.

Section 585(1) does not apply to any case which was lawfully commenced in the Magistrates' Court.

Presumptive hearing but discretionary transfer to Magistrates' Court of child now 19 or more:

For any proceeding for the hearing of a charge for an offence commenced on or after 01/07/2005, s.516(5) of the CYFA provides that, despite s.516(4), if before or during the hearing it appears to the Children's Court that the accused is of or above the age of 19 years but was a child when the proceeding for the offence was commenced in the Court, the Children's Court must hear and determine the charge unless at any stage the Court considers that exceptional circumstances exist, having regard to:

- (a) the age of the accused;
- (b) the nature and circumstances of the alleged offence;
- (c) the stage of the proceeding;
- (d) whether the accused is the subject of another proceeding in another court;
- (e) any delay in the hearing of the charge and the reason for the delay;
- (f) whether the sentencing orders available to the Court are appropriate;
- (g) whether the accused prefers the charge to be heard in the Children's Court or the Magistrates' Court;
- (h) any other matter that the Court considers relevant.

Section 516(6) provides that if the Court considers that exceptional circumstances exist under s.516(5), it must discontinue the proceeding and order that it be transferred to the Magistrates' Court and in the meantime may:

- permit the accused to go at large; or
- grant the accused bail; or
- remand the accused in prison or a police gaol or under s.49 of the Magistrates' Court Act.

7.1.5 Age of 'child' for breach, variation & revocation proceeding

For the purposes of the breach proceedings referred to in s.516(1)(e), s.423 of the CYFA provides a "generic" mechanism for the hearing of proceedings for breach of a sentencing order made under Part 5.3 of the CYFA, including default in the payment of a fine or of any instalment under an instalment order, regardless of when the sentencing order was made. It is clear that the intention of s.423 is that there should be no age restriction on the commencement of breach proceedings against a person who has been placed on a sentencing order made under the CYPA or the CYFA, irrespective of how old the person was at the time of the alleged breach or at the time the breach proceeding was commenced. This intention is consistent with the powers given to the Court by s.366 [breach of accountable undertaking], s.371 [breach of bond], s.378 [fine default], s.384 [breach of probation], s.393 [breach of YSO] & s.408 [breach of YAO], all of which now use the word "person" rather than the word "child". The same is true of proceedings for variation or revocation of probation, youth supervision or youth attendance orders: see ss.409 & 421 of the CYFA.

7.2 General powers of arrest

An excellent legal analysis of general Victorian powers of arrest is contained in chapter 8.14 of the Judicial College's eManual under the heading "**8.14 – Powers of arrest**" which was last updated on 17 May 2019. In this material – which is set out below – all statutory references are to the *Crimes Act 1958* Vic [as amended] unless otherwise indicated.

Introduction

1. A person is arrested when police make it plain to him or her that he or she is not free to leave (*R v Lavery* (1978) 19 SASR 515).
2. The *Crimes Act 1958* contains several provisions empowering police officers to make arrests in various circumstances.
3. In addition, other legislation provides additional bases for arrests without warrant (see, e.g. *Bail Act 1977* s.24). These other bases for arrest without warrant are beyond the scope of this commentary.
4. While powers of arrest are now governed by statute in Victoria, the common law still dictates the requirements of a lawful arrest (*Slaveski v State of Victoria & Ors* [2010] VSC 441; *Crimes (Powers of Arrest) Act 1972*).

To Which Crimes are Police powers of Arrest Available as a Defence?

6. Police powers of arrest provide a lawful excuse for what would otherwise be an unlawful application of force. The defence is therefore most likely to arise in relation to offences like:
 - a. assault (*Slaveski v State of Victoria & Ors* [2010] VSC 441); and
 - b. false Imprisonment (*Biddle v State of Victoria & Ors* [2015] VSC 275).

General powers of arrest without warrant (s.458)

7. Section 458(1) provides three situations in which any person (including a police officer) may arrest a person without a warrant.

Person arrested found committing an offence (s.458(1)(a))

8. This first situation applies where:
 - a. a person (including a police officer) found the other person committing an indictable or summary offence; or
 - b. a person (including a police officer) believed on reasonable grounds that apprehension was necessary for one or more of the prescribed reasons.
9. A person (including a police officer) finds a person committing an offence including when a person (including a police officer) finds a person doing any act or so behaving or conducting himself or in such circumstances that the person finding him believes on reasonable grounds that the person so found is guilty of an offence (s.462).
 - "Finds committing" is intended to be given an extended meaning to encompass circumstances beyond actually finding an offender engaged in the relevant act (*De Moor v Davies* [1999] VSC 416).
10. Section 462 extends the point of discovery of the commission of the offence to encompass:
 - a. the actual perpetration of the offence;
 - b. finding a person behaving or conducting him or herself so as to create a reasonable belief of guilt; or
 - c. finding a person in such circumstances so as to create a reasonable belief of guilt (*De Moor v Davies* [1999] VSC 416; *Lynch v Hargrave* [1971] VR 99; *Lunt v Bramley* [1959] VR 313).
11. The prescribed reasons are:
 - (i) to ensure the attendance of the offender before a court of competent jurisdiction;
 - (ii) to preserve public order;
 - (iii) to prevent the continuation or repetition of the offence or the commission of a further offence; or
 - (iv) for the safety or welfare of members of the public or of the offender.

Person arresting was instructed by an authorised police officer (s.458(1)(b))

12. The second situation under s.458 applies where a person (including a police officer) was instructed to apprehend a person by a police officer who had the power to apprehend that person.

Person arrested escaping from custody or evading arrest (s.458(1)(c))

13. The third situation under s.458 applies where a person (including a police officer) believed on reasonable grounds that the other person was:
- escaping from legal custody; or
 - aiding and abetting another person to escape from legal custody; or
 - avoiding apprehension by some person with authority to apprehend the person.

Duration of arrest under s.458 (s.458(3))

14. A person who has been apprehended under s.458 may only be held as long as the reason for their apprehension continues. If the reason ceases to exist, the arrested person must be released.

Police specific powers of arrest without warrant (s.459)

15. Section 459 provides powers that only apply to a police officer or a protective services officer on duty at a designated place. Under section 459 a person is lawfully arrested if a police officer protected services officer believes on reasonable grounds that the person has committed-
- an indictable offence in Victoria; or
 - an offence elsewhere which would be an indictable offence in Victoria.
16. A protective services officer exercising this power must hand the person into the custody of a police officer as soon as practicable (s.459(2)).
17. A protective services officer can only exercise this power in relation to a person who is at or in the vicinity of a "designated place" as defined in the *Victoria Police Act 2013* (s.459(3)).
18. Where an arrest is made under a belief held on reasonable grounds, the apprehension does not cease to be lawful if it later turns out the person arrested did not commit the offence alleged against him (s.461).

Belief distinguished from suspicion

19. Belief has been distinguished from suspicion (*George v Rockett* (1990) 170 CLR 104). The facts grounding a suspicion may be insufficient to ground a belief (*Walsh v Loughnan* (1991) 2 VR 351).
20. Belief is a more certain state of mind than suspicion and involves an inclination of the mind towards assenting to, rather than rejecting, a proposition (*George v Rockett* (1990) 170 CLR 104).
21. Suspicion is a positive feeling of actual apprehension of mistrust, amounting to a slight opinion, but without sufficient evidence. Suspicion is not enough to justify an arrest without warrant (*Slaveski v State of Victoria & Ors* [2010] VSC 441).
22. The information upon which the arrester forms their belief depends on all of the circumstances that prevailed at the relevant time, including what the arrester saw, heard or did.
23. A person (including a police officer) must have believed that a particular indictable offence occurred, and not simply any indictable offence generally (*R v Vollmer* [1996] 1 VR 95).

Reasonable grounds

24. "Reasonable grounds" requires the existence of facts which are sufficient to induce that state of mind (e.g. belief, suspicion) in a reasonable person (*George v Rockett* (1990) 170 CLR 104; *Walsh v Loughnan* [1991] 2 VR 351).
25. A person (including a police officer) must believe that the person being arrested has committed an indictable offence and this belief must be based on facts that would induce that state of mind in a reasonable person (*Slaveski v State of Victoria & Ors* [2010] VSC 441).

Use of force

26. Section 462A authorises a person to use force to effect or assist in effecting the lawful arrest of a person committing or suspected of committing an offence.
27. The force used must not be disproportionate to the objective that the person believed on reasonable grounds to be necessary.
28. Section 462A of the *Crimes Act* does not confer a power of arrest, it merely provides that proportionate force may be used to effect an arrest. The lawful power of arrest must be derived from either s.458 or s.459 (*Slaveski v State of Victoria & Ors* [2010] VSC 441).
29. The right to use force is a corollary of the right to effect an arrest, as without such a right, a power of arrest would be ineffective (*R v Turner* [1962] VR 30).
30. The right to use force only authorises using the amount of force reasonably necessary to carry out the arrest. The force must not be disproportionate to the “evil to be prevented” (*R v Turner* [1962] VR 30).
31. The level of force that is reasonable is to be determined objectively.

Arrest with Warrant

32. In addition to the various bases for arrest without warrant, Victorian law provides a range of bases for a court to issue a warrant to arrest (see, e.g., *Criminal Procedure Act 2009* s.12; *Evidence Act 2008* s.194).
33. Where there is an arrest with warrant, the person must comply with any conditions on the warrant, along with the common law elements of lawful arrest described below.

Common Law Elements of Lawful Arrest

34. While the powers of arrest are largely governed by statute, the common law still dictates the process of a lawful arrest (*Slaveski v State of Victoria & Ors* [2010] VSC 441).
35. These procedural requirements are:
 - a. The other person was deprived of his or her liberty;
 - b. The arrestee informed the other person that he or she was under arrest; and
 - c. The arrestee informed the other person of the reason for the arrest.

Deprivation of Liberty

36. There is no requirement that the other person be seized or subjected to physical force. There may be an arrest by mere words (*Alderson v Booth* [1969] 2 QB 216).
37. There will be a sufficient deprivation of liberty if the other person submits to the arrestee's control after the arrestee has indicated his or her intention to effect the arrest (*Slaveski v State of Victoria & Ors* [2010] VSC 441).
38. If the other person does not comply, the deprivation of liberty must be formalised by the accused touching the other person (*Sandon v Jervis* (1859) 120 ER 760).

Communication of arrest

39. A person (including a police officer) must do everything that a reasonable person in the circumstances would do to inform the person being arrested that they are under arrest (*R v Stafford* (1976) 13 SASR 392; *Hull v Nuske* (1974) 8 SASR 587).
40. The person being arrested must comprehend that they are acting under compulsion and not voluntarily (*Alderson v Booth* [1969] 2 QB 216; *R v O'Donoghue* (1988) 34 A Crim R 397).
41. The question of whether it was clear to the person being arrested that they were under compulsion is a question of fact dependant on the circumstances of the case (*R v Inwood* [1973] 2 All ER 645).

Communication of reason for arrest

42. A person (including a police officer) must inform the person being arrested, at the time of the arrest, of the offence or facts constituting an offence, for which they are being arrested (*Christie v Leachinsky* [1947] AC 573; *Adams v Kennedy* (2000) 49 NSWLR 78; *R v Tipping* [2019] SASCFC 41).

43. The reason given must be the true reason. A person cannot keep the reason for arrest to himself or herself, or give a reason which is not the true reason (*Christie v Leachinsky* [1947] AC 573).
44. An arrest for the mere purpose of questioning is unlawful (*Bales v Parmenter* (1935) SR (NSW) 182).
45. The reason for arrest does not need to be communicated using technical or precise language (*Christie v Leachinsky* [1947] AC 573).
46. In certain circumstances, the accused will be excused from immediately informing the person being arrested, for example:
 - if the other person resists arrest or absconds (*Christie v Leachinsky* [1947] AC 573);
 - if the circumstances of the arrest are such that the offence or reason for arrest is apparent to the other person (*Christie v Leachinsky* [1947] AC 573); or
 - if the other person is unable to understand the reason because of disability, intoxication or lack of English language skills, as long as the accused does all that a reasonable person would do in such circumstances (*Tims v John Lewis & Co Ltd* [1952] AC 676).
47. In these circumstances, a person (including a police officer) must inform person being arrested of the reason for the arrest at the earliest reasonable opportunity (*Christie v Leachinsky* [1947] AC 573).
48. In assessing the second exception described above, the focus must be on the circumstances of the arrest itself, rather than the subjective knowledge of the arrested person. The prosecution must show that, in the circumstance, the other person must have known the reason for the arrest (*State of NSW v Delly* (2007) 70 NSWLR 125).

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7.3 Victoria Police Personal Search Powers under Victorian law

This section is limited to police personal search powers under Victorian law. It does not extend to an analysis of any search powers contained in Commonwealth legislation.

7.3.1 Personal searches of adults and children generally

Summarising the common law and statutory powers of Victorian police officers to conduct a personal search of adults & children, website <https://www.gotocourt.com.au/criminal-law/vic/personal-searches/> states:

“Police have a legal right to search you or your property only if:

- *You agree to the search.*
- *They have a warrant.*
- *They have reason to believe that you have a concealed weapon.*
- *You have been arrested.*
- *You are in a declared ‘designated area’.*
- *There is some other reason specified in the law.”*

In relation to personal searches without a warrant in Victoria the website continues:

“In certain circumstances, police don’t need a warrant to search you, anything you are carrying, or the car you are in. They can search your car even if you are no longer in it. Police can only conduct personal searches in Victoria if you are in a public place and they reasonably suspect:

- *you have illegal drugs*
- *you have dangerous items in your possession, such as guns (including imitation guns), knives, knuckle-dusters, nunchakus, other weapons, things that may explode or catch fire*
- *you are in an area where a lot of violent crime happens*
- *you have tools for graffiti like spray paint, textas, or gouging tools. Police can only search you for graffiti tools if you are aged 14 or older and are on or near public transport property or trespassing on someone else’s property.*
- *you are in a designated place. An area can be declared ‘designated’ if there have been two or more events of violence or disorder there in the last year, it is a regular trouble spot, or there have been events or demonstrations that have become violent. The police are usually required to publish the declaration of an area as designated in a local newspaper. If it has occurred at short notice, though, there is no requirement for them to do so.”*

The above summary relates to police powers under Victorian law to search persons generally, not to specific powers to strip search nor to searches of persons in custodial institutions. There are very few circumstances in which police can lawfully strip search a young person under 18 prior to arrest and charge.

Website <https://www.legaldid.vic.gov.au/find-legal-answers/police-powers-and-your-rights> – under the heading **“Young people and the police”** and the sub-heading **“What happens when you are searched”** – states:

“Pat-down search: *This is when the police officer uses their hands to feel over the outside of your clothes. The police officer can:*

- *search you in public or inside a private property*
- *ask you to empty your pockets or remove your jacket or jumper*
- *ask you to show them something they believe is a weapon. The police can charge you and fine you if you refuse*
- *use a metal detector to look for something they reasonably suspect is a weapon.*

The police officer that does the search must:

- *be the same sex as you (unless this is not reasonably possible)*
- *make a written record of the search*
- *give you a receipt when they take anything away from you, including drugs.*

Strip search: *This is when the police officer removes and searches all of your clothing. An officer will usually do a strip search when they are looking for something they could not find in a pat-down search.*

A police officer can only do a strip search in a private place, usually at a police station. They must follow the rules for a pat-down search.

A police officer must also make sure you have someone with you if:

- *you are under 18 – a parent, guardian or independent person must be with you*
- *you have a cognitive disability or a mental illness – an Independent Third Person must be with you.*

They do not have to do this if there are urgent or serious circumstances that mean they cannot get one of these people to be with you.

If the search is in a designated area and it is not 'practicable' for police to have a parent, guardian or independent person, police may use another person to watch the search. That other person could be another police officer. The law does not say what 'practicable' means. It could mean the police officer believes it would take too long for the parent, guardian or independent person to get there.

Internal body search: *This means searching inside your body. An internal body search is a forensic procedure. If you agree to it, only a doctor can do the search. The doctor must be the same sex as you. You do not have to agree to an internal body search. The police must get a [court order](#) to do the search if you refuse."*

It is important to note the distinction between the conduct of a personal search and the conduct of a forensic procedure, for example. The latter requires a court order, in relation to a child under s.464U of the *Crimes Act 1958*. Examples of a forensic procedure are a search of a body cavity or an examination of a person's body for the purpose of obtaining evidence which might implicate the person in – or exonerate the person from – a criminal offence.

7.3.2 Legal analysis of police powers to search adults and children

An excellent legal analysis of Victoria police search powers is contained in chapter 8.15 of the Judicial College's eManual under the heading "**8.15 – Police search and seizure powers without a warrant**" which was last updated on 28 August 2019. The most relevant material from this document is set out below.

Introduction

1. Police officers' powers of search and seizure in relation to persons, goods and land are circumscribed in the absence of an authorising warrant.
2. **Interferences with one's person or possessions are presumed to be a grave infringement of elementary common law rights and may engage the doctrine of trespass to person or goods.** The mere fact that a person is a police officer does not justify such an interference (*Trobrudge v Hardy* (1955) 94 CLR 147, 152).
3. Similarly, police officers are subject to the law regarding trespass to land and require authority or consent to enter private premises (*Mackay v Abrahams* [1916] VLR 681, 684; *Plenty v Dillon* (1991) 171 CLR 635, [4]).
4. One statutory exception to this principle is found in s 459A of the *Crimes Act 1958*, which authorises entry onto private premises for the purpose of arresting a person in accordance with ss 458 or 459 of the *Crimes Act 1958*, where the police officer believes on reasonable grounds the person has committed a serious indictable offence or has escaped from legal custody. See 8.14 – Powers of arrest, for information on these provisions.
5. **Police search and seizure powers generally arise in three circumstances:**
 - **Search incidental to an arrest;**
 - **Search and seizure of stolen goods;**
 - **Specific statutory powers.**
6. Recent cases have also considered whether there is a broader power to conduct investigative searches in relation to serious offences [see paragraphs 34-39 below].
7. Where it arises as an issue, the lawfulness of a search will need to be determined before the possible exclusion of the evidence under *Evidence Act 2008* s 138 is considered. It is only if the court decides that the search was unlawful that s 138 may be engaged (*McElroy & Wallace v The Queen* [2018] 55 VR 450, [116]).

Search and seizure incidental to an arrest

What is permitted when searching a person under arrest?

8. **A police officer has a common law duty to take reasonable measures to prevent a person in custody from harming themselves or others or destroying or disposing of evidence. This often involves a search of the person's clothes and body. Such a search is called a 'safety and evidence search' (*Botton v Winn* (Supreme Court of Victoria, J H Phillips J, 18 December 1987); *Director of Public Prosecutions v Tupper* (2018) 55 VR 720, [35]).**

9. **What amounts to a reasonable method of discharging this duty will turn on the circumstances of the case and should ordinarily involve the person being informed of the reasons for the search (*Botton v Winn* (Supreme Court of Victoria, J H Phillips J, 18 December 1987)).**
10. **In certain circumstances, this common law power may involve requiring the person to remove some or all of their clothes (*Botton v Winn* (Supreme Court of Victoria, J H Phillips J, 18 December 1987)).**
11. Officers conducting such searches must weigh the affront to a person's dignity against the desirability of preserving and protecting evidence and persons (*Director of Public Prosecutions v Tupper* (2018) 55 VR 720, [37]).
12. **The common law power to conduct a safety and evidence search does not permit forensic procedures. Police officers who wish to take a sample from a person, conduct a procedure on the person or make a physical examination of the person must comply with the requirements imposed by *Crimes Act 1958* ss 464R, 464U and 464Y.**

Seizure of stolen goods

13. **Police officers are entitled to seize stolen goods from a person provided the seizure occurs without force, violence or otherwise unlawful conduct (*Dalton v McNaughton* (1903) 29 VLR 144, 151).**
14. **This does not include a power to search a person or premises for stolen goods.** The police officers must be able to identify and reach the goods without trespass to land or individuals (*Laurens & Anor v Willers* [2002] WASCA 183, [45]).

