# **7. CRIMINAL DIVISION – GENERAL**

**[7.1 Jurisdiction of Criminal Division](#_7.1_Jurisdiction_of)**

[**7.1.1 Classification of offences**](#_7.1.1_Classification_of)

[**7.1.2 Age of ‘child’ for hearing of a charge**](#_7.1.2_Age_of)

[**7.1.3 No criminal responsibility of a child under 10**](#_7.1.3_No_criminal)

[**7.1.4 Transfer of the hearing of a charge to or from Magistrates’ Court**](#_7.1.4_Transfer_of)

**[7.1.5 Proceedings for breach of sentencing order](#_7.1.5_Breach,_variation)**

**[7.1.6 Proceedings for variation or revocation of sentencing order](#_7.1.6_Proceedings_for)**

**[7.2 General powers of arrest](#_7.2_General_powers)**

[**7.3 Victoria Police Powers to search children & adults**](#_7.3_Victoria_Police)

[**7.3.1 Personal searches of adults and children generally**](#_7.3.1_Personal_searches)

[**7.3.2 Legal analysis of police powers to search adults and children**](#_7.3.2_Legal_analysis)

[**7.3.3 Three types of personal search described**](#_7.3.3