Statutory powers independent of an arrest

15. **Police officers are empowered under s 82 of the *Drugs, Poisons and Controlled Substances Act 1981* to search a person or vehicle in a public space provided the police officer has reasonable grounds for suspecting that the person possesses a drug of dependence or psychoactive substance or that any such substances are in the vehicle.**
16. The test for establishing that the suspicion is based on reasonable grounds has two elements. First, the suspicion must have actually been held. The second element is objective – The circumstances must have been of a kind that would raise a suspicion in the mind of a reasonable person. A suspicion is a 'positive or actual apprehension or mistrust' that requires more than a 'mere idle wondering' (*Murray, Hale and Olsen (Pseudonyms) v The Queen* [2017] VSCA 236, [62] citing *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, [4])
17. Section 82 should be construed as balancing the need for an effective criminal justice system against the desirability of protecting individuals from arbitrary interferences with their person and property (*Murray, Hale and Olsen (Pseudonyms) v The Queen* [2017] VSCA 236, [62]).
18. Section 82 is not restricted to circumstances in which a warrant cannot be acquired under s 81: see s.81(7).
19. There is authority, though *obiter*, to suggest that s 82 powers could possibly extend to confiscating a person's vehicle for the purposes of a later search to be conducted at a police station. Whether this *obiter* will be confirmed is a question for future determination (*GA, MM and PJ v The Queen* [2012] VSCA 44, [13]).
20. Police officers have a broad power to enter premises if they believe on reasonable grounds that a person has assaulted or threatened to assault a family member or is in contravention of a family violence intervention order, family violence safety notice or a personal safety intervention order (*Family Violence Protection Act 2008* s 157; *Personal Safety Intervention Orders Act 2010* s 114).
21. Other statutory powers include:
 - **A power to search (including a strip search) where there are reasonable grounds to suspect the person has weapons in their possession (*Control of Weapons Act 1990* s 10).**

- A power to search for firearms where there are reasonable grounds to suspect the person is committing or about to commit a *Firearms Act* offence and that he or she has a firearm or ammunition in their possession (*Firearms Act 1996* s 149).
- A power to frisk search any person on court premises (*Court Security Act 1980* s 3).
- A power to search persons under the *Gambling Regulation Act 2003* s 2.5.38(f).
- **A limited power to search persons (not strip search) under the *Graffiti Prevention Act 2007* s 13.**

General common law powers of search and seizure

31. **Historically, Victorian cases stated that there were no common law powers of search and seizure beyond those conferred incidental to an arrest, a search warrant or in instances of seizing stolen goods (*Levine v O'Keefe* [1930] VLR 70, 72).**
32. Investigating breaches of the peace or threats to breach the peace did not suffice to justify police interference with persons, goods or land in the absence of statutory authority (*Kuru v New South Wales* (2008) 236 CLR 1, [47]).
33. **Similarly, there was no power for seizure solely on the basis of a reasonable belief that goods could form material evidence of a crime (*Ozzie Discount Software (Aust) Pty Ltd v Muling* (1996) 86 A Crim R 387, 395).**
34. **However, recent Victorian judgments have entertained discussions that suggest that the law may be straying from this approach.**
35. **Osborn J in *obiter* in *Goldberg v Brown* suggested that the UK decision of *Ghani v Jones* [1970] 1 QB 693 was applicable in Victoria (*Goldberg v Brown* [2003] VSC 104, [4]).**
36. In *Ghani v Jones*, Lord Denning MR found that an assessment of the lawfulness of a seizure disconnected from an arrest requires the weighing up of the freedom and privacy of an individual against the public interest in repressing crime. His Honour identified five requirements that govern a lawful seizure of goods in these circumstances:
 - i. Officers must believe on reasonable grounds that an offence has occurred that is of such gravity that it is of first importance that the offenders be brought to justice.
 - ii. Officers must believe on reasonable grounds that the articles to be seized constitute material evidence to prove the commission of the serious offence.
 - iii. The person in possession of the article being seized must be someone whom the officers believe on reasonable grounds is implicated in the crime.
 - iv. The police are not permitted to retain the seized articles for longer than is reasonably necessary to complete their investigations or to create a copy of it.
 - v. These requirements must be assessed at the time of the seizure and are unaffected by any subsequent events (*Ghani v Jones* [1970] 1 QB 693, 708-709).
37. These principles represent the outer limits of police powers of seizure considered in the United Kingdom and do not permit police officers to interfere with one's person or property simply to see if they have committed a crime (*Ghani v Jones* [1970] 1 QB 693, 707).
38. In *Siddique v Martin* (2016) 51 VR 564, the Crown argued that *Ghani v Jones* [1970] 1 QB 693 was good law in Victoria. While the Supreme Court noted that it was 'prepared to assume' in favour of the Crown, it was not necessary to decide the point as the case concerned the operation of the chance discovery rule when exercising a search warrant (at 574).
39. The most recent consideration of the principles can be found *McElroy & Wallace v The Queen* (2018) 55 VR 450. The Court acknowledged that the factual matrix before it mirrored the circumstances in which the *Ghani v Jones* principles might apply. However, as the Crown did not offer evidence for the proposition that the Court should follow *Ghani v Jones* [1970] 1 QB 693, the Court declined to rule on the matter (at [111]). Instead, the seizure was presumed to be unlawful given the lack of warrant or arrest connected to the evidentiary purpose of the seized goods (at [117]).

7.3.3 Three types of personal search described

Three types of personal search are defined in rule 2 of Schedule 1 of the *Terrorism (Community Protection) Act 2003 (Vic)* in the following terms which, in the author's view, are also applicable – where relevant – to searches authorised by common law and by other Victorian statutes:

- **frisk search** means—
 - (a) a search of a person conducted by quickly running the hands over the person's outer clothing or by passing an electronic metal detection device over or in close proximity to the person's outer clothing; and
 - (b) an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person, including an examination conducted by passing an electronic metal detection device over or in close proximity to that thing.
- **ordinary search** means a search of a person or of things in the possession or under the control of a person that may include—
 - (a) requiring the person to remove only his or her overcoat, coat or jacket or similar article of clothing and any gloves, shoes and hat; and
 - (b) an examination of those items.
- **strip search** means a search of a person or of things in the possession or under the control of a person that may include—
 - (a) requiring the person to remove all of his or her clothes; and
 - (b) an examination of the person's body (but not of the person's body cavities) and of those clothes.

7.3.4 Statutory police powers to search a child whether or not the child is under arrest

Unless a child has been arrested, police powers to strip search a person under the age of 18 years appear to be very limited unless the young person has consented. And the ability of a particular child to give informed consent must always be considered. A VLA Booklet says of searches by consent https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/vla-resource-police-powers_0.pdf: Police Powers – Your rights in Victoria, p.6):

"If the police officer does not have a warrant or the power to search you, they might ask you if you will let them search you... You can say 'No.' If you say 'Yes', the police officer should get your agreement in writing. You can complain if this does not happen."

Police cannot search a person under 18 for alcohol but they can seize the alcohol if they see the young person with it (ibid., p.8).

Under the heading **"Are the police allowed to search me"**, the Youth Law Australia website (<https://yla.org.au/vic/topics/courts-police-and-the-law/police-powers-and-my-rights-with-the-police/>) says of the legal right of a police officer to conduct a personal search of children under Victorian law:

"The police can stop and search you, your car or your house if they have a warrant (where they've already been to court to ask if it's okay). Without a warrant, they can also search you if they think you have:

- *Illegal drugs;*
- *Weapons, like guns or knives;*
- *Something to inhale an illegal drug with (like a bong).*

In some cases, the police can also search your car if they believe the search will help them find evidence of a crime."

Drugs, Poisons and Controlled Substances Act 1981 (Vic)

As noted above, police officers are empowered under s 82 of the *DPCSA* to search a person or vehicle in a public place provided the police officer has reasonable grounds for suspecting that the person possesses a drug of dependence or psychoactive substance or that any such substances are in the vehicle.

Police officers are also empowered under Division 2 of Part IV of the *DPCSA* [ss.60A to 60T] to search a person aged under 18 if they suspect the young person is inhaling or is going to inhale a volatile substance. This activity, known as chroming, is not an offence but the police can stop a young person suspected of chroming and take the person somewhere safe if they think that the person will hurt themselves by chroming.

Under ss.82A & 60BA of the *DPCSA* the above powers may also be exercised by a protective services officer on duty at a designated place.

Graffiti Prevention Act 2007 (Vic)

The *GPA* contains a search power which might be described as a double frisk search but which falls short of a strip search.

Section 14(1) provides that a child who is or appears to be under 14 years of age must not be searched under the *GPA*.

Section 13 provides that if a police officer (or a protective services officer on duty at a designated place under s.52 of the *Victoria Police Act 2013*) has reasonable grounds for suspecting that-

- (a) a person has in his or her possession a prescribed graffiti implement on property, or in a place, referred to in s.7(1); and
- (b) relevant evidence is likely to be lost or destroyed if a search is delayed until a search warrant is obtained; and
- (c) the person is 14 years of age or more-

the officer may without warrant, search the person and any vehicle, package or thing in the possession of the person and seize any prescribed graffiti implement or other evidence of an offence against this Act found during the course of the search. The places referred to in s.7(1) are-

- on the property of a transport company or in an adjacent public place;
- a place where the person is trespassing or has entered without invitation

For a child aged between 14 & 17 inclusive ss.14 & 15 provide that in such a search the officer-

- may run his or her hands over the person's outer clothing;
- may request the person to remove his or her outer clothing and gloves, shoes and headgear so that the officer may-
 - (i) run his or her hands over the person's clothing that was immediately under the person's outer clothing; or
 - (ii) search the person's outer clothing and gloves, shoes and headgear.

The search must be conducted in a manner that affords reasonable privacy and is as quick as is reasonably practicable.

If, before or during such a search, the officer has reasonable grounds for suspecting that the person is under 18 and-

- has in his or her possession a volatile substance within the meaning of Part IV of the ***Drugs, Poisons and Controlled Substances Act 1981***; or
- is inhaling or will inhale a volatile substance-

the officer must cease conducting the search under the *GPA* and deal with the person in the manner set out in Division 2 of Part IV of the *DPCSA*.

Control of Weapons Act 1990 (Vic)

Section 10(1) of the *CWA* empowers a police officer who has reasonable grounds for suspecting that a person is carrying or has in his or her possession in a public place a **weapon** contrary to the *CWA*, without a warrant, to search a person and any vehicle or thing in the person's possession or under the person's control for the weapon. Section 10(7) provides that **weapon** means (a) a prohibited weapon; (b) a controlled weapon; or (c) a dangerous article. Section 10(4) provides that Schedule 1 applies to such search.

For completeness, it is noted that s.10G(1) of the *CWA* empowers a police officer, without a warrant, to stop and search a person and search any thing in the possession or under the control of the person for weapons if the person, and if applicable the thing, are in a public place that is within a designated area. A designated area is an area in respect of which a declaration under ss.10D or 10E is in effect. Section 10G(2) provides that Schedule 1 also applies to such search.

In Schedule 1-

- Clause 4 empowers a police officer authorised under s.10 to examine a thing.
- Clause 5 empowers a police officer authorised to search a person under s.10 to conduct an "**outer search**" (sometimes termed a "**frisk search**").

- Clause 7(1) empowers a police officer to conduct a “**strip search**” of a person if-
 - (a) a search of the person or thing has been conducted under clause 4 or 5; and
 - (b) the police officer reasonably suspects that the person has a weapon concealed on his or her person; and
 - (c) the police officer believes on reasonable grounds that it is necessary to conduct a strip search of the person for the purposes of the search and that the seriousness and urgency of the circumstances require the strip search to be carried out.
- Clause 9 sets out the rules for CWA strip searches generally.
- Clause 11(5) provides that for a frisk search of a child – defined as “a person under the age of 18 years” – under clause 5 or a strip search of a child under clause 7, the search “must, if practicable in the circumstances, be conducted in the presence of-
 - (a) a parent or guardian of the child being searched; or
 - (b) if it is not practicable in the circumstances for a parent or guardian of the child to be present, any person (whether or not he or she is a police officer) other than a police officer who is conducting the search.
- Clause 12 is similar for searches of persons with impaired intellectual functioning.

Terrorism (Community Protection) Act 2003 (Vic)

Part 3A of the *TCPA* sets out a number of Special Police Powers for the purposes of the *TCPA*. Section 21P of the *TCPA* empowers a police officer or protective services officer, without a warrant, to stop and search a person, and anything in the possession of or under the control of the person if-

- (a) they suspect on reasonable grounds that the person is the target of an authorisation to exercise special powers or is in the company of the target of the authorisation; or
- (b) the person is in or on a vehicle that they suspect on reasonable grounds is the target of an authorisation; or
- (c) the person is in an area that is the target of an authorisation.

Schedule 1 applies to the search of a person conducted under s.21P. Rule 3 authorises a **frisk search** or an **ordinary search** of the person for any purpose for which the search may be conducted. Rule 4 expressly authorises a **strip search** only if-

- (a) the person is suspected of being the target of an authorisation; and
- (b) the officer believes on reasonable grounds that it is necessary to conduct a strip search of the person for the purposes of the search and that the seriousness and urgency of the circumstances require the strip search to be carried out.

Conclusion re police powers to strip search a child whether or not the child is under arrest

The only two instances which the author has been able to find in which police officers are expressly empowered to strip search children-

- (i) prior to arrest; and
- (ii) without a warrant; and
- (iii) in the absence of informed consent by the child-

are in the limited and highly regulated circumstances set out in sections 7 & 8 above in relation to the following two acts-

- *Control of Weapons Act 1990* (Vic)
- *Terrorism (Community Protection) Act 2003* (Vic).

Although the matter is not entirely free from doubt, the author considers that Victoria Police have no power, in the absence of a warrant or informed consent by the child, to strip search a child prior to arrest under any other Victorian law. It is surprising that there does not appear to be a pre-arrest power to strip search a child for drugs of dependence or psychoactive substances in s.82(2)(f) or s.82A(1) of the *DPCSA*. However, the common law presumption that interference with one’s person is a grave infringement of elementary common law right [see *Trobrudge v Hardy* (1955) 94 CLR 147, 152] coupled with the absence of an express power to strip search – in strong comparison with the express strip search powers in the *CWA* and the *TCPA* – have grounded the author’s opinion that no such power to strip search exists in the *DPCSA*. That opinion is reinforced by the fact that *DPP v Tupper* – discussed in section 7.3.5 below – was argued on the basis of a power to strip search on a ‘safety and evidence search’, not as a general power to strip search for drugs under the *DPCSA*.

7.3.5 Personal searches of persons under arrest ('safety and evidence' searches)

As noted above in section 7.3.2:

- A police officer has a common law duty to take reasonable measures to prevent a person in custody from harming themselves or others or destroying or disposing of evidence. This often involves a search of the person's clothes and body. Such a search is called a 'safety and evidence search' (*Botton v Winn* (Supreme Court of Victoria, J H Phillips J, 18 December 1987); *Director of Public Prosecutions v Tupper* (2018) 55 VR 720, [35]).
- What amounts to a reasonable method of discharging this duty will turn on the circumstances of the case and should ordinarily involve the person being informed of the reasons for the search (*Botton v Winn* (Supreme Court of Victoria, J H Phillips J, 18 December 1987)).
- In certain circumstances, this common law power may involve requiring the person to remove some or all of their clothes (*Botton v Winn* (Supreme Court of Victoria, J H Phillips J, 18 December 1987)).

In *DPP v Tupper* (2018) 55 VR 720 a magistrate had held that evidence of 7 grams of heroin found in the respondent's underpants was inadmissible as a consequence of an illegal search. The informant had given evidence that he believed that the common law authorised him to conduct a '**safety and evidence search**', saying in evidence: *"The accused was under arrest and, therefore, I have a common law power to conduct a safety and evidence search and I had reasonable grounds to believe that he was hiding something in his underwear... It was conducted with a view that he could be safely transported back to a police station."*

Macaulay J allowed the DPP appeal, referring with approval to the dicta of J H Phillips J in *Botton v Winn*. However his Honour considered that only in rare circumstances could underclothing be removed in a safety and evidence search, stating at [36]-[38]:

*"It is not wise to constrain or define how a particular search may or should be carried out, other than by reference to the general principles that have been stated in Lindley v Rutter [1981] 1 QB 128 and Botton v Winn. That is to say, **there is no reason to stipulate that such a search can never involve the removal of all items of an arrested person's clothing, as opposed to only some of them. Some circumstances may require a frisk over external clothing, or the removal of only outer clothing or, I expect in only rare circumstances, the removal of underclothing as well.***

In all cases the appropriate balance must be struck between observing a person's privacy and dignity, on the one hand, and the duty to ensure safety and the preservation of evidence, on the other. But given that the range of possible circumstances in which a search might need to be conducted on an arrested person is impossible to predict and almost limitless, it is inadvisable to impose arbitrary limits which must apply in every case on the specific means by which the safety and evidence search power may be exercised.

Despite the fact that in none of the reported cases has a court approved a search that involved the removal of underclothing, I do not interpret authority as laying down any principle that the common law power of search can never extend to that degree. To the contrary".

It is also important to note that in *DPP v Tupper* at [43] Macaulay J said:

"[T]here is no justification for concluding that the introduction of sub-div 30A [of the Crimes Act 1958], and in particular the provision defining a physical examination of the body as a forensic procedure, abrogated or interfered with the common law power of police to conduct a 'safety and evidence' search."

7.3.6 Personal searches of children in custodial institutions

Victoria Police Act 2013 (Vic)

Section 200I of the VPA is entitled "**Functions and powers of police custody officers in relation to persons they supervise or transport**". Section 200I(2) provides:

"A police custody officer has the following powers in relation to a person the police custody officer is supervising or transporting under this Division—

- (a) to order the person to do or not to do anything that the police custody officer believes on reasonable grounds is necessary for the safety of the police custody officer, the person or any other person;*

- (b) *to search and examine the person or any thing in the person's possession or under the person's control if the police custody officer believes on reasonable grounds that this is necessary for the safety of the police custody officer, the person or any other person;*
- (c) *to seize any thing found on the person or in the person's possession or under the person's control if the police custody officer believes on reasonable grounds that this is necessary for the safety of the police custody officer, the person or any other person;*
- (d) *to apply an instrument of restraint to the person for the duration of the supervision or transport of the person if the Chief Commissioner believes on reasonable grounds that the application of the instrument of restraint is necessary to prevent the escape of the person or the assault of, or injury to, any person;*
- (e) *to apply an instrument of restraint to the person during the supervision or transport of a person if the conduct of the person during that supervision or transport has been such that it is reasonable to believe that the application of the instrument of restraint is necessary to prevent the escape of the person or the assault of, or injury to, any person;*
- (f) *to continue the application of an instrument of restraint to the person for the duration of the supervision or transport of the person if a police officer applied an instrument of restraint to the person and the police officer believes on reasonable grounds that the application of an instrument of restraint is necessary to prevent the escape of the person or the assault of, or injury to, any person.*

Section 200J authorises a police custody officer, where necessary, to use reasonable force to compel a person whom the police custody officer is supervising or transporting under this Division to obey an order given by the police custody officer in the exercise of a function or power the police custody officer has under this Division.

It is arguable that s.200I(2)(b) of the VPA – read in conjunction with the rest of s.200I(2) & s.200J – is broad enough to encompass a strip search of a person being supervised or transported by a police custody officer but the author considers that the better view is that it is not broad enough in the absence of express words authorising it.

Children, Youth and Families Act 2005 (Vic) and Corrections Act 1986 (Vic)

Children held in a remand centre established under s.478(a) of the CYFA are deemed to have been in the legal custody of the Secretary of the Department of Justice and Community Safety pursuant to s.483(1) of the CYFA. Such children are required to submit to-

- a **screening search** or a **frisk search** under s.488AA of the CYFA upon entering or leaving the remand centre if so asked;
- an **unclothed search** under s.488AC only if the **officer in charge of the remand centre** considered it was necessary to do so-
 - (a) in the interests of the security or good order of the facility; or
 - (b) in the interests of the safety or security of the detainee or any other person in the facility.

On the other hand, children held in a police gaol pursuant to ss.347(1) or 347A(1) of the CYFA rather than in a remand centre are subject to the more rigorous provisions of the *Corrections Act 1986* and in particular-

- **Orders to detained persons [s.104AE]:**

"A police officer, a police custody officer supervisor or a police custody officer may give to a detained person any order that the police officer, the police custody officer supervisor or the police custody officer believes on reasonable grounds is necessary for the security, good order or management of the police gaol or for the safety of any person at the police gaol."

- **Search powers [s.104C]:**

"(1) For the good order or security of a police gaol or detained persons—

- (a) the officer in charge of the police gaol may, at any time exercise or order a police custody officer supervisor or a police officer or a police custody officer to exercise any of the powers under subsection (1A); or*
- (b) a police custody officer supervisor may, at any time exercise or order a police custody officer to exercise any of the powers under subsection (1A).*

(1A) In conducting a search under subsection (1), the officer in charge of a police gaol, a police custody officer supervisor, a police officer or a police custody officer may—

- (b) search and examine any charged person."*

Section 45(1)(b) of the *Corrections Act 1986* gives the **Governor of a prison** power, for the security or good order of the prison or the prisoners, at any time to order a prison officer to search and examine any person in the prison other than a judge of the Supreme Court or County Court or a magistrate. The exercise of this power in relation to search of prisoners is governed by regs.85-87 of the *Corrections Regulations 2019*. Reg.85 defines four types of searches: (a) a garment search; (b) a pat-down search; (c) a scanning search; (d) a strip search. Reg.86 sets out general requirements for strip searches of prisoners. Reg.87 sets out when a strip search of a prisoner may be conducted. It provides:

- “(1) *For the purposes of section 45(1)(b) of the Act, the Governor may order a prison officer to conduct a strip search of any prisoner in the following circumstances if the Governor believes on reasonable grounds that the strip search is necessary for the security or good order of the prison—*
 - (a) *when a prisoner enters or leaves a prison;*
 - (b) *prior to or on completion of a contact visiting programme or a residential visiting programme;*
 - (c) *when a prisoner is transferred to or from an observation cell or a management unit;*
 - (d) *before urinalysis testing.*
- (2) *For the purposes of section 45(1)(b) of the Act, the Governor may order a prison officer to conduct a strip search of a prisoner at any time if the Governor believes on reasonable grounds that—*
 - (a) *the search is necessary for the security or good order of the prison or the safety or welfare of any prisoner; or*
 - (b) *the prisoner is concealing an unauthorised article or substance or any thing that may—*
 - (i) *be used to intimidate another person; or*
 - (ii) *be used to commit a criminal offence or a prison offence; or*
 - (iii) *pose a risk to the good order or security of the prison; or*
 - (iv) *pose a risk to the safety of any person at the prison.*
- (3) *A strip search of a prisoner may be conducted immediately after any scanning search, garment search, or pat-down search.*

Example

If a scanning search, garment search or pat-down search indicates that a prisoner is concealing an unauthorised article or substance, the Governor may direct that the prisoner be required to undergo a strip search.

There is no equivalent to regulations 85-87 governing search powers in **police gaols** pursuant to s.104C of the *Corrections Act 1986*. Paradoxically, not only the officer in charge of the police gaol but even a police custody officer supervisor appears to have more power to search an inmate in a police gaol than the governor has in a prison. The above example at the end of reg.87 is particularly noteworthy in that it appears to be stating that a scanning search, a garment search or a pat-down search is a mandatory pre-requisite before a strip search can be conducted pursuant to an order of the Governor.

Under ss.347(2) & 347A(2) of the *CYFA*, there are six matters which differentiate children from adults being held in a police gaol:

- (a) they are entitled to be kept separate from adults who are detained there;
- (b) they are entitled to be kept separate according to their sex;
- (c) subject to the *Corrections Act 1986* and the associated regulations, they are entitled to receive visits from parents, relatives, legal practitioners, persons acting on behalf of legal practitioners and other persons;
- (d) they are entitled to have reasonable efforts made to meet their medical, religious and cultural needs including, in the case of Aboriginal children, their needs as members of the Aboriginal community;
- (e) they are entitled to complain to the Chief Commissioner of Police or the Ombudsman about the standard of care, accommodation or treatment which they are receiving in the police gaol;
- (f) they are entitled to be advised of their entitlements under this subsection.

Unfortunately ss.347(2) & 347A(2) do not expressly discriminate between children and adults in relation to the application of the search powers under s.104C of the *Corrections Act 1986*.

It is arguable that s.104C of the *Corrections Act* is not broad enough to encompass a strip search of a child who has been charged and is being held in a police gaol. However, in the author's opinion, given the broad terms of the section – especially when read in conjunction with the equally broad terms of s.104AE – **there is power to order a strip search of a particular charged child held in a police gaol but only if it is necessary to do so for the good order or security of the police gaol or of the child.**

It may be possible to argue that it is unlawful to subject an Aboriginal child to a strip search – or at least that the child's Aboriginality is a factor which would militate strongly against the use of strip searches – if to be subject to such a search would not meet the subject child's cultural needs or their needs as members of the Aboriginal community and so would be contrary to ss.347(2)(d) & 347A(2)(d) of the *CYFA*.

In the author's opinion it would be unlawful-

- to subject a child in a custodial institution to a strip search for any collateral purpose, such as to teach him or her a lesson;
- to apply a blanket rule that all charged children were to be subject to a strip search; such a search can only be ordered if the good order or security of the facility would be at risk **if the particular child** was not the subject of a strip search.

It seems odd that children who are held in a police gaol under ss.347/347A of the *CYFA* should be disadvantaged by comparison with those who are detained in remand centres where the power to strip search detainees is more circumscribed. It is the author's opinion that regulations similar to regs.85-87 should be included in the *Corrections Regulations 2019* to regulate the search provisions of s.104C for children being held on remand in police gaols.

Finally, the author considers that any relevant legislation authorising police searches of children should make it clear that a child cannot "consent" to an otherwise unlawful personal search – and especially to a strip search – unless that consent is "informed consent" and should include a statutory definition of "informed consent".

7.4 "Police Cautioning Programme" as a means of diversion from court

Not all offences committed by identified young offenders result in court proceedings. In 2008/09 and in 2010/11 some 27% of juvenile offences were processed by way of a formal caution administered to the young offender by a senior police officer in the presence of a parent or guardian of the offender. After a caution, no further action is taken by the police in respect of the offence. Victoria Police statistics for the numbers of cautions issued to juvenile offenders in 2010/11 & 2008/09 are shown in the tables below. They do not include cautions issued for traffic or transit offences.

There is no specific legislative basis for the police cautioning programme but details of it are contained in the Victoria Police Manual, updated to 14/01/2002: see the judgment of McDonald J in *Y v F* [2002] VSC 166 at [33]. In the Manual it is said-

- at [7.8.5.1], that the programme applies to all offences by children;
- at [7.8.5.2], that the criteria for application of the programme are, *inter alia*, there must be sufficient admissible evidence to establish the offence and the offender must admit the offence.

Generally, though not always, an offender deemed eligible for a caution will have had no prior police involvement. As can be seen from the tables below, some 62% of the 5818 shop theft offences were diverted from court by way of formal police cautions in 2008/09.

Since 2002 a number of young offenders who have been dealt with by way of formal caution have voluntarily participated in the "ROPES" program, details of which are set out in the Sentencing chapter of these materials.

Though an administered caution remains in police records, it is not recorded as a 'prior', is not included in Victoria Police's LEAP data base and is inadmissible against an offender in the event of a subsequent court appearance in relation to another offence: cf. s.358 of the *CYFA*. See *O v McDonald* [2000] TASSC 13.

CAUTIONS ISSUED TO JUVENILE CRIMINAL OFFENDERS 2010/11			
Offence	Total Offences	Cautions Issued	Caution Issued %
Homicide	7	0	0
Rape	81	0	0
Sex (non rape)	291	13	4
Robbery	1056	30	3
Assault	4523	609	13
Abduction/Kidnap	42	0	0
Arson	295	76	26
Property Damage	4083	1148	28
Aggravated burglary	181	6	3
Burglary	2703	651	24
Deception	326	37	11
Handle Stolen Goods	542	51	9
Theft from M/Vehicle	1875	206	11
Theft (Shop steal)	4803	2793	58
Theft of M/Vehicle	1577	167	11
Theft (other)	1885	512	27
Drugs - Cult.Manuf.Traff	76	11	14
Drugs - Possess, Use	698	375	53
Going Equip to Steal	63	4	6
Justice Procedures	1069	94	9
Regulated Public Order	568	181	32
Weapons/Explosives	660	151	23
Harrassment	86	27	31
Behaviour in Public	469	97	21
Other	1015	399	39
Total	28793	7632	27

CAUTIONS ISSUED TO JUVENILE CRIMINAL OFFENDERS IN 2008/09			
Offence	Total Offences	Cautions Issued	Caution Issued %
Homicide	17	1	6
Rape	76	0	0
Sex (non rape)	422	23	5
Robbery	1204	36	3
Assault	4671	672	14
Abduction/Kidnap	39	0	0
Arson	441	154	35
Property Damage	5839	1411	24
Aggravated burglary	181	3	2
Burglary	3694	876	24
Deception	506	96	19
Handle Stolen Goods	707	63	9
Theft from M/Vehicle	1905	244	13
Theft (Shop steal)	5818	3580	62
Theft of M/Vehicle	2230	251	11
Theft (other)	2226	633	28
Drugs - Cult.Manuf.Traff	90	14	16
Drugs - Possess, Use	608	281	46
Going Equip to Steal	93	8	9
Justice Procedures	1057	72	7
Regulated Public Order	1202	345	29
Weapons/Explosives	904	257	28
Harrassment	78	19	24
Behaviour in Public	599	93	16
Other	1317	547	42
Total	35924	9679	27

7.5 Commencement of ordinary process - Securing attendance of child

7.5.1 Charge-sheet

Under s.6(1) of the CPA, read in conjunction with s.528 of the CYFA, a criminal proceeding is commenced-

- (a) by filing a charge-sheet containing a charge with a registrar of the Children's Court; or
- (b) if the accused is arrested without a warrant and is released on bail, by filing a charge-sheet containing a charge with a bail justice; or
- (c) if a summons is issued under s.14, at the time the charge-sheet is signed.

The Electronic Transactions (Victoria) Act 2000 enables a charge to be filed electronically in certain circumstances. Section 6(2) of the CPA provides that if a charge-sheet is filed in accordance with the rules of court for electronic filing, the requirements of ss.8(1) & 9(1) of the Electronic Transactions (Victoria) Act 2000 (Vic) are taken to have been met.

Under s.6(3) of the CPA a charge-sheet must-

- (a) be in writing; and
- (b) be signed by the informant personally; and
- (c) comply with Schedule 1 [which sets out requirements for the format and content of a charge-sheet or indictment].

However, s.9 of the CPA provides that a charge-sheet is not invalid by reason only of-

- a failure to comply with Schedule 1; or
- an omission of the time at which the offence was committed unless time is an essential element of the offence; or
- incorrectly stating the time at which the offence was committed; or
- stating the offence to have been committed on an impossible day or on a day that never happened.

The following paragraphs in Schedule 1 of the CPA govern the contents of charge-sheets:

PARAGRAPH	SUBJECT MATTER
1	Statement of offence
2	Statement of particulars
4	Exceptions, exemptions etc need not be specified or negated in a charge
5	Joinder of charges for related offences in the one charge-sheet
7	Descriptions generally suffice if in reasonably clear, ordinary language
8, 9, 10	Descriptions of persons, documents, property

In *Wells v Stillman & Anor* [2020] VSC 51 a charge had been filed against the applicant police officer alleging that contrary to s.227(1) of the Victoria Police Act 2013 (Vic): "The accused at Victoria on 20 March 2017, being a member of Victoria Police, without reasonable excuse, accessed police information contrary to his duty not to access the information." Clause 1 of Schedule 1 of the CPA provides:

"A charge must-

- (a) state the offence that the accused is alleged to have committed; and
- (b) contain the particulars, in accordance with clause 2, that are necessary to give reasonable information as to the nature of the charge."

At [11] Quigley J stated:

"The parties did not take issue with the proposition that the law is as stated in the High Court in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 and more recently stated to the same effect by the Victorian Court of Appeal in *Baiada Poultry Pty Ltd v Victorian WorkCover Authority* (2015) 257 IR 204. That is, for a criminal charge to be valid it must include not only the legal elements of the charge but also the essential factual ingredients of the alleged misconduct."

At [60] her Honour stated:

"Whilst the charge identifies 'police information' as being an element of the charge, and this is sufficient to uphold the legal components required in accordance with the terms of the statute, this is no answer to the complaint in respect of cl 1(b) of sch 1. Save for the identification of the manner of committing the offence being by 'accessing' the police

information (there being a variety of ways in which the police information might be dealt with to create an offence) the lack of identification of the 'police information' other than in the reference back to the statutory definition fails to disclose, in my view, 'reasonable information as to the nature of the charge'."

On this basis her Honour found the charge invalid, stating at [75]:

"I find that the charge insofar as it does not adequately particularise the 'police information' alleged to have been wrongly accessed invalidates the current form of the charge. I find that the charge...is invalid and I will quash the order made by the Magistrates' Court of Victoria on 25 October 2018 dismissing the application to strike out the charge."

However, it is unclear how this decision sits compatibly with s.9(1) of the CPA which provides that: "A charge sheet is not invalid by reason only of a failure to comply with Schedule 1."

7.5.2 Time limits for filing a charge-sheet

Section 344A of the CYFA provides-

- (1) A proceeding against a child for a summary offence must be commenced within 6 months after the date on which the offence is alleged to have been committed except where-
 - (a) the Court extends the time for commencement of the proceeding under s.344C; or
 - (b) the child, after receiving legal advice, gives written consent, and a member of the police force of above the rank of sergeant consents, to the proceeding being commenced after the expiry of that period.
- (2) A proceeding against a child for an indictable offence may be commenced at any time except where otherwise provided by or under the CYFA or any other Act.

By contrast, s.7(1) of the CPA sets a 12 month time limit for the commencement of a proceeding against an adult for a summary offence except where-

- (c) otherwise provided by or under any other Act; or
- (d) the accused gives written consent, and the DPP or a Crown Prosecutor consent, to the proceeding being commenced after the expiry of that period.

Sections 344A(3) to 344A(6) of the CYFA set out a procedure if the Court is not satisfied that a child obtained legal advice before giving consent to an extension of the initiating period.

Section 53 of the Infringements Act 2006 (Vic) and Part 4 of Schedule 3 to the CYFA also provide for the extension of the period in which a proceeding may be commenced in respect of an offence for which an infringement notice was issued.

7.5.3 Notice to Appear

A case involving an application for breach of a sentencing order is commenced by a notice to appear before the Court being served - generally by the Secretary or by the Court - on the person and in some instances, if the person is under the age of 15 years, on his or her parent. See ss.366(1), 371(1), 378(2), 384(1), 392(1) & 408(4) of the CYFA.

A case involving an application for variation or revocation of a probation order, a youth supervision order or a youth attendance order is commenced:

- (i) where the applicant is the Secretary, by the Secretary serving on the person a notice of the date set by the Court for the hearing of the application: ss.409(3) & 421(3) of the CYFA; or
- (ii) where the applicant is the person, by the principal registrar of the Court serving on the Secretary a notice of the date set by the Court for the hearing of the application: ss.409(4) & 421(4).

All of these statutory provisions now use the word "person" rather than the word "child" demonstrating Parliament's intention that proceedings in relation to breach, variation or revocation of Children's Court sentencing orders are to be commenced in the Children's Court whether or not the person the subject of the order is still a child.

The "Notice to Appear" provisions in ss.21-26 of the CPA do not apply to proceedings in the Children's Court: see s.528(2)(b) of the CYFA.

7.5.4 Securing attendance of accused

Section 12(1) of the CPA, read in conjunction with s.528 of the CYFA, provides that on the filing of a charge under s.6, an application may be made to a registrar of the Children's Court for the issue of-

- (a) a summons to answer the charge directed towards the accused; or
- (b) a warrant to arrest in order to compel the attendance of the accused.

However, s.345 of the CYFA prohibits a registrar from issuing in the first instance a warrant to arrest a child accused unless satisfied by evidence on oath or affidavit that the circumstances are exceptional.

Section 14 of the CPA empowers a member of the police force or a public official acting in the course of his/her duty, after signing the relevant charge-sheet, to issue a summons to answer to the charge.

Section 13(a) requires that a summons or warrant be accompanied by a copy of the charge-sheet.

The following sections of the CPA govern the content of a summons and the service of documents:

SECTION	SUBJECT MATTER
15(1)	Contents of summons (venue, date, time): see <i>Dawson v Magistrates' Court of Victoria & Anor.</i> [2003] VSC 336 at [9]-[11] per Warren J. and cases cited therein; <i>DPP v Diamond</i> [2004] VSC 35 per Kaye J.
16, 17(1) & 391	Personal service of summons. The requirements in predecessor to s.16 were mandatory: see <i>Platz v Barmby</i> [2002] VSC 531 at [9] per Byrne J; <i>Nitz v Evans</i> (1993) 19 MVR 55 per Hayne J. However, the "copy" required to be served on the defendant pursuant to s.391 may be the summons issued by police 'on the spot', not necessarily the summons issued and filed at court: see <i>DPP v Fodero</i> [2008] VSC 46 per Bell J.
17(2) & 394	Ordinary service of charge or other document. See s.49 of the Interpretation of Legislation Act 1984 (Vic) as to service by post. See the Electronic Transactions (Victoria) Act 2000 (Vic) for service by electronic means.
397	Order for substituted service
399	Proof of service of summons and other documents
19	Extension of return date if summons not served
32	Accused entitled to receive free of charge a copy of the charge-sheet
39-50	Service of full brief of evidence on accused

7.5.5 Amendment of charge-sheet

Section 8(1) of the CPA – read in conjunction with s.528 of the CYFA – gives the Court a broad power to amend a charge-sheet:

"The Children's Court at any time may order that a charge-sheet be amended in any manner that the Court thinks necessary, unless the required amendment cannot be made without injustice to the accused."

Section 8(3) provides:

"An amendment of a charge-sheet that has the effect of charging a new offence cannot be made after the expiry of the period, if any, within which a proceeding for the offence may be commenced."

Section 8(4) provides:

"If a limitation period applies to the offence charged in the charge-sheet, the charge-sheet may be amended after the expiry of the limitation period if-

- (a) the charge-sheet before the amendment sufficiently disclosed the nature of the offence; and
- (b) the amendment does not amount to the commencement of a proceeding for a new offence; and
- (c) the amendment will not cause injustice to the accused."

There is a large amount of caselaw in relation to the ambit of the power to amend a charge-

- which does not comply with the statutory or common law requirements as to the contents of a charge; or
- which does not disclose an offence known to the law; or
- which fails sufficiently to refer to the essential elements of the alleged offence; or

- which is otherwise a nullity; or
- which contains an incorrect reference or no reference at all to the law allegedly contravened; or
- where the effect is to charge a "cognate offence", that is "an offence similar in origin and quality and allied in nature to the offence originally charged" (*Kennett v Holt* [1974] VR 644-headnote; *Thomson v Lee* [1935] VLR 360); or
- where the effect is to charge a new offence in a case where the statutory time limits have expired.

Many of these cases are either discussed or referred to in the comprehensive judgment of Redlich J in *Ciorra v Cole* [2004] VSC 416. In that judgment His Honour also emphasized that a Court should not make an amendment of substance and then hear the amended charge without proper notice of the amendment being drawn to the attention of the accused. At [85]-[86] his Honour said:

"[85] In *Wickham v Cole* [1957] Tas SR 111 at 114 Burbury CJ stated:

'.....An amendment of substance either to the legal nature of the offence or to the material facts relied upon as the foundation to the charge could not properly be allowed without giving the defendant full opportunity to answer the newly framed charge.'

[86] Whether or not the amendment should be viewed as resulting in a new or different charge, justice required that it should have been served upon the appellant in its amended form. Until the prosecutor applied for an amendment the appellant was entitled to assume that the case which would be presented by the prosecution and which he had to answer was that as specifically pleaded. The appellant was entitled to an opportunity to be heard on the charge as amended. *Parkinson; Ex parte* (1909) Vol 9 SR (NSW) 174 at 178 ; *Lovell; Ex parte; Re Buckley* (1938) 38 SR (NSW) 153 at 173; *Willing v Hollobone (No. 2)* (1975) 11 SASR 118 at 121; *Garfield v Maddocks* [1973] 2 All ER 303 at 306."

7.5.6 Proper Venue

In s.3(1) of the CYFA, the "proper venue", in relation to a proceeding in the Criminal Division, is the venue of the Court that is nearest to:

- the place of residence of the child; or
- the place where the offence is alleged to have been committed.

'Appropriate registrar' means the registrar at the proper venue of the Court.

Compare s.11 of the CPA relating to the appropriate place of hearing of a criminal proceeding in the Magistrates' Court. See also *Rossi v Martland* (1994) 75 A Crim R 411 and compare section 7.11.5 for the relationship between "proper venue" for a mainstream court and "proper venue" for Koori Court.

7.6 Children and Young Persons Infringement Notice System (CAYPINS)

CAYPINS is a process by which the Children's Court can deal with unpaid infringement penalties which, in respect of adults, are enforceable through the Infringements Court. The catalyst for CAYPINS was the increased numbers of unpaid infringement penalties involving children expected as a result of the increase in the age jurisdiction of the Children's Court.

Previously, when an enforcement agency such as Victoria Police or the Department of Infrastructure issued an infringement notice to a child and the penalty was not paid, the agency had to file a charge against the child in the Children's Court if it wished to pursue the matter. The charge was then heard in open court by the President or a magistrate. By contrast, the system set up pursuant to the Infringements Act 2006 (Vic) allows for the automated enforcement of unpaid infringement penalties against adults.

Pursuant to s.581(1) of the CYFA the CAYPINS procedure set out in Schedule 3 of the CYFA may be used instead of commencing a proceeding against a child for-

- an offence for which an infringement notice or a penalty notice within the meaning of Schedule 3 could be issued; or
- a prescribed offence within the meaning of that Schedule.

This procedure enables the issuing agencies to enforce unpaid infringement penalties issued on or after 01/07/2005 in the Children's Court as an optional alternative to proceeding by way of charge and summons. CAYPINS does not merely graft the adult infringement process on to the Children's Court but involves greater discretion to take into account a child's individual circumstances, as it has been recognised that a more flexible process is needed when dealing with children. For example, one major difference is that CAYPINS allocates a date for a hearing before a Registrar from the outset.

The Attorney-General said in the second reading speech: "The system focuses on finding a balance between a child's financial capacity and the need to ensure accountability for unpaid infringement notices." [Hansard-21/04/2005-p.651]. Hence the basic aims of CAYPINS are-

- to provide flexibility and discretion in decision-making which takes into account a child's age and personal and financial circumstances; and
- to maximise the efficient use of the resources of the Children's Court and the issuing agencies.

The legal mechanism for CAYPINS is contained in Schedule 3 of the CYFA whose contents are:

PART 1 - INTRODUCTORY

1. Application of Schedule
2. Definitions

PART 2 – INFRINGEMENT NOTICES

3. Courtesy letters
4. Agreeing to pay by instalments has the same effect as a full payment
5. Registration of infringement penalties
6. Child's options
7. Applications concerning payment of fine
8. Enforcement order
9. Court review of enforcement order
10. Enforcement hearing
11. Effect of enforcement order
12. Expiry of enforcement order
13. Service of documents

PART 3 – PENALTY NOTICES

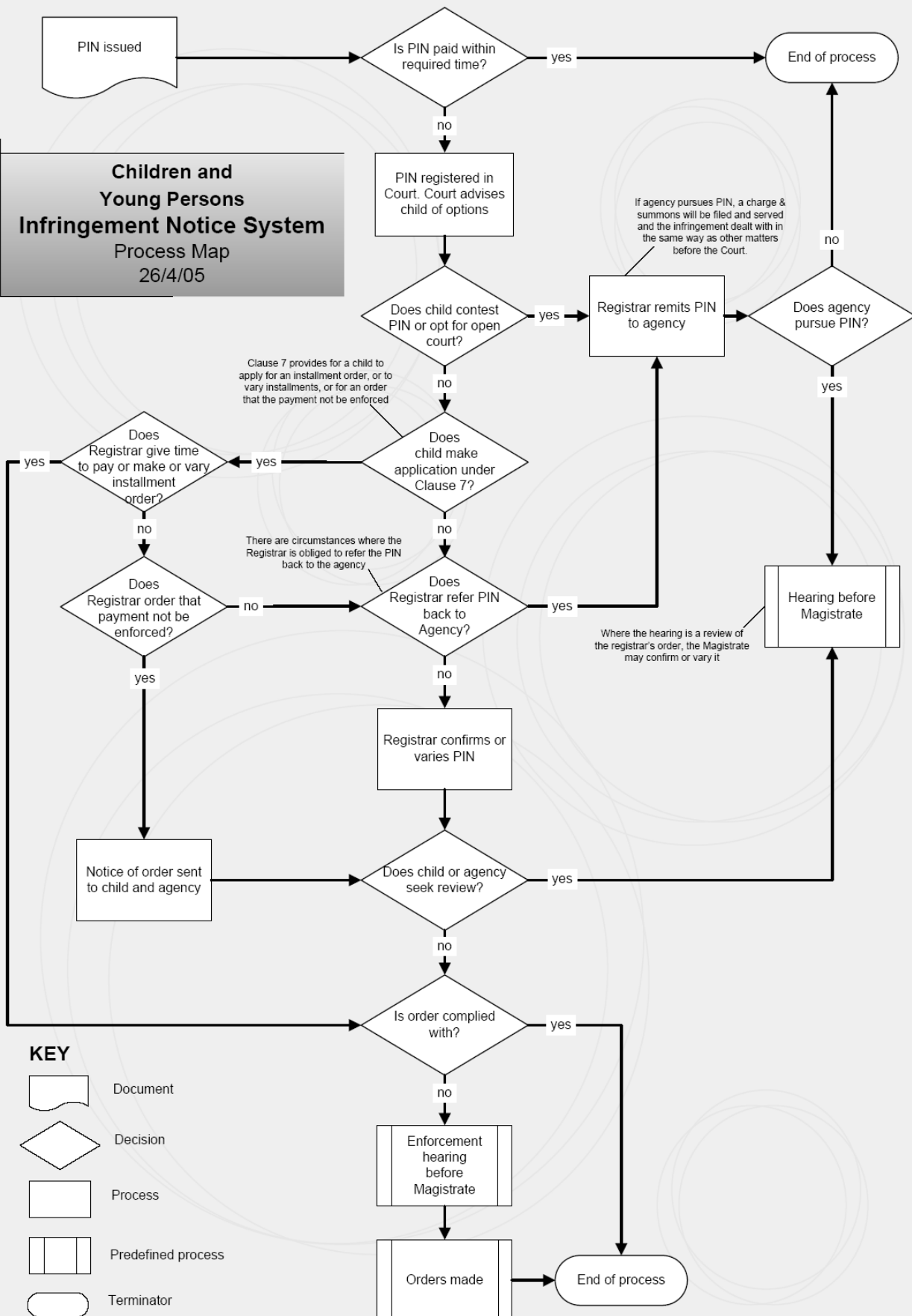
14. Application of Part 2 to penalty notices
15. Deemed conviction where failure to do act or thing

In 2008/09 a total of 12,241 young persons were processed through the CAYPINS system. Nearly half of these – 6,172 – had no ticket on public transport. In addition 1,792 had no valid concession card while travelling on a concession ticket, 1,213 had feet on public transport seats, 800 were riding a bicycle without a helmet and 374 were driving a motor vehicle without being the holder of a valid driver licence. The numbers then declined to 9,879 finalized cases in 2009/10 and 7,588 finalized cases in 2010/11. Since then the numbers of finalized CAYPINS cases are: 8,865 in 2011/12, 10,392 in 2012/13, 10,441 in 2013/14, 9,247 in 2014/15, 14,163 in 2015/16, 8,590 in 2016/17, 3,787 in 2017/18 & 2,963 in 2018/19.

The CAYPINS system is necessarily relatively complex, as can be seen from the "simplified" process map on the next page.

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**Children and
Young Persons
Infringement Notice System
Process Map
26/4/05**



7.7 Youth and adult offending statistics

The statistics in this section do not include the transit or traffic offences processed by the adult Infringement Notice System or the CAYPINS process detailed in section 7.6.

7.7.1 Youth and adult offending in 2008/09, 2009/10 & 2010/11

Most of the statistics in this sub-section and the commentary on the overall Victorian crime rate in these years are taken from www.police.vic.gov.au under the tabs "About Victoria Police", "Statistics" & "Crime Statistics". The column headed "Total persons (*)" is slightly greater than the sum of the columns headed "Juveniles (<18)" and "Adults" because it includes a small number of additional offenders whose date of birth has not been specified. These have not been included in the percentages listed in the last two columns, the sum of which accordingly falls a little below 100%.

ALLEGED JUVENILE AND ADULT CRIMINAL OFFENCES 2008/09 & 2009/10								
Offence	Juveniles (<18)		Adults		Total persons (*)		Percent juvenile	Percent adult
Against person	2008/09	2009/10	2008/09	2009/10	2008/09	2009/10	2009/10	2009/10
Homicide	16	3	165	233	185	238	1.2%	98.0%
Rape	80	153	675	708	762	871	17.5%	81.3%
Sex (non rape)	418	466	2,322	2,376	2,757	2,860	16.3%	83.1%
Robbery	1,210	1,207	1,417	1,255	2,631	2,471	48.8%	48.9%
Assault ③	4,681	4,972	23,254	24,124	28,089	29,274	17.0%	82.4%
Abduction/Kidnap	39	59	315	379	356	442	13.3%	85.7%
Sub-total	6,444	6,860	28,148	29,107	34,780	36,156	19.0%	80.4%
Against property	2008/09	2009/10	2008/09	2009/10	2008/09	2009/10	2009/10	2009/10
Arson	439	389	452	610	897	1,005	38.7%	60.7%
Property damage ②	5,840	4,972	8,598	9,120	14,507	14,219	35.0%	64.1%
Burglary (aggravated)	180	334	1,117	1,190	1,301	1,530	21.8%	77.8%
Burglary (residential)	1,750	1,510	3,760	4,186	5,528	5,714	26.4%	73.3%
Burglary (other)	1,942	1,818	3,816	3,423	5,778	5,264	34.5%	65.0%
Deception	505	464	9,909	8,608	10,484	9,134	5.1%	94.2%
Handle stolen goods	712	685	4,755	4,424	5,491	5,127	13.4%	86.3%
Theft from motor vehicle	1,918	2,478	4,214	3,931	6,153	6,434	38.5%	61.1%
Theft (shopsteal) ①	5,892	5,951	12,333	13,084	18,340	19,176	31.0%	68.2%
Theft of motor vehicle ⑤	2,237	2,033	3,092	2,358	5,340	4,402	46.2%	53.6%
Theft of bicycle	235	240	296	210	533	452	53.1%	46.5%
Theft (other) ④	1,911	2,108	7,909	7,426	9,905	9,594	22.0%	77.4%
Sub-total	23,561	22,982	60,251	58,570	84,257	82,051	28.0%	71.4%
Drug offences	2008/09	2009/10	2008/09	2009/10	2008/09	2009/10	2009/10	2009/10
Drug (cultivate, manufacture, traffick)	93	90	4,011	4,211	4,115	4,323	2.1%	97.4%
Drug (possess, use)	603	762	9,815	9,617	10,466	10,443	7.3%	92.1%
Sub-total	696	852	13,826	13,828	14,581	14,766	5.8%	93.6%
Other crime	2008/09	2009/10	2008/09	2009/10	2008/09	2009/10	2009/10	2009/10
Going equipped to steal	89	90	390	436	481	528	17.0%	82.6%
Justice procedures	1,057	1,103	13,183	13,450	14,290	14,600	7.6%	92.1%
Regulated public order	1,207	1,002	661	666	1,876	1,684	59.5%	39.5%
Weapons/explosives	903	990	5,686	5,414	6,611	6,434	15.4%	84.1%
Harassment	77	127	1,228	1,517	1,313	1,655	7.7%	91.7%
Behaviour in public	599	643	5,513	7,399	6,183	8,128	7.9%	91.0%
Other	1,323	1,216	3,339	3,359	4,692	4,612	26.4%	72.8%
Sub-total	5,255	5,171	30,000	32,241	35,446	37,641	13.7%	85.7%
TOTAL	35,956	35,865	132,225	133,714	169,064	170,614	21.0%	78.4%

The criminal offending statistics show that there were 133,714 adult offences processed during 2009/10, which is an increase of 1.1% on the 132,225 processed in 2008/09. There were 35,865 juvenile offences processed in 2009/10, a decrease of 0.3% on the 35,956 processed in 2008/2009.

Between 2008/09 & 2009/10, there was a decline in overall crime of 6.4%, as a rate per 100,000 population. The 2009/10 crime rate per 100,000 is 6,665.6, the lowest since the implementation of Victoria Police's LEAP computer system in March 1993. Since 2000/01, overall crime has decreased by 29.9%, as a rate per 100,000 population. The number of recorded offences has decreased by 19.3% over the same period.

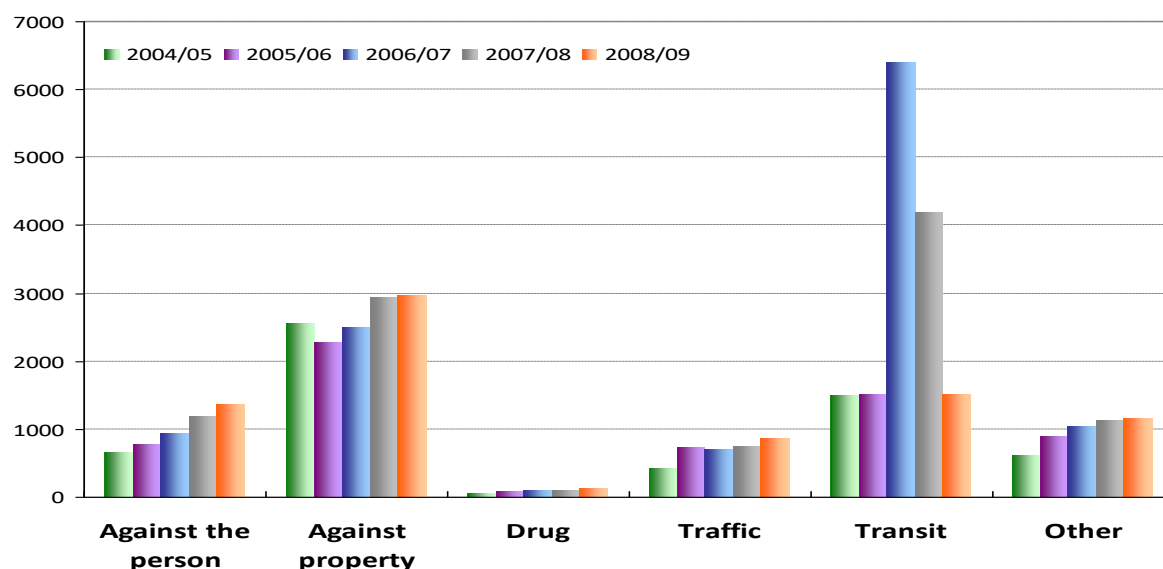
While the decline in the overall crime rate – involving both juveniles and adults – is encouraging, it is of concern that between 2008/09 & 2009/10 there was an increase of 6.4% in the number of offences against the person allegedly committed by juveniles. At the same time, there was a decrease of 2.5% in the number of offences against property allegedly committed by juveniles.

In 2009/10 approximately 21% of the processed criminal offences were allegedly committed by juveniles. The large majority of juvenile offenders were male. Unsurprisingly, juveniles are over-represented in theft and property damage offences.

The above statistics are for all processed criminal offences in Victoria in 2008/09 & 2009/10. They are somewhat misleading for it is common for offenders to be charged with multiple charges, often including alternative charges arising from the one incident. A common example of this is intentionally/recklessly causing injury/ serious injury and assault. A more accurate picture is provided by the following chart of principal proven offences for the years from 2004/05 to 2008/09.

Principal Proven Offences Vic

	2004/05	2005/06	2006/07	2007/08	2008/09
Against the person	649	776	938	1181	1365
Against property	2555	2274	2482	2920	2966
Drug	51	66	76	74	110
Traffic	402	719	693	728	858
Transit	1493	1501	6388	4186	1509
Other	605	889	1034	1108	1145
Total	5755	6225	11611	10197	7953

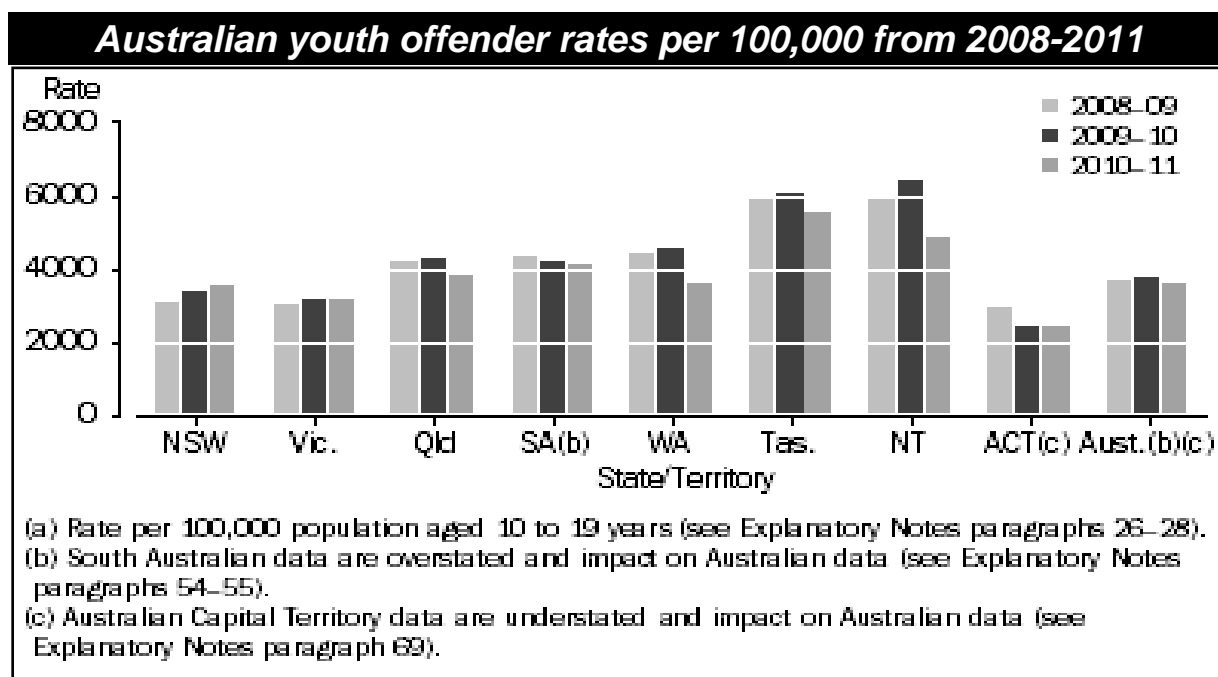


It is noteworthy that only a small percentage of young people engage in offending that leads to court intervention. In 2008/09, 6,633 young people – 1.2% of the 620,000 young Victorians aged 10 to 17 inclusive – were found guilty of one or more offences in the Children's Court of Victoria. Of these:

- 4,986 [75%] received undertakings, bonds or fines;
- 1,431 [22%] received some form of supervisory order [probation etc];
- 209 [3%] received detention orders.

These figures demonstrate that only a small percentage of young Victorians actually come to the attention of law enforcement authorities and fewer still require formal intervention in their lives. The vast majority of the small percentage of young Victorians involved in criminal behaviour do not constitute a risk to the safety of the Victorian community.

It is also noteworthy that Victoria – which had by far the lowest youth detention rate – also had the lowest rate of youth offending of any Australian State or Territory other than the A.C.T. whose data is described in notes to the chart below as “understated”.



7.7.2 Youth offending from 2008/09 to 2019/20

Since 01/01/2015 the Crime Statistics Agency (CSA) became responsible for processing, analysing and publishing Victorian crime statistics, independently of Victoria Police. Information taken from the CSA website www.crimestatistics.vic.gov.au shows that the total numbers of alleged youth offender (10-17) incidents for years ending 31 March were as follows:

CHILDREN	2016	2017	2018	2019	2020	2021
MALES	15,626	16,142	14,716	13,414	14,826	
FEMALES	4,161	4,491	4,502	4,805	5,312	
TOTAL	19,787	20,633	19,218	18,219	20,138	

By comparison the total numbers of alleged adult youth offender incidents for years ending 31 March were as follows:

ADULTS	2016	2017	2018	2019	2020	2021
TOTAL	144,435	153,651	146,761	153,704	157,744	

It is significant that number of alleged offender incidents recorded in the year ending March 2020 compared with those recorded in 2008/09 have decreased by 43% for youths aged 10-17 but have increased by 18% for adults.

In 2018/19 – by comparison with 2008/09 when **6,633** young people aged 10 to 17 inclusive were found guilty of one or more offences in the Children's Court of Victoria – only **3,479** young people aged 10 to 17 inclusive were found guilty by – or acknowledged guilt to – the Children's Court. Of these **2,071** were found guilty of one or more offences and-

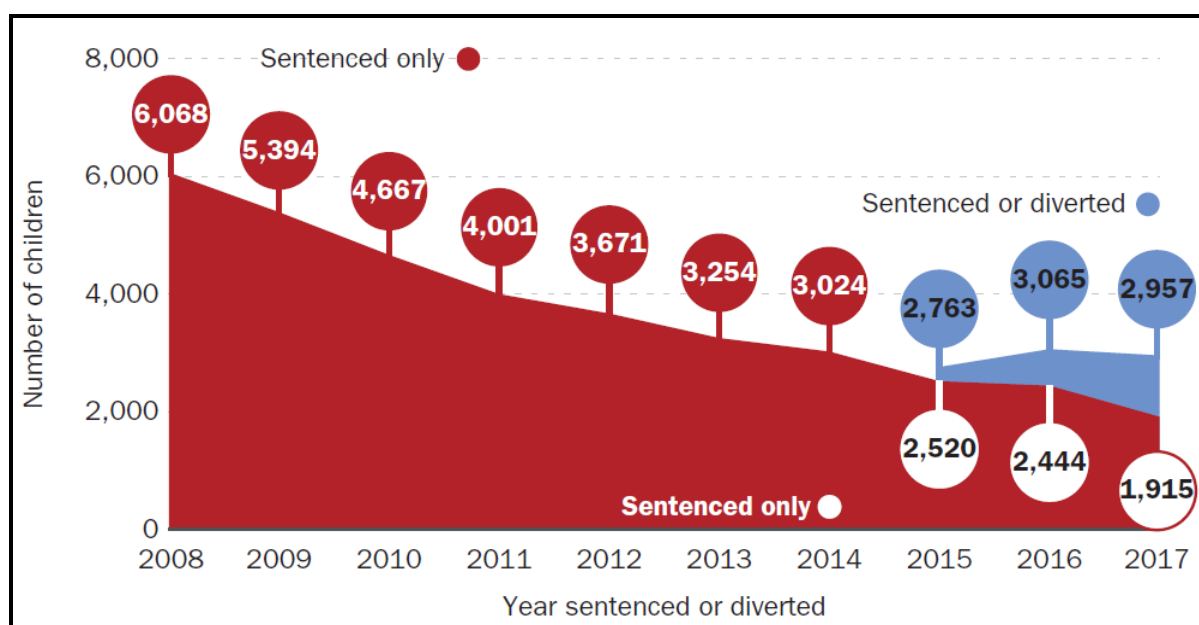
- 1,167 [56%] received undertakings, bonds or fines;
- 694 [34%] received some form of supervisory order [probation etc];
- 210 [10%] received detention orders.

A further break-down of the above figures can be found in section 11.7.1 of the Research Materials. The balance of **1,408** received diversion orders, 94% of whom successfully completed the associated diversion program. For more details of Children's Court diversion powers see section 10.7.

This reduction of 48% in the number of children who were processed in the main-stream Criminal Division of the Children's Court between 2008/09 and 2018/19 occurred despite an increase in the demographic of the 10-17 year old cohort in Victoria during that period.

The on-going reduction in the number of youth offenders **found guilty by** or **acknowledging guilt to** the Criminal Division of the Children's Court of Victoria over the period 2008-2017 is graphically illustrated by the following chart:

Number of sentenced and diverted children, 2008-2017



In 2019/20 the top five offences for which children were found guilty were: (i) assault; (ii) burglary/robbery; (iii) theft; (iv) traffic offences; and (v) property damage. Males comprised 70% of the offenders and females 30%.

7.7.3 Offending by children aged 10-13 inclusive in 2017/18 & 2018/19

In both 2017/18 & 2018/19 very few children charged with offending between the ages of 10-12 were placed on CCV sentencing orders. In both years the vast majority of the charges against 10-12-year old children and the majority of the charges against adolescents who allegedly offended at age 13 were not proven, were struck out or were adjourned for participation in a diversion program or a ROPES program.

FINANCIAL YEAR		2018/19 (Age at date of offence)				2017/18 (Age at date of offence)			
ORDER ↓	AGE →	10	11	12	13	10	11	12	13
	Not proven	1	0	0	6	1	2	9	14
	Struck out	37	86	189	445	42	27	143	274
	Diversion program	3	9	17	107	3	9	26	138
	ROPES program	0	0	3	30	0	0	5	32
	Proved and dismissed	0	0	0	0	1	0	1	7
	Undertaking	0	1	2	10	0	0	2	7
	Good behaviour bond	0	0	9	33	0	2	8	45
	Fine	0	0	0	0	0	0	0	1
	Probation	0	1	3	29	1	1	13	46
	Youth Supervision Order	0	0	2	7	0	0	3	26
	Youth Detention	0	0	1	9	0	0	1	8
TOTALS		41	97	226	676	48	41	211	598

Five of the total of 19 youth detention orders for 12 & 13 year-olds were made in relation to four Indigenous children, one Indigenous child receiving two youth residential centre orders. The above table illustrates that in 2017/18 & 2018/19 combined the only CYFA sentencing orders made state-wide by the CCV for very young children were:

- 2 sentencing orders for 10-year old children, one of which was proved and dismissed;
- 5 sentencing orders for 11-year old children, two of which were supervisory orders;
- 45 sentencing orders for 12-year old children, 21 of which were supervisory orders, 2 were youth detention and one was proved and dismissed;
- 228 sentencing orders for 13-year old children, 108 of which were supervisory orders, 17 were youth detention and 7 were proved and dismissed;
- 1 fine for a child aged 13 and no fines for any younger children; and
- no detention of children aged 10-11 and only 1 each year for children aged 12.

The table below – the contents of which are taken from the Australian Institute of Health & Welfare 2017/18 data set - shows the numbers of children aged 10-15 who were the subject of community-based supervision (supervised bail, probation or other supervisory orders) or in detention or on remand **on an average day** in Victoria during 2017/18.

UNDER COMMUNITY-BASED SUPERVISION							IN DETENTION OR ON REMAND					
	10	11	12	13	14	15	10	11	12	13	14	15
Indigenous	0	1	1	3	11	23	0	0	0	1	3	3
Non-indigenous	0	0	4	12	49	95	0	0	0	1	7	21
TOTALS	0	1	5	15	61	118	0	0	0	2	10	24

The table below – the contents of which are taken from the CCV's Courtlink system – shows the number of children aged 10-13 remanded in a youth remand centre in Victoria at least once during 2017/18 & 2018/19.

FINANCIAL YEAR	2018/19 (Age at date of offence)				2017/18 (Age at date of offence)			
AGE	10	11	12	13	10	11	12	13
NUMBER REMANDED	0	0	3	31	0	0	7	62

This data contained in the above 3 tables illustrates that if the age of criminal responsibility in Victoria had been 12 during the periods 2017/18 & 2018/19, it would not have had any significant impact on the CCV sentencing, diversion or remand statistics for the relevant years.

However, had the age of criminal responsibility been 13, the data demonstrates that it would have impacted on the outcomes for the 21 child offenders aged 12 who were placed on supervisory orders in those 2 years.

7.8 Warrant to arrest for failing to appear (Bench warrant)

7.8.1 On bail

If a child who has been charged with or convicted of an offence has failed to appear before the Court in accordance with his or her undertaking of bail, the Court may, without prejudice to any right of action arising out of the undertaking, issue a warrant for his or her apprehension: s.26(2) of the Bail Act 1977 (Vic).

7.8.2 On summons

A warrant to arrest other than in the first instance may be issued when the accused fails to appear before the Court in answer to a summons: s.80(1)(b) & 81 of the CPA. A warrant to arrest is often not issued when a child fails to appear in answer to a summons for a summary offence for, depending on the nature of the offence and the personal characteristics of the offender, the Court may be willing to hear the case *ex parte*. A warrant to arrest is almost always issued where a child fails to appear in answer to a summons for an indictable offence, for the Court is unable to exercise summary jurisdiction in the absence of the child: see s.356(1) of the CYFA.

7.8.3 On alleged breach of sentencing order

The Court may issue a warrant to arrest a child alleged to have breached a sentencing order in the circumstances detailed in each of the following sections:

CYFA	SENTENCING ORDER	CYFA	SENTENCING ORDER
366(2)	Accountable undertaking	384(2)	Probation
370(1)	Good behaviour bond	392(2)	Youth supervision order
378(3)	Fine	408(6)	Youth attendance order
		409Q(6)	Youth control order

7.9 Representation of children in the Criminal Division of the Court

"Lawyers, I suppose, were children once."

Inscription upon the statue of a child in the Inner Temple Garden in London

Section 525(2) of the CYFA provides that, subject to s.524, a child must be represented by a legal practitioner in the following proceedings in the Criminal Division-

- (a) an opposed bail proceeding;
- (b) a proceeding under s.24 of the Bail Act 1977 for revocation of bail;
- (c) the hearing of a charge for an offence punishable, in the case of an adult, by imprisonment;
- (d) review of a monetary penalty imposed by the Court in respect of an offence punishable, in the case of an adult, by imprisonment;
- (e) application in respect of a breach of a sentencing order in respect of an offence punishable, in the case of an adult, by imprisonment.

Guidelines for child legal representatives are contained in Louise Akenson's "[Guidelines for Lawyers Acting for Children and Young People in the Children's Court](#)". See also "Representing Children and Young People – A Lawyers Practice Guide" by Lani Blackman (Victoria Law Foundation, 2002).

Section 524(2) of the CYFA requires the Court to adjourn the hearing of any of the above proceedings in which a child is not legally represented to enable the child to obtain legal representation. Sections 524(2) & 524(3) prohibit the Court from resuming the hearing while the child is unrepresented unless the child has had a reasonable opportunity to obtain legal representation and has failed to do so. Section 524(1) empowers the Court to adjourn the hearing of any proceeding in the Criminal Division at any stage to enable the child to obtain legal representation.

7.10 Referral for investigation by protective services

By and large the 2 Divisions of the Court are mutually exclusive. The only area of overlap is to be found in the "referral" provisions of ss.349-355 of the CYFA. These provisions have no parallel in adult criminal procedure. They are a statutory recognition that addressing the welfare and rehabilitative needs of a child offender may ameliorate future criminal behaviour by the child. A referral under s.349 is not restricted to any particular time in the proceeding, that is to say it is not limited to either before or after a child having been found guilty of the offence. Indeed the Court is often as likely to have the requisite *prima facie* evidence of issues relating to the child at an early stage in the proceeding - for example in a bail application - as it is at the later stage of a finding of guilt. And since it is clear from the Second Reading Speech [Legislative Council, 15/11/2005] that part of the rationale of the therapeutic treatment order provisions is to be able to order treatment in cases where it may be difficult to prove the necessary mental intent by the child, it is probable that most referrals under s.349(2) will turn out to be pre-proof.

7.10.1 Referral re protection application investigation

Section 349(1) provides that if-

- (a) a child appears as an accused in a criminal proceeding in the Court; and
- (b) the Court consider that there is *prima facie* evidence that grounds exist for the making of a protection application in respect of the child-

the Court may refer the matter of an application to the Department of Human Services (Protective Services Division) for investigation.

Section 349(1) ought to be able to be used to good purpose when it is clear that the root cause of a young person's offending relates to him or her being out of home, rejected by family and/or "living around" with no adult supervision, guidance or support. However, in the experience of members of

the Melbourne Children's Court, it is uncommon for the Secretary to accept a referral under s.349(1). In the event that the Secretary reports back to the referring Court that "no protection application is required" [s.350(2)(b)(iii)], there is little that the Court can do except tailor a sentencing order to address any identified "welfare needs" of the child if such a sentencing order is otherwise appropriate.

7.10.2 Referral re therapeutic treatment application investigation

Section 349(2) provides that if-

- (a) a child appears as an accused in a criminal proceeding in the Court; and
 - (b) the Court consider that there is *prima facie* evidence that grounds exist for the making of an application for a therapeutic treatment order in respect of the child-
- the Court may refer the matter of an application to the Department of Human Services (Protective Services Division) for investigation.

7.10.3 Report of investigation

Under ss.350(1) & 350(2) of the CYFA the Secretary must enquire into a referred matter and provide a report to the Court within 21 days of the referral confirming that the Secretary has enquired into the referred matter and advising that-

- a relevant application has been made by the Secretary; or
- the Secretary is satisfied that no such application is required.

7.10.4 Report on outcome of application

Under s.351 of the CYFA the Secretary must, as soon as possible after the determination of a protection application or an application for a therapeutic treatment order (as the case may be), report to the Criminal Division the outcome of the application.

7.10.5 Pre-sentence report

Under s.355(1), if a matter is referred to the Secretary under s.349, the Court may also order the Department of Human Services (Juvenile Justice Division) to prepare a pre-sentence report in respect of the child and may, subject to s.522(2), defer sentencing the child until the Secretary provides the pre-sentence report (if any) together with a report under either:

- s.350(2)(b)(iii) [if the Secretary is satisfied that no application is required]; or
- s.351 [on the outcome of any relevant application made by the Secretary].

7.11 The Children's Koori Court (Criminal Division)

One important challenge for the Criminal Division of the Children's Court of Victoria – as also throughout Australia – is the alarming over-representation of indigenous children. The Koori Court is one part of a comprehensive response developed by government and the koori community to try to tackle this issue.

The Children and Young Persons (Koori Court) Act 2004 (Vic) [No.89/2004] was assented to on 07/12/2004. Section 1 provides that the purposes of the Act are-

- (a) to establish a Koori Court (Criminal Division) of the Children's Court; and
 - (b) to provide for the jurisdiction and procedure of that Division-
- with the objective of ensuring greater participation of the Aboriginal community in the sentencing process of the Children's Court through the role to be played in that process by the Aboriginal elder or respected person and others so as to assist in achieving more culturally appropriate sentences for young Aboriginal persons.

Under s.3(1) of the CYFA "Aboriginal person" means a person who:

- (a) is descended from an Aborigine or Torres Strait Islander; and
- (b) identifies as an Aborigine or Torres Strait Islander; and
- (c) is accepted as an Aborigine or Torres Strait Islander by an Aboriginal or Torres Strait Islander community.

Under s.536(1) of the CYFA the Secretary to the Department of Justice may appoint a person who is a member of the Aboriginal community as an Aboriginal elder or respected person for the purpose of performing functions in relation to the Koori Court (Criminal Division) as set out in the CYFA.

Section 3(4) of the CYFA provides that unless the context otherwise requires, a reference in the CYFA to the Criminal Division includes a reference to the Koori Court (Criminal Division).

7.11.1 Jurisdiction & powers

By s.518 of the CYFA, the Koori Court (Criminal Division) has the following three areas of jurisdiction-

- (I) Jurisdiction to deal with a proceeding for an offence given to it by s.519, that is it has jurisdiction only if-
 - (a) the child is Aboriginal; and
 - (b) the offence is within the jurisdiction of the Criminal Division, other than a sexual offence as defined in s.6B(1) of the Sentencing Act 1991; and
 - (c) the child-
 - (i) intends to plead guilty to the offence; or
 - (ii) pleads guilty to the offence; or
 - (iii) has been found guilty of the offence by the Criminal Division; and
 - (d) the child consents to the proceeding being dealt with by the Koori Court (Criminal Division).
- (II) Jurisdiction to deal with a breach of a sentencing order made by it (including any offence constituted by such a breach) or variation of such a sentencing order.
- (III) Any other jurisdiction given to it by or under the CYFA or any other Act.

By s.517(1) of the CYFA the Koori Court has all of the powers of the Court that are necessary to enable it to exercise its jurisdiction.

Sections 519(2)(a) & 519(2)(b) of the CYFA permit a proceeding to be transferred from the Criminal Division of the Court to the Koori Court (Criminal Division) or vice versa, whether sitting at the same or a different venue. Under s.519(3) the transferee venue of the Court becomes the proper venue of the Court for the purposes of the CYFA. See the judgment of Ginanne J in *Cemino v Cannan* [2018] VSC 535 discussed in section 7.11.5.1 below.

Unlike the adult Koori Court, a Koori child who has pleaded not guilty but has been found guilty by the Criminal Division, may have his or her case transferred to the Koori Court (Criminal Division) for sentencing: see s.519(1)(c)(iii).

7.11.2 Procedure

Section 517(3) of the CYFA requires the Koori Court (Criminal Division) to exercise its jurisdiction with as little formality and technicality, and with as much expedition, as the requirements of the CYFA and the proper consideration of the matters before the Court permit.

Section 517(4) requires the Koori Court (Criminal Division) to take steps to ensure that, so far as practicable, any proceeding before it is conducted in a way which it considers will make it comprehensible to-

- (a) the child; and
- (b) a family member of the child; and
- (c) any member of the Aboriginal community who is present in court.

Section 517(5) provides that subject to the CYFA, the regulations and the rules, the Koori Court (Criminal Division) may regulate its own procedure.

Section 517(6) provides that nothing in s.517 limits the general procedural guidelines set out in Part 7.3 [ss.522-527] of the CYFA.

At Melbourne Children's Court the Koori Court sits in a courtroom with an oval bar table at which all persons involved in the case (including the judicial officer) are seated. The Court is constituted by a judicial officer and two Aboriginal elders or respected persons. In addition, seated at the oval table during the hearing are the Koori Court officer, the prosecutor, a Youth Justice worker, the accused and his/her lawyer and family members. The procedure is not easy for the accused as Judge Grant has explained:

"In my experience, proceedings in the Koori Court are often dynamic and confronting. The voice of the [accused], family and community are always present and central. There is no escape from acceptance of responsibility and particular problems that should be addressed are discussed openly and honestly. The open exchange of information that occurs within the Koori Court gives the judicial officer a better understanding of the

[accused's] circumstances, the context of the offending and the prospects for rehabilitation. The sentencing decision is a fully informed one.

Sometimes the issues before the court extend as they do beyond the individual and into the social and economic life of our community, are hard for the law to address. This means the work is challenging. The Koori Court is not a magic solution to the problem of over-representation. Some offenders come from backgrounds of significant disadvantage with well-established offending histories and often require support services that are not always available."

In *Honeysett v The Queen* [2018] VSCA 214 at [47] the Court of Appeal noted that in *R v Morgan* (2010) 24 VR 230 at [20]-[31] the Court of Appeal had accepted as correct the following description of a plea hearing in the Koori Court as conducted in the County Court:

"A Koori Court plea hearing is conducted in a three stage process. **Stage 1** is a formal arraignment. Guilty pleas are entered...[and] the matter will then be given a plea date in the County Court.

Stage 2 is the sentencing conversation. This procedure is different from the usual plea hearing conducted in the County Court. The sentencing conversation is carried out as a discussion around a table. The Judge sits at the table with an Aboriginal Elder or respected person on either side of him or her. Also seated at the table are the offender, the Koori Court officer, the offender's legal representative and prosecutor. Each participant has the opportunity to participate in the sentencing conversation.

The first part of the sentencing conversation concerns aspects of cultural significance and is repeated with every offender. The sentencing conversation begins with an acknowledgment of country. The Judge explains to the offender that the Court respects Aboriginal people and culture and that the room has been smoked in accordance with tradition. The Judge introduces the participants or asks them to introduce themselves and explain to the offender their role in the process.

The second part of the conversation deals with the law. The prosecutor provides a summary of the offending, details the maximum penalty applicable and makes submissions on penalty. The defence lawyer will then outline the offender's situation, placing before the Court the plea material, and make submissions about penalty. The offender is asked to speak to the court about their offending and about themselves. Family members, support persons, or counsellors are also invited to contribute to the conversation.

The Aboriginal Elders or respected persons may then speak to the offender. The Elders or respected persons may provide information on the background of the offender and possible reasons for the offending behaviour. They may also explain relevant kinship connections and how a particular crime has affected the indigenous community, and may provide advice on cultural practices, protocols and perspectives relevant to sentencing. They may also speak to the offender about his or her behaviour and its effect upon the community.

The victim will be offered the opportunity to be heard. The victim can attend the conversation and speak or a Victim Impact Statement may be read aloud in court at their request.

During the sentencing conversation the Judge may ask the Koori Court officer about the availability of local services and programs appropriate to the offender. The corrections officer can also provide advice about indigenous programs offered by Corrections Victoria, either in custody or with the offender remaining in the community. The aim of this approach is to maximise the rehabilitation prospects of the offender.

The Judge may discuss community and family considerations openly with the Aboriginal Elders or respected persons and other participants at the table.

Stage 3 is the sentence. The usual sentencing procedures are followed. The procedure is formal with the Judge sitting alone at the bench to deliver the sentence."

7.11.3 Sentencing Procedure

Section 520 of the CYFA governs sentencing procedure in the Koori Court (Criminal Division). Nothing in that section affects the requirement to observe the rules of natural justice [s.520(4)]. The

section does not limit any other power or any other specific provision under the CYFA or any other Act [s.520(5)]. Conversely, nothing in s.358 of the CYFA operates to limit s.520 [s.520(6)].

In considering which sentencing order to make in respect of a Koori child, the Koori Court (Criminal Division)-

- [s.520(2)] may consider any oral statement made to it by an Aboriginal elder or respected person; and
- [s.520(3)] may inform itself in any way it thinks fit, including by considering a report prepared by, or a statement or submission prepared or made to it by, or evidence given to it by-
 - (a) a Children's Koori Court officer [as defined in s.3(1)];
 - (b) a juvenile justice worker;
 - (c) a health service provider;
 - (d) a victim of the offence;
 - (e) a family member of the child [as defined in s.3(1)]; or
 - (f) anyone else whom the Koori Court (Criminal Division) considers appropriate.

7.11.4 Sitting times and locations

There are a number of Children's Koori Courts in Victoria. The first commenced sitting at Melbourne Children's Court on 06/10/2005 and was expanded to Heidelberg & Dandenong Children's Courts in 2014. Koori children who reside in metropolitan Melbourne are eligible to have their cases heard in one of these three Children's Koori Courts. This means that those cases which are listed at the Neighbourhood Justice Centre and at Heidelberg, Broadmeadows, Sunshine, Werribee, Dandenong, Frankston, Moorabbin and Melbourne Children's Courts are eligible for transfer into the relevant Koori Court pursuant to s.519(2) of the CYFA. The transfer of cases to the Koori Court is handled by the court coordinators in conjunction with the Koori Court Officer, Ms ***. In the event of any dispute as to eligibility, the State Children's Court Co-ordinator must be consulted. Currently the Children's Koori Court sits every sixth Thursday at each of Melbourne, Heidelberg & Dandenong.

In regional Victoria the Children's Koori Court sits at Mildura, Swan Hill, Shepparton, Warrnambool region (Warrnambool, Portland and Hamilton courts). Latrobe Valley (Morwell), Bairnsdale and Geelong.

The recommendation of the Aboriginal Justice Forum that government fund an expansion of the Children's Koori Court to every venue where there is an "adult" Koori Court has been effected.

7.11.5 Case law

7.11.5.1 TRANSFER TO KOORI COURT

In *Cemino v Cannan* [2018] VSC 535 the plaintiff was a Yorta Yorta man who had been charged with a number of criminal offences which were listed for hearing at Echuca Magistrates' Court. In refusing his application to transfer the criminal proceedings to the Koori Court Division of the Magistrates' Court at Shepparton (the nearest Koori Court to Echuca), a magistrate relied on the decision of Mandie J in *Rossi v Martland* (1994) 75 A Crim R 411 that "generally speaking, serious indictable offences should be dealt with in the locality at which they occur, especially then the defendant's address was in that locality". But *Rossi's Case* did not involve a Koori Court. It involved an application by the defendant – unopposed by the prosecution – to transfer proceedings from the Ballarat Magistrates' Court to the Melbourne Magistrates' Court to meet the convenience of a number of professional witnesses.

In quashing the magistrate's decision refusing the plaintiff's application made under s.4F of the Magistrates' Court Act 1989 to transfer the criminal proceedings to Shepparton Koori Court, Ginnane J held that the magistrate had made errors of law on the face of the record, namely "the failure to properly exercise the discretion in s.4F(2), both in respect of the provision itself and the effect of the Charter of Human Rights and Responsibilities Act 2006 (Vic), pursuant to s.6(2)(b), on the proper exercise of the discretion contained in s.4F(2)."

Section 4F(2) provides: "Subject to and in accordance with the rules-

- (a) a proceeding may be transferred to the Koori Court, whether sitting at the same or a different venue; and
- (b) the Koori Court Division may transfer a proceeding (including a proceeding transferred by it under paragraph (a)) to the Court, sitting other than as the Koori Court Division, at the same or a different venue."

At [7]-[8] & [72]-[74] Ginnane J said:

[7] “The valid exercise of the s.4F(2) discretion required the Magistrate to give proper consideration to the purpose of the Koori Court legislation [contained in] s.1 of the Magistrates’ Court (Koori Court) Act 2002:

‘To ensure greater participation of the aboriginal community in the sentencing process of the Magistrates’ Court through the role to be played in that process by the Aboriginal elder or respected persons and others.’

[8] While the Magistrate referred to the benefits of the Koori Court, I do not consider, with respect, that he properly exercised the discretion contained in s.4F(2). A key basis of the Magistrate’s decision was his understanding of the importance of the ‘proper venue’ principle as discussed in *Rossi*. His emphasis on the importance of the proper venue meant that he did not give appropriate consideration to the purposes of the Koori Court legislation. He therefore failed to properly exercise the discretion.”

[72] “The result of these authorities [*R v Trebilco*; *Ex parte F S Falkiner & Sons Ltd* (1935) 56 CLR 20 at 32, *Swan Hill Corporation v Bradbury* (1937) 56 CLR 746 at 757-8, *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40] is that in determining the matters relevant to the discretion that the Magistrate exercised under s.4F, attention must primarily be given to the subject-matter, scope and purpose of the Koori Court legislation.

[73] Without attempting an exhaustive list of the relevant considerations to the proper exercise of the s.4F(2) discretion, a few potentially relevant matters can be identified. First is the greater participation of the Aboriginal community in the sentencing process through the role played by Aboriginal Elders and Respected Persons in the Koori Court. Other relevant factors might be whether the Elders or Respected Persons who are likely to participate in the proposed Koori Court hearing are from the same nation as the accused, in this case the Yorta Yorta nation, the distance of the Koori Court from the accused’s residence and the location of the alleged offences. The nature of the offences may also be relevant as may the previous sentencing of the accused by the Koori Court or the General Division of the Court and the accused’s conduct after such sentence. The fact that the accused is said to have reoffended after having been sentenced by the Magistrates’ Court is no reason by itself why the further offences cannot be determined by the Koori Court, it will all depend on the circumstances...

[74] In my respectful opinion, the Magistrate erred by giving primacy in his consideration of relevant factors to ‘proper venue’ and the principles in *Rossi*. As I have mentioned, in many if not most instances, an application for a criminal proceeding to be transferred to the Koori Court will be made when proceedings have been commenced in the initial proper venue that is the closest court to the location of the alleged offences or the residence of the accused. Transfer applications to the Koori Court will only be made when that has occurred, so the traditional proper venue consideration and any public interest in the hearing of the charges in the locality of their commission should generally be given less weight than the purpose of the creation of the Koori Court. That Court becomes the proper venue if the transfer application is successful.”

For his Honour’s discussion of and findings in relation to the relevant Charter provisions see especially [79]-[99] & [139]-[150].

The relevant statutory provisions relating to ‘proper venue’ in the Children’s Court generally and to the transfer of proceedings to and from the Children’s Koori Court are set out respectively in ss.3 & 519 of the CYFA and are in substantially similar terms to the equivalent provisions in the Magistrates Court Act 1989. Accordingly the decision of Ginnane J in *Cemino v Cannan* is equally applicable to the Children’s Court.

7.11.5.2 THE KOORI COURT IS NOT A SOFT OPTION

In *Cemino v Cannan* [2018] VSC 535 at [54] Ginnane J said:

“It is important to note that participation in the Koori Court process can be more burdensome than a traditional plea hearing. The Koori Court is not designed to be, nor is it actually, a soft avenue for offenders. This was discussed by Maxwell P and Buchanan JA in the Court of appeal decision of *R v Morgan* (2010) 24 VR 230. They noted, in contrast to a plea hearing in the mainstream Court, in the Koori Court offenders cannot ‘hide behind counsel’ [at p.237]. Further in *Honeysett v The Queen* [2018] VSCA 214 at [20], Priest, Beach and Hargrave JJA noted that in the Koori Court offenders are required to engage in ‘sentencing conversations’ with Elders that are ‘challenging’ and can involve

‘firm admonishments’. Offenders are often ‘shamed’ for their conduct during a hearing – a traditional punishment that is an important part of maintaining order in Aboriginal communities, and one that is considered effective with administered by Elders: see *R v Morgan* at [35]; Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No.31 (1986) at [500]-[501].”

7.11.5.3 WEIGHT TO BE GIVEN TO THE ACCUSED’S PARTICIPATION IN KOORI COURT

In *Honeysett v The Queen* [2018] VSCA 214 the applicant had been granted leave to appeal against a sentence of 5 years imprisonment with a non-parole period of 3 years imposed in the Koori Court Division of the County Court on charges of armed robbery and theft. The applicant had submitted that ‘the sentencing judge had failed to give sufficient weight to the appellant’s engagement in the process and had thus failed to adequately moderate the principles of specific deterrence and protection of the community.’ See [34].

The Court of Appeal dismissed the appeal. At [46] & [51] Priest, Beach and Hargrave JJA said:

[46] “In *R v Morgan* (2010) 24 VR 230 at 237 it was accepted that active participation in the Koori Court process was more burdensome than appearing at a traditional plea hearing. In that case the point was conceded by the Crown on the appeal. The Court went on to say that active participation in the process was a factor that mitigated punishment, and explained that such an approach was consistent with legal principle. At 238 the Court in *Morgan* concluded that the extent to which participation in the sentencing conversation will be a mitigating factor in a particular case ‘will, of course, depend on the circumstances of the case’.

[51] “In neither *Morgan* (2010) 24 VR 230, 237 [37]) nor *Nicholson* ([2017] VSCA 238) was there any discussion of the weight separately to be accorded to the appellant’s active participation in a sentencing conversation in the Koori Court. Nor was there any discussion as to how that factor might be balanced against considerations of general and specific deterrence and the need to protect the community. In these circumstances, in granting leave to appeal in this case Weinberg JA stated at [51]:

Having regard to the lack of case law dealing in an extended way with that issue, it would be useful to have this Court provide guidance as to how, precisely, the procedures adopted in the Koori Court should impact upon the overall synthesis when trial judges sentence in such cases.’

At [54]-[55] Priest, Beach and Hargrave JJA said:

[54] “In our view, in determining the weight to be attached to an offender’s participation in a Koori Court sentencing conversation as a mitigating factor, a sentencing court should consider a range of factors, including:

- (1) The fact that participation in the process is a voluntary one, may be confronting to the offender, and will likely involve him or her being ‘shamed’. As noted in *Morgan*, participation in the process may of itself be rehabilitative.
- (2) The fact that the offender is, rather than ‘hiding behind counsel’, taking the opportunity to personally:
 - a. demonstrate his or her remorse for offending;
 - b. demonstrate insight into the reasons for, and the seriousness and effect of, the offending; and
 - c. express any intention to reform and how that will be done, including by participating in available rehabilitation programs.
- (3) The Court’s assessment of the genuineness of the offender’s statements during the sentencing conversation. That assessment should take account of all of the information before the Court.”

[55] “Based on the sentencing Court’s assessment of the quality and genuineness of the statements made by the offender, it is a matter for the individual judge to assess weight in the circumstances of the particular case.”

7.11.5.4 WHETHER PRE-SENTENCE REPORTS SHOULD BE MANDATORY IN KOORI COURTS

In *Honeysett v The Queen* [2018] VSCA 214 the applicant had submitted that the Court of Appeal should endorse a practice of sentencing judicial officers in the Koori Court requesting pre-sentence reports in every case comparable to the ‘Gladue’ reports (see *Gladue v The Queen* [1999] 1 SCR 688,

736-9 [93]) routinely sought by Canadian courts when sentencing First Nation offenders. At [66] Priest, Beach and Hargrave JJA rejected this submission:

“Absent the kind of legislative requirement outlined in *Gladue*, the appellant's submissions bear the hallmark of a plea for law reform. While we accept that the Koori Court has the power to inform itself as it thinks fit, no obligation is imposed on it to request reports of any kind. That is not to say that Koori Court judges could not request reports, evidence or submissions where the material put before them by the offender and the Crown is thought to be insufficient. Moreover, it is always open to an offender to put forward a *Gladue*-style report for consideration during the sentencing conversation and by the judge in determining the sentence.”

However in both mainstream Children's Courts and Children's Koori Courts a sentence of detention cannot be imposed unless the Court has received and considered a pre-sentence report: see ss.410(1)(e) & 412(1)(e) of the CYFA. Further, s.520(3) empowers – but does not compel – a Children's Koori Court to inform itself in any way it thinks fit, including by considering a report prepared by, or a statement or submission, made by any of 6 different classes of people: see section 7.11.3 above.

7.11.6 Statistics

	2015/16		2016/17		2017/18		2018/19		2019/20	
LOCATION	Number of young persons	Matters finalized	Number of young persons	Matters finalized	Number of young persons	Matters finalized	Number of young persons	Matters finalized	Number of young persons	Matters finalized
Dandenong	18	16	24	31	10	9	11	23	6	46
Geelong	---	---	13	26	32	41	14	44	17	14
Heidelberg	4	1	19	37	32	20	12	7	17	12
Latrobe Valley	19	41	14	21	14	42	4	1	8	20
Melbourne	37	69	22	45	37	79	46	93	23	18
Mildura	55	79	48	46	37	40	21	23	9	2
Shepparton	10	27	14	18	12	25	14	19	4	4
Swan Hill	3	2	4	7	5	3	2	3	0	0
Warrnambool [+ Portland & Hamilton]	6	8	4	7	3	1	2	2	5	6
TOTALS	152	243	162	238	173	260	126	215	89	122

7.12 Cases on selected offences

7.12.1 Offensive behaviour

In *Nelson v Mathieson* [2003] VSC 451 the accused had been found guilty of offensive behaviour contrary to s.17(1)(d) of the Summary Offences Act 1966. The question which arose for determination in the ensuing appeal was whether solvent inhalation - "chroming" - in public could constitute offensive behaviour *per se*. In allowing the appeal, Nathan J held (at [6]) that it could not:

"I do not consider that chroming in public can of itself be offensive within the meaning of the Act. However, should there be surrounding circumstances which exacerbate that antisocial behaviour into something more than just concern for the welfare of the offender, then it may be offensive."

At [10] Nathan J said:

"The law relating to offensive behaviour is tolerably clear. It will never be pellucid because offensiveness depends upon time, place, social context and to some extent, although not exclusively, upon the intent of the offender. Its categories are never closed and that which may be offensive to one generation may be regarded as a matter of hilarity by the next."

After referring to dicta of O'Bryan J in *Wooster v Smith* [1951] VLR 316, Sully J in *Spence v Loguch* [Supreme Court NSW, unreported, 12 November 1991], Bray CJ in *Proust v Bartlett* (1972) 3 SASR 472 at 480, Higgins J in *Saunders v Herold* (1991) 105 FLR at 1 and Harper J in *Pell v Council of the Trustees of the National Gallery* [1998] 2 VR 391, Nathan J held at [17]-[18]:

"It is no longer necessary for the Crown to prove that the offender intended to be offensive, but it is still a requirement that the conduct has the effect of wounding the feelings, arousing anger, resentment, disgust or outrage in the mind of the reasonable person who may have or could have viewed, or been the object of that conduct. In my view, the words should be interpreted *ejusdem generis*. Wounded feelings, anger, resentment, disgust, outrage, all denote immediate and strong emotions or reactions. A reaction to conduct which is merely indifferent or at its highest anguished is not the same as being offended. Merely being put out, or affronted by conduct, does not warrant the imposition of a criminal penalty upon the actor. A person may be appalled by conduct and yet his or her own personal feelings not be wounded by it. For example, spitting or urinating in a public place but attempting to conceal may appal the reasonable passer-by, but that person would not expect the perpetrator be visited with a criminal sanction. It could however be offensive if there was no effort to conceal it. The behavioural offence of being offensive is dependent upon time, circumstance, motive and place. A vulgar gesture at a wedding may well be offensive but the same digital activity at a football match merely jocular.

I return to the central issue in this case: could a reasonable magistrate, as opposed to one anguished, exasperated or concerned for a child's future, conclude beyond any reasonable doubt that the act of chroming in these circumstances amounted to offensive behaviour within the meaning of the Act? I think not. The activity roused in the minds of both the investigating police and the magistrate, feelings of anguish, despair and exasperation. A reasonable person would be saddened, pitiful and concerned by paint sniffing, but not angered, wounded, outraged or disgusted and therefore not offended. What could the magistrate have done to have helped this unfortunate defendant overcome his desperately sad and dispiriting condition, exemplified by the phrase, 'I've got nothing better to do'. The answer may be uncertain but to have found him guilty of a criminal offence was not open. The appeal will be allowed."

7.12.2 Insulting words in a public place

In *Ferguson v Walkley & Anor* [2008] VSC 7 Harper J discussed at length the tension between freedom of expression and the criminal law in a democratic society and applied the test enunciated by Gleeson CJ in *Coleman v Power* (2004) 220 CLR 1 in determining whether words are insulting within the meaning of s.7(1) of the Summary Offences Act 1966 (Vic.):

[1] "The principles of democratic governance have had difficulty in accommodating laws designed to deal with offensive behaviour – with which I include offensive language. This has been reflected in the difficulties experienced by agencies such as the police in the fair and impartial execution of those laws, and by the courts in resolving the disputes to which their execution has given rise. Government of the people, by the people, and for the people is government by majority will. It is also (indeed, it must also by definition be) government that recognises that all, including minorities, have rights. These rights must be respected. According to John Stuart Mill, "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self protection [and] the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others." (John Stuart Mill *Utilitarianism, Liberty and Representative Government* (1910) J.M.Dent & Sons Ltd (1960 reprint) pp.72-73). One may accept the criticism that this statement is too wide (see, for example, *Two Concepts of Liberty* in *The Proper Study of Mankind: An Anthology of Essays* by Isaiah Berlin (Pimlico) 1998 pp. 199-201) while also accepting that it has sufficient validity to support the proposition that a state which seeks to impose upon its subjects an all-embracing moral code is the antithesis of a democracy.

[2] This means, among other things, that the majority should be diffident about imposing its view of morality on others. Behaviour, deemed unacceptably offensive by some, may not trouble others at all. The danger therefore is that legislation which turns offensive conduct into a crime, and punishable accordingly, will be employed as a heavy-handed instrument for the imposition, by one segment of society on another, of the former's moral precepts. This is a prospect about which those concerned with the practicalities of

democratic governance – including the police and the courts – must always and of necessity be seriously concerned...

[16] In giving an extempore judgment, the learned magistrate noted the importance of context. He was right to do so: many, if not all, of these cases are fact-specific and ultimately turn on questions of fact and degree. His Honour also referred at some length to the most recent High Court pronouncements on offensive behaviour. These are to be found in the six judgments delivered by the seven justices who heard the final appeal in the case of *Coleman v Power* (2004) 220 CLR 1. The magistrate said, in effect, that sitting as he did in rural Victoria and, having therefore a part to play in the maintenance of public order within a number of small communities, he would be concerned were language to attract the sanctions of the criminal law as being insulting or offensive only if it were intended or reasonably likely to provoke unlawful physical retaliation. I can understand that concern. But his Honour also held, in my opinion correctly, that this was not the law as expounded by the majority of the seven-member bench in *Coleman*...

[42] The test, as I understand the judgment of the Chief Justice, is whether the impugned behaviour is so deeply or seriously insulting, and therefore so far contrary to contemporary standards of public good order, as to warrant the interference of the criminal law. In my opinion, Mr Ferguson's behaviour in each instance met those criteria and was thus contrary to the relevant provisions of the *Summary Offences Act*. It follows that the magistrate's decision to convict was in each case correct. The appeals must be dismissed."

7.12.3 Arson

In *DPP v Eade* [2012] VSCA 142 the appellants – who were young adults – had pleaded guilty to having intentionally destroyed the heritage-listed Camperdown Milk and Cheese Factory contrary to s.197(6) of the *Crimes Act 1958*. Each had been sentenced to 2y4m youth detention notwithstanding that they had no intention to destroy the building. Their actual intention was the destruction of milk crates within the building. The fire had started when the appellants used cigarette lighters to set fire to the plastic wrapping on some milk crates on the floor of the factory to which they had gained access by climbing over the surrounding barbed-wire fence. They were both very drunk. They had been drinking bourbon and coke all evening. The appellants were aware when they left the factory that the plastic was still burning. However, it was conceded by the prosecution (and accepted by the judge) that neither of them had at any stage intended to burn down the factory. Nor, when they left, had they appreciated the risk of the fire spreading.

The Court of Appeal allowed the appeal and amended the presentments to intentional destruction of the milk crates by fire. Holding that no further penalty was warranted over and above the 4m the appellants had already spent in detention, the appellants were convicted and discharged pursuant to s.73 of the *Sentencing Act 1991*. At [2] Maxwell P, Neave JA & Lasry AJA said:

"The appellants were sentenced to a custodial term for an offence which they did not commit and which – on the agreed facts – they could not have committed. Their actual offence was the intentional destruction of milk crates. Though the unintended consequences of their conduct were very serious, the actual offence was one of very low culpability. Particularly in view of their youth and personal circumstances, a custodial term could never have been warranted."

At [16]-[22] the Court of Appeal

[16] "Arson is a sub-category of the offence of intentionally destroying or damaging property, under s 197 of the *Crimes Act 1958*. Section 197(1) provides:

'A person who intentionally and without lawful excuse destroys or damages any property belonging to another or to himself and another shall be guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).'

Section 197(6) provides:

'An offence against this section committed by destroying or damaging property by fire shall be charged as arson.'

[17] The element of intention is dealt with exhaustively by s 197(4), which provides:

'For the purposes of subsections (1) and (2) a person who destroys or damages property shall be taken as doing so intentionally if, but only if—

- (a) his purpose or one of his purposes is to destroy or damage property;
- or
- (b) he knows or believes that his conduct is more likely than not to result

in destruction of or damage to property.'

[18] This subsection makes clear that proof of the offence depends on showing that the offender had turned his/her mind to the likely destruction or damage of property, either because that was his/her conscious purpose or because (s)he was aware that destruction or damage was 'more likely than not to result'. Of these alternatives, only the first is what would ordinarily be understood as intentional conduct. The second alternative is a statutory form of recklessness: cf. *The Queen v Crabbe* (1985) 156 CLR 464, 469–70; see *R v Stephenson* [1979] 1 QB 695 (CA). As the Director's submission noted, the subsection does not incorporate any concept of negligence.

[19] As a matter of ordinary language, the conduct which s 197(1) criminalises is the intentional bringing about of a result, that is, the destruction of or damage to the property the subject of the charge (the 'subject property'). It follows, in our view, that s 197(4) must be read as requiring proof that the offender:

- (a) had the purpose of destroying or damaging the subject property; or
- (b) knew or believed that his conduct 'was more likely than not to result in' the destruction of or damage to the subject property.

[20] That is certainly how the former s 197 was interpreted. As first enacted in the *Crimes Act 1958*, s 197 created the offence of 'unlawfully and maliciously [setting] fire to any dwelling-house any person being therein'. In *R v Whitehead* [1960] VR 12, 13, Hudson J held that the word 'maliciously' involved proof by the Crown that

'the accused did the act or acts which resulted in setting fire to the house with the intention of bringing about this result, or that he did such act or acts foreseeing that they would probably produce this result, but was reckless as to the consequence of his acts'.

[21] We recognise, however, that the language of s 197(4) is not so specific. Thus, s 197(4)(a) speaks of the offender having a (generalised) purpose 'to destroy or damage property'. Read literally, the subsection would have the result that a person who destroyed particular property would be taken to have done so intentionally, even though he/she had no purpose to destroy or damage *that* property and no awareness that his/her conduct was likely to destroy or damage *that* property.

[22] Given the clear language of s 197(1) itself, Parliament cannot have meant by subsection (4) to deem *unintended* (and un contemplated) damage to property to be *intentional* damage, carrying a maximum penalty of 10 years' imprisonment. As we have noted, this would have represented a wholesale departure from the previous position regarding arson offences."

7.13 Papers on adolescent offenders, adolescent offending & treatment

Copies of the following papers on various matters relating to adolescent offenders, adolescent offending & treatment of adolescent offenders, some of which have been provided by the Director of the Children's Court Clinic, are held by the Court Liaison Officer at Melbourne Children's Court. Enquiries can be made by phone 8638 3300.

C1

Assessing Violence Risk among Youth

Randy Borum (University of South Florida)

Journal of Clinical Psychology, Vol.56(10), 1263-1288 (2000)

Despite recent declines in the reported rate of juvenile violence, there appears to be increasing public and professional concern about violent behaviour among children and adolescents. Media accounts of school shootings and juvenile homicides have prompted a need to develop approaches for systematically assessing violence risk. This article describes the task of assessing general violence risk among youth, and argues that a somewhat different approach is required to assess cases where an identified or identifiable young person may pose a risk to a specifically identified or identifiable target (also referred to as 'targeted violence'). Key risk factors for violent behaviour among children and adolescents are identified, fundamental principles for conducting an assessment of violence potential in clinical and juvenile justice contexts are outlined, and an approach to assessment when an identified person engages in some communication or behaviour of concern that brings him or her to official attention is briefly described. © 2000 John Wiley & Sons, Inc. *J Clin Psychology*.

C2

Towards a developmental understanding of violence

Peter Fonagy

British Journal of Psychiatry (2003), 183, 190-192

- i. Violence is unlearned, not learned.
- ii. Attachment enables the mastery of aggression.
- iii. The development of mentalisation.
- iv. Where mentalisation fails, violence results.
- v. Biological evidence to link violence with impaired mentalisation.

Recent epidemiological data have clarified that if children are followed from school entry to the end of adolescence, the frequency with which they are likely to resort to physical aggression decreases with age. Physical aggression peaks at perhaps around the second year of life, and subsequently shows distinct developmental trajectories in different individuals. These new data have shifted the emphasis of the developmental understanding of violence. Historically, models of aggression have tended to focus on how human aggression is acquired. Yet aggression appears to be there as a problem from early childhood, arguably from toddlerhood and perhaps from birth. Violence ultimately signals the failure of normal developmental processes to deal with something that occurs naturally. Freud suggested (and is supported by modern developmental data) that social experience is there to tame a destructiveness inherent in humanity. Biological pre-disposition and social influence do not create destructiveness, but rather compromise the social processes that normally regulate and tame it. Not that aggression always shows the failure of some system: the innate aggression theory must take proper account of positive, survival-oriented aggression and also of aggression that is a genuine protest against hardship in life.

C3

Key Results from the First Forty Years of the Cambridge Study in Delinquent Development

David P. Farrington (Institute of Criminology, University of Cambridge)

Chapter for Thornberry, T.P. and Krohn, M.D. (Eds.) *Taking Stock of Delinquency: An Overview of Findings from Contemporary Longitudinal Studies*. New York: Kluwer/Plenum.

The Cambridge Study in Delinquent Development is a prospective longitudinal survey of the development of offending and antisocial behaviour in 411 South London boys, mostly born in 1953. These males have been followed up by personal interviews from age 8 to age 46. The Study began in 1961, and for the first 20 years was directed by Donald West. David Farrington joined him to work on it in 1969 and has directed the Study for the past 20 years. Results of the Study have been described in four books (West, 1969, 1982); West & Farrington, 1973, 1977) and in nearly 120 articles: see Farrington and West (1990) and Farrington (1995b). This article focuses particularly on the most recently obtained results and concludes that the types of acts that lead to convictions (principally crimes of dishonesty) are components of a larger syndrome of antisocial behaviour. Generally, working class males are versatile rather than specialized in their offending and antisocial behaviour. The high degree of continuity between ages 18 and 32, during a period of enormous environmental change, suggests that stability lies in the individual rather than in the environment. The authors conclude that there are individual differences between people in some general underlying theoretical construct which might be termed 'antisocial tendency', which is relatively stable from childhood to adulthood. Offending may increase or decrease over time, but the worst offenders at one age still tend to be the worst at another age. Significant prediction is possible from age 8 to age 32 but that does not mean that outcomes are inevitable or that people cannot and do not change. The good news is that most juvenile delinquents were leading quite successful lives by age 32.

C4

Early developmental prevention of juvenile delinquency

David P. Farrington (Institute of Criminology, University of Cambridge)

Criminal Behaviour and Mental Health, 4 (1994) 209-225 © Whurr Publishers Ltd

In this paper, methods of preventing juvenile delinquency that are targeted on the development of children and families and that be implemented in pregnancy, infancy, childhood or the pre-teenage years are reviewed. These methods are termed 'early developmental prevention' to distinguish them from situational prevention (which focuses on reducing opportunities for crime by increasing physical security and surveillance), social prevention (which focuses on community-based programmes, such as providing better leisure facilities for youth living on deprived housing estates) and prevention

through criminal justice system measures (which focuses on detection, retribution, deterrence and incapacitation). Knowledge about developmental prevention obtained in randomised experiments are emphasised because these yield the most convincing demonstration of causal and preventive effects. Methods of preventing delinquency should be grounded in knowledge about the causes of delinquency, or at least in knowledge about risk and protective factors that predict delinquency. Hence, while reviewing preventive methods, the author briefly summarizes knowledge about causes. The paper focuses especially on prenatal and perinatal factors, on the individual factors of impulsivity and low intelligence and on parental child-rearing techniques. Generally, early child-bearing (teenage pregnancy), substance use during pregnancy and perinatal complications are associated with poor child-rearing and with hyperactivity, impulsivity, low intelligence and low attainment of the child, which in turn predict childhood behaviour problems and later delinquency and crime. As this chain of events begins at the child's conception, it is important to implement delinquency prevention programmes as early in a child's life as possible.

C5

Meta-Analysis of Rehabilitation Programs for Juvenile Delinquents - A Brief Report

Rhena L. Izzo & Robert R. Ross (University of Ottawa)

Criminal Justice and Behaviour, Vol.17, No.1, March 1990, 134-142

A meta-analysis of 46 studies of intervention programs for juvenile delinquents revealed a significant difference between programs that included a cognitive component and those that did not. Cognitive programs were more than twice as effective as non-cognitive programs. These results are consistent with previous qualitative analyses and provide support for a cognitive model of offender rehabilitation.

C6

Developmental Pathways in Boys' Disruptive and Delinquent Behaviour

Barbara Tatem Kelly, Rolf Loeber, Kate Keenan and Mary DeLamatre

U.S. Department of Justice, *Juvenile Justice Bulletin*, December 1997

Boys may follow various developmental pathways that lead to increasingly disruptive and delinquent behaviour. To most parents, teachers, youth workers, mental health professionals, and juvenile justice practitioners, the development of disruptive and delinquent behaviour in boys may appear erratic and unpredictable. It is difficult for these adults to see a pattern in such behaviours or to accurately predict what disruptive or delinquent youth will do next. This Bulletin summarizes longitudinal research from the Pittsburgh Youth Study which examined an all-male sample. The study shows that the development of disruptive and delinquent behaviour by boys generally takes place in an orderly, progressive fashion. The researchers documented three developmental pathways that display progressively more serious problem behaviours among boys in three conceptually similar domains:

1. authority conflict (defiance and running away);
2. covert actions (lying and stealing); and
3. overt actions (aggression and violent behaviour).

The researchers believe that conceptualisation of past, current, and future disruptive behaviour can best be captured by means of developmental pathways, a pathway being identified when a group of individuals experience a behavioural development that is distinct from the behavioural development of other groups of individuals. In a developmental pathway, stages of behaviour unfold over time in an orderly fashion. Understanding these pathways will help us identify problem behaviour and intervene earlier and more effectively in the lives of troubled boys before they advance to the more serious stages of delinquent and disruptive behaviour.

C7

Serious & Violent Juvenile Offenders - Risk Factors and Successful Interventions

Rolf Loeber & David P Farrington (Eds.)

The two main aim of this work are to review knowledge about serious and/or violent juvenile (SVJ) offending. The main conclusions of the work are:

- SVJ offenders are a distinct group of offenders who tend to start early and continue late in their offending. It is never too early or late to implement preventive interventions.
- From childhood to adolescence SVJ offenders tend to develop behaviour problems in several areas, including aggression, dishonesty/property offences, and conflict with authority figures.

- Many potential SVJ offenders below the age of 12 are not routinely processed in the juvenile court, and services in the community for such offenders appear unnecessarily fragmented, leading to a lack of public accountability for young potential SVJ offenders.
- There are many known predictors of SVJ offending that could be incorporated into screening devices for the early identification of SVJ offenders.

An integrated and coordinated program of research is needed on the development and the reduction of SVJ offending.

C8

Working with sibling incest

Karen Flanagan and Janet Patterson
Children Australia Volume 21, No.2, 1996

This article presents the work of the Child Sexual Abuse Treatment Program and Adolescent Sex Offender Treatment Program, auspiced by the Children's Protection Society. The focus is upon their experiences in working with families in which sibling incest has occurred. It outlines the philosophy, principles and model of the program, gives an overview of the demographic data and client profiles, and finally reflects on practice observations relating to issues which have emerged in their work.

C9

Adolescents who Sexually Abuse their Siblings: An Overview of the Literature and Issues for Research Attention

Jo Hatch & Karla Hayman-White (Sexual Abuse Counselling and Prevention Program - Children's Protection Society)

Research into intra-familial sexual abuse - A historical perspective on 'incest' and why we need to rethink traditional views of sexual abuse in the family.

C10

MAPPS - The Male Adolescent Program for Positive Sexuality

Adolescent Forensic Health Service, 900 Park St, Parkville, Vic, 3052

A bundle of materials:

1. Interventions in Sexually Abusive Behaviour - Ethos, Information & Program Content
2. Interventions in Sexually Abusive Behaviour - Evaluation Report [Executive Summary] June 1998
3. Offending Profile Statistics for the year ending 30 June 2002
4. Client Profile: 117 adolescents with sexually abusive behaviour referred to the Sexual Abuse Counselling and Prevention Program between 1 January 1999 to 30 June 2001

C11

Juvenile Sex Offender Assessment Protocol

Prentky, Harris, Frizzell, and Righthand

A set of 23 factors divided into 4 scales:

1. Sexual Drive/Preoccupation Scale
2. Impulsive, Antisocial Behaviour Scale
3. Clinical/Treatment Scale
4. Community Stability/Adjustment Scale

C12

The Management and Design of Good Lives

Tony Ward (University of Melbourne & CORE - The Public Correctional Enterprise, Australia)
Australian Psychologist, Vol.37, No.3, pp.172-179 (November 2002)

In this paper the author attempts to integrate the risk-need and good lives models of offender rehabilitation. He sets out to show how it is possible to capitalise on the strengths of the risk management perspective by locating or embedding it within a more constructive, strength based capabilities approach - what he has called the good lives model of offender rehabilitation. In the good lives model, risk factors are viewed as obstacles that erode individuals' capacity to live more fulfilling lives. Thus the therapeutic focus is on implementing offenders' good lives conceptualisation rather than simply managing risk, although risk is not neglected. First, the author briefly outlines the risk-

need and good lives models and then discusses how they might be integrated. Secondly, he considers a clinical example, demonstrating in some detail how a good lives perspective impacts on assessment and treatment. Finally, he concludes with a few comments on the clinical and policy implications of this integrated approach.

C13

Forensic aspects of Asperger's Syndrome

Justin B Barry-Walsh and Paul E Mullen

The Journal of Forensic Psychiatry & Psychology, Vol.15, No.1, March 2004, 96-107

Asperger's Syndrome is a pervasive developmental disorder on the Autistic spectrum. Antisocial behaviour is frequently described as an accompaniment of Asperger's Syndrome although the strength of any association between Asperger's Syndrome and offending remains uncertain. This paper presents five patients with Asperger's Syndrome with a history of offending. For each of them the offending is understandable in the context of the disorder. The specific and general issues raised by these cases in relation to Fitness to Plead and Legal Insanity are considered. Offenders with Asperger's Syndrome have deficits that raise the likelihood that their disorder will render them unfit or be of exculpatory value.

C14

Social Maturity, Morality, Law, and the Frontal Lobes

Dr Elkhorn Goldberg (Clinical Professor of Neurology, New York University)

Chapter 9 of "The Executive Brain: Frontal Lobes & the Civilized Mind"

Amid the myriad of anthropomorphic qualities lavished on the frontal lobes, they have been proclaimed the ultimate seat of morality. Does this mean that the underdevelopment of, or damage to, the frontal lobes will result in immorality? Probably not, but how about amorality? Patients suffering such frontal lobe syndrome are generally emotionally disinhibited. Their affect is rarely neutral, constantly oscillating between euphoria and rage, with impulse control ranging from poor to nonexistent. Their ability to inhibit the urge for instant gratification is severely impaired. They do what they feel like doing when they feel like doing it, without any concern for the social taboos or legal prohibitions. They have no foresight of the consequences of their actions.

The author analyses the effect on a patient's behaviour of underdevelopment of, or damage to, the frontal lobes under headings:

1. Orbitofrontal "Pseudopsychopathic" Syndrome and the Loss of Self-Control
2. Social Maturity and the Frontal Lobes
3. Biological Maturation and Social Maturity: A Historical Puzzle
4. Frontal Lobe Damage and Criminal Behaviour
5. The Hapless Robber
6. Frontal Lobe Damage and the Public Blindspot

C15

Generation Y and Crime; A longitudinal study of contact with NSW criminal courts before the age of 21

Jiuzhao Hua, Joanne Baker and Suzanne Poynton

Contemporary Issues in Crime and Justice – August 2006

This bulletin reports the results of a study designed to estimate what proportion of all persons born in New South Wales in 1984 (the cohort) appeared in a NSW criminal court before the age of 21. The results show that 9.9% of the cohort (15.7% of males and 3.8% of females) had at least one court appearance. Most (71.3%) of those who appeared in court before the age of 21 appeared after the age of 18. About a third of the first appearances in court were for driving-related offences but appearances for theft offences, acts intended to cause injury and public order offences were also quite common. The 9% of those who appeared in court five times or more accounted for 36% of the cohort's court appearances. The 2.3% who appeared in court ten times or more accounted for 15% of the cohort's court appearances.

C16

The “ROPES” Program – 2006 Report

Police Officer Mick O'Meara APM (Victoria Police)

The ROPES program is a joint venture between Victoria Police, the Children's Court of Victoria and municipal youth workers. One of the program's primary objectives is to turn a negative contact with police and the court systems into a positive outcome. The program brings together the young offender and the police informant into a series of physical challenges requiring true trust and co-operation which breaks down the barriers between them and helps each to see things from the other's perspective. The program is targeted at young persons aged between 12 & 18 who have little or no criminal history. The young persons are either referred to the program from a particular Children's Court or have been cautioned under the Police Cautioning Program and have agreed to participate in the program. Some young people are also accepted onto the program who are displaying anti social behaviour patterns but have not yet come within the criminal justice system. To achieve the objective of the ROPES program the young persons and police informants complete a full day program on a low ROPES and high ROPES course supervised by experienced and qualified outdoor education specialists. The course is not easy. It requires teamwork, encouragement and trust. 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. More details of the program are to be found in Chapter 11.15.

C17

Understanding and treating juvenile offenders: A review of current knowledge and future directions

Susan M Tarolla, Eric F Wagner, Jonathan Rabinowitz & Jonathan G Tubman

Aggression and Violent Behaviour 7 (2002) 125-143

Juvenile delinquency is one of our most pressing social problems, with negative emotional, physical, and economic effects felt throughout society. Considering the prevalence, stability, and detrimental impact of juvenile offending, the development of effective treatments is of utmost importance. This article provides an overview of available evidence regarding several key issues pertaining to treatment for juvenile offenders. First, the etiology, continuity, and long-term consequences of juvenile offending are reviewed. Second, factors associated with treatment outcome are discussed. Third, information regarding the most commonly used intervention strategies are provided. These strategies include family/systems, parent and social skills training, cognitive-behavioural, peer group counselling, wilderness programs, and boot camps. Finally, gaps in knowledge, research implications, and future directions are presented.

C18

The Age of Criminal Responsibility

Gregor Urbas

Australian Institute of Criminology [No.181, November 2000]

Updated by Australian Institute of Criminology Info Sheet [No.106 13/09/2005]

One of the most difficult areas of criminal justice policy lies in providing appropriate legal mechanisms to reflect the transition from the age of childhood innocence through to maturity and full responsibility under the criminal law. Along with specialised institutions such as Children's Courts and juvenile detention centres, specific legal rules have been developed which differentiate the position of children and young people within the general criminal justice system. Considerable recent attention has been directed towards rules governing the minimum age of criminal responsibility, and the imposition of criminal responsibility above that age depending on a young offender's appreciation of the wrongness of his or her act. This Trends and Issues paper examines the operation of these rules, along with criticisms and prospects for reform.

C19

The Children's Court of Victoria – November 2010

Judge Paul Grant

In this paper presented at the Victorian Court Network State Conference on 30/11/2010 the President of the Children's Court of Victoria focussed on the Criminal Division of the Children's Court. Using various statistics, His Honour explained the application of the principles for sentencing of young offenders which are set out in the *Children, Youth and Families Act 2005 (Vic)* and concluded that:

- only a small percentage of young Victorians actually come to the attention of law enforcement authorities and fewer still require formal intervention in their lives;
- the vast majority of the small percentage of young Victorians involved in criminal behaviour do not constitute a risk to the safety of the Victorian community.

A number of papers with relevance to adolescent offending and/or children's criminal cases were delivered at the XVI World Congress of the International Association of Youth and Family Judges and Magistrates held in Melbourne in October 2002. The following papers are available in PDF format from the Court Liaison Officer at Melbourne Children's Court. Enquiries can be made by phone 8638 3300.

WCC1

Mediation in the Criminal System. A contribution towards a better coexistence. (Towards a Reality-based Criminal Law and Criminal Procedural Law). The experience in Argentina.

Judge Ricardo Angel Basílico (Penal Judge, First Tribunal, Province of Chubut, Argentina)

This paper champions the use of a mediation procedure in the resolution of violent disputes and recommends the incorporation of the institution of mediation into Chubut's Code of Procedure. The author is in agreement with the conclusion of Chavez Ramirez that conciliation "is one of the best forms of resolution of the conflict caused by crime, as it involves the participation of the true protagonists in the conflict (victim and offender), but it also includes a party directly interested in maintaining and restoring social harmony, that is the Government, who participates in the resolution of the dispute through the overarching action of the courts". He believes that mediation clearly tends towards the peaceful resolution of a dispute in a non-adversarial manner, not damaging family or community relations, and thus becoming a valuable tool that would improve the criminal justice system.

WCC2

The Youth Part and Juvenile Justice: The New York Experience

The Hon. Michael A Corriero (Supreme Court of the State of New York, USA)

In 1992 a special project was launched in Manhattan's Supreme Court. The creation of the "Youth Part", as it has come to be known, was in response to New York State's "Juvenile Offender" Law which requires children aged 13, 14 or 15 who are accused of violent crimes to be tried within the adult Criminal Court system. The author has had the responsibility of presiding over the Youth Part since its inception. Those working in the Youth Part have endeavoured to create a process that helps to identify a malleable child - a child who can be safely channelled out of the system and placed in a suitable alternative to incarceration program. His Honour's paper centres on the development and practice of the court, the ideas that fuel it and the evolving work that sustains it.

Since 1992 the author has had the responsibility of presiding over Manhattan's "Youth Part", a court set aside within the adult Criminal Court system for the purpose of resolving the cases of all 13, 14, and 15 year olds who are charged with certain violent offences, as well as the cases of their co-accused regardless of age.

WCC3

Sentencing Young Offenders

Professor Arie Freiberg (Then Professor of Criminology, University of Melbourne; Now Dean of the Faculty of Law, Monash University)

This paper provides a brief overview of some of the recent developments in the sentencing of young offenders in Australia. It notes the major legislative reforms over the last two decades, identifies

trends in adult and juvenile incarceration rates and describes a number of changes which have taken place in the theory and practice of sentencing young Australian offenders.

WCC4

Police Involvement in Juvenile Crime Prevention & Diversion - New Zealand

Inspector Chris Graveson (Co-ordinator, Police Youth Aid, New Zealand)

Prior to the New Zealand Children, Young Persons and Their Families Act being introduced on 01/11/1989, many children and young persons were informally dealt with by police, although there was no statutory authority for that. Informal action could range from a good talking to, a clip around the ear or even a kick in the pants. Justification for informal action came under the wider umbrella of 'Police Discretion', which derives from a common law principle.

The object of the Act when dealing with offending is:

Ensuring that where children or young persons commit offences-

- (i) *They are held accountable, and encouraged to accept responsibility, for their behaviour; and*
- (ii) *They are dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in responsible, beneficial, and socially acceptable ways."*

There are four levels of intervention which can occur under the Act:

1. **Warning** - This is often given by the attending officer and followed up by a letter from the Youth Aid Officer acknowledging the warning.
2. **Alternative Action** - This is a diversion plan carried out by the Youth Aid Officer.
3. **Family Group Conference** - Offending that cannot be dealt with by way of warning and alternative action; and
4. **Youth Court** - The young person has been arrested and brought before the Court or the offending cannot be dealt with by way of Family Group Conference.

This paper discusses each of these four interventions in detail, including material on the origins of the Family Group Conference process, and concludes:

"Now the formal Youth Justice Process deals with only 20% of offences. Those who were Youth Aid Offices at the time the Act was introduced have said, "It is unbelievable what young people were taken to Court for, and now their families deal with it, and probably more effectively". These comments confirm the ethos and success of the Act and statistics show there are less than half the number of young persons in Court as there were in 1989."

WCC5

Police Involvement in Juvenile Crime Prevention & Diversion - Australia

Inspector Bill Mathers (Youth Affairs Office, Victoria Police)

This paper discusses police involvement in Juvenile Crime Prevention and Diversion from a policing viewpoint and is presented as a practical rather than a theoretical perspective. The author has been in Victoria Police since 1979 and examines the current approaches by police in Victoria to juvenile crime prevention and diversion.

A background as to why police are involved in juvenile crime prevention and diversion is presented along with a discussion of the existing environment in Victoria for young people entering the juvenile justice system. The involvement of the police in juvenile crime prevention and diversion is discussed as well as early intervention strategies and specific diversion programs. The paper concludes with comments on the future direction for juvenile crime diversion and prevention.

WCC6

Reintegration program for Juvenile Offenders: Work-Wise

Mr Bert Minjon MM (Executive Director, Rentray, Netherlands)

The author is the Executive Director of the largest private juvenile correctional institution in the Netherlands. Rentray provides accommodation and treatment for juveniles with a penal (or treatment) order. Preparing young people for the world of work is a major element in the work of Correctional Institutions for Juvenile Offenders. Literature surveys show that availability of a job is a strong predictor of resocialisation: it is an important protecting factor, a counterbalance to antisocial behaviour tendencies on the part of youngsters who have been placed in these institutions. Jobs provide people not only with structure and income but also status and self-confidence. In 1998 Rentray developed Work-Wise, a work preparation programme for inmates of Correctional Institutions for Juvenile Offenders. The aim of the Work-Wise system is to prepare youngsters for work by means

of individual route counselling as an integral part of the detention/treatment regime. They also receive continuing supervision for an average of six months after leaving the institution.

WCC7

The Youth Justice in Northern Ireland and the Role of Consumer Feedback

Mr Artie O'Neill (Juvenile Justice Board for Northern Ireland, United Kingdom)

Despite 30 years of conflict in Northern Ireland much work has been done to develop a viable child focussed Youth Justice System. Northern Ireland now has a community oriented model of justice, having moved in the last 10 years from a more custodial based model.

WCC8

Village Mediation Units in Lao PDR & Their Adaptation for Children & Young People

Pheyphanome Nhouyvanisvong & Aith Inthaphonh (researchers) & Kolakot Venevankham & John Parry-Williams

From September 2000 to August 2001 a pilot Juvenile Justice Project (JJP) was introduced in 4 of the 18 provinces of the Lao PDR. Eight principles for the JJP evolved through discussion in the early training:

1. In giving justice to children their rights should be respected.
2. Children should be kept out of the criminal justice system whenever possible (for example by 'diverting' the child from the court system by using mediation and village based re-education).
3. For those who have to go to court non-custodial sentences should be the norm except for very serious offences like murder, rape and extreme violence.
4. Bail should be granted in all cases except for very serious offences.
5. Custody should be a last resort.
6. Children should not be in adult prisons or police cells where they mix with adults under any circumstances.
7. There should be a separate system of courts for children with specially trained personnel.
8. Crime prevention strategies for children should be planned and supported.

This paper details the findings of a Village Mediation Unit Research project, undertaken by Aith Inthaphonh (a judge in the Vientiane Municipality Court) and Pheyphanome Nhouyvanisvong (an independent consultant) undertaken over 4 weeks in September 2001 in relation to the 2nd of the JJP's eight guiding principles. The research study had 4 objectives-

1. To make an assessment of what Village and Ward mediation Units (VMU), each consisting of 10-15 households, are used for, how they work and whether they are seen by those involved as a good system for resolving conflicts.
2. To learn whether children (under 18 years) are having their difficulties, especially those concerning conflict with the law, settled through mediation at the VMU and if so what do they, victims and other adults involved say about the experience.
3. From the study to comment on the problems, if any, of trying to introduce a system of mediation at community level for children in conflict with the law.
4. To make observations as to how the present system would need to be adapted so as to be appropriate for children and in line with the CRC and other international Human Rights and JJ instruments.

The paper concludes with observations on and recommendations in relation to the establishing of a mediation system for children and young people under 18 years of age.

WCC9

***Doli Incapax* in the Children's Court - Is the Defence Double Dipping?**

Dr Moshe Perl (Clinical & Forensic Psychologist, Victoria)

Assessing criminal responsibility forms a routine part of the psychological assessment in the Criminal Division of the Children's Court of Victoria. Most cases referred to the Children's Court Clinic have already been found proved. For the small number that are not, *doli incapax* is often the issue. Support for or rebuttal of *doli incapax* requires review of past behaviour, assessment of current level of adjustment and functioning, as well as a detailed examination of the child's statements about the offence(s) in question. The paper includes a review of several cases.

WCC10

The Palau Restorative Justice Program

The Honorable Michael J Rosenthal (Minister of Justice, Palau)

As a former prosecutor with more than ten years of experience in the United States Federal Government and the Republic of Palau National Government, the author considers that Court systems and prison facilities do not necessarily address the fundamental needs of society. Incarceration does not usually cure the root of the problem which has caused criminal activity and rehabilitation is usually the exception, thus leaving high rates of recidivism. Additionally, studies throughout the world have shown that the Court process results in satisfaction to victims of crimes in only about 20% of cases.

WCC11

Children in Mental Health Detention

Professor Horst Schüler-Springorum (Germany)

A general discussion on the problems faced by children both inside mental health detention and after discharge from such institutions.

WCC12

Children's Court Clinics and their role in informing judicial decision making: The Children's Court Clinic Drug Program

Mr Carl Scuderi (Psychologist and Senior Drug Clinician, Children's Court Clinic of Victoria)

Court diversion programs for drug offenders have become an important part of the Commonwealth and State governments' response to illicit drug use. The author outlines the operation of the new Children's Court Clinic Drug Program in Victoria and briefly describes the philosophy which underpins it, with particular reference to the assessment process and psychological treatment for young drug users appearing before the Victorian Children's Court. The program primarily operates using the provision for a deferral of sentencing which is contained in the CYPA and the CYFA.

WCC13

Mandatory Minimum Sentences and the Young Offender

Justice Nazhat Shameem (High Court of Fiji)

Sentencing principles in respect of the young offender do not vary widely around the world. The general principle is that incarceration should be avoided unless there is no other option. No sentence is passed without the report of a social welfare officer. Parents are expected to be involved in the sentencing process. In many jurisdictions, the focus is on reparation, reconciliation and apology. Whichever sentencing option is chosen, the sentencer is generally given a wide discretion fettered only by statutory maximum terms and judicial precedent. Sentencing for the juvenile court is a process driven by two main considerations: one is punishment, the other is welfare. Traditionally, welfare considerations are dominant.

In recent years, however, the mandatory minimum sentence, introduced by the legislature, usually in response to public opinion about particular types of offences, has played havoc with these sentencing principles. The author's strong view is that the community has no right to detain juveniles and children regardless of mitigation, seriousness of offending and welfare concerns. The welfare-driven humane juvenile justice system is not a pseudo-liberal wishy-washy soft option for losers. A juvenile justice system which tries not to incarcerate children, which tries to give children a sense of self-worth and dignity and a system which diverts more than it punishes, ensures reparation rather than retribution, is the only system which civilized societies must aim for.

Mandatory minimum terms of detention can result in real injustice in individual cases. In juvenile justice systems, they are inhumane, unprincipled and potentially in breach of a State's international obligations. It is heartening that more and more members of the judiciary have used the most effective weapon they have to strike down mandatory sentences. That weapon is justice itself.

WCC14

Juvenile Sentencing, Priorities and Trends: Fear of Crime - Fear of Youngsters - Juvenile Delinquency and the Development of Criminal Policy towards Young Offenders

Herr Bernd-Rüdiger Sonnen (Professor in Criminal Law and Criminology, University of Hamburg, Germany)

We frequently perceive teenagers as dangerous, inclined to commit violence, and criminal. Juvenile delinquency is often equated with delinquency in general. Fear of crime - which assumes unrealistic and outsized proportions anyway - ultimately turns into gear of youngsters. However, it is our society's children and adolescents who turn delinquent. The author, who is president of the DVJJ, the German Juvenile Court Association, analyses juvenile delinquency and calls for a new approach and culture in dealing with our youth.

WCC15

Some Thoughts on Children & Community Policing

Senior Constable Nick Tuatasi (New Zealand Police Force, Auckland)

This transcript of Police Officer Tuatasi's entertaining and informative presentation is difficult to summarize but well worth reading.

WCC16

The Role of the Department of Community Services with particular reference to Juvenile Justice in Victoria

The Hon. Bronwyn Pike, MP (Minister for Community Services and Housing, Victoria)

The Victorian system of juvenile justice for people aged 10 to 16 is distinguished from other Australian jurisdictions by its emphasis on diversion and our orientation toward rehabilitation. Increasingly, Victoria is also focusing on restorative justice. During the year 2000, Victoria had the lowest per capita incarceration rate of young people aged 10 to 17 years among Australian States and Territories. The Victorian rate of 10.9 per 100,000 of the population is less than a third of the national average rate of 29.8. For slightly older offenders, aged 17-20, Victoria is also unique in that it has a 'dual track' custodial sentencing option.

WCC17

Children's Participation in the Inquisitorial System

Judge Herlinde Van de Wynckel (Juvenile Court, Belgium)

This paper summarises how the inquisitorial system works in Belgium and discusses minors as parties in legal proceedings under 3 heads:

1. Juvenile law, encompassing juvenile delinquency and child protection.
2. Civil proceedings.
3. Criminal proceedings against adults with minors as victims.

WCC18

Child Victim Assistance Project

Vered Windman (Israel National Council for the Child)

Child victims, especially victims of violent and sex crimes, encounter distinct difficulties upon entering the legal system. These difficulties may include: lack of acquaintance with the investigative and judicial authorities, a long procedure, lack of standing in the process, running into suspects and accused or an encounter with a large number of authorities throughout the ordeal.

The legal system in Israel, as elsewhere, is geared for adults. However, victims are not considered a party within it. Children therefore find themselves dealing with an unfamiliar, stressful process of which they do not know the stages, rules, timetables or language. Understanding these difficulties and the child victims' need for support and assistance throughout the process, the Israel National Council for the Child, the country's leading child-focussed NGO, created the Child Victim Assistance Project (CVAP). The project is the first and only one of its kind in Israel. It was established to provide an answer to the unique difficulties of child victims throughout the criminal process and this to make it more child friendly, minimising "secondary victimisation" as much as possible. The project provides child victims and their families with information, support, council, accompaniment throughout the court appearance and, under particular circumstances, representation vis-à-vis the authorities. All are provided by trained volunteers, usually law students.

Recently a study was conducted among children and families who received services from the CVAP. The study focused on the child victim's experiences, attitudes and difficulties, including their perspective on compensation, and analysed the child victims' needs in regard to existing services and in comparison to their parents' perceptions.

WCC19

Problem Solving Courts

Judge Len Edwards (President, Santa Clara County Superior Court, California, USA)

Problem Solving Courts have become integrated into many court systems in the United States of America. These courts include drug courts, homeless courts, mental health courts, domestic/family courts, teen courts, peer courts, and more. While different subject matter is addressed in many of these courts, there are similarities. Only accused/clients who meet certain criteria are eligible to participate in the court process. Most problem solving courts identify a team of professionals which meets regularly to address the administration of the court and individual cases appearing before the court. These teams usually include service providers who are experts in the resolution of the problems faced by the clients. Problem Solving Courts utilize non-traditional strategies to achieve success including both rewards and a range of punishments depending on the client's progress or lack thereof. Clients are expected to appear regularly before the court and their progress is closely monitored by team members and reported to the court. Problem Solving Courts have received significant attention from the legal community. However, rigorous evaluation of their effectiveness has not been forthcoming.

7.14 Papers on other aspects of the criminal law

Copies of the following papers on various aspects of the criminal law are held by the Court Liaison Officer at Melbourne Children's Court. Enquiries can be made by phone **8638 3300**.

CL1

Voluntariness, Intention, and the Defence of Mental Disorder: Towards a Rational Approach

Bernadette McSherry (Faculty of Law, Monash University)
Behavioural Sciences and the Law – Vol.21 581-593 (2003)

This article addresses how mental disorder may be used in common law countries to negate the requirements of voluntariness and intention in serious criminal offences as well as to provide the basis for current versions of the insanity defence. The notion that mental disorder can cause conduct to become completely involuntary or unintentional is questionable, given current thinking in the behavioural sciences. This article argues that different forms of mental disorder should be subsumed within a separate defence of mental disorder. Providing that a range of dispositional options is available, the law in this complex area would be simplified and brought into line with current psychological notions of goal-directed behaviour. © 2003 John Wiley & Sons, Ltd.

CL2

Sentencing Aboriginal Offenders in a Large City – The Toronto Gladue (Aboriginal Persons) Court

Judge Brent Knazan (Ontario Court of Justice)

This paper, given at the National Judicial Institute Aboriginal Law Seminar in Calgary in January 2003, traces the history, establishment, resources, strategies and procedures of the Toronto Gladue Court. The purpose of this specialist Court is to make s.718(2)(e) of the Criminal Code work in the way that the Supreme Court of Canada has said it should and keep Aboriginal offenders out of prison unless imprisonment is the only reasonable sanction in the circumstances.

CL3

Sexual Offences Law Reform (Victoria)

Jane Dixon (Victorian Bar)

This paper dated 17/11/2006 summarizes the legislative changes flowing from the Victorian Law Commission's *Sexual offences; Law and Procedure Final Report*. These changes – to be fully in force by 01/12/2006 – involve amendments to Crimes Act 1958 (Vic), Crimes (Criminal Trials) Act 1999 (Vic), Evidence Act 1958 (Vic) & Magistrates' Court Act 1989 (Vic).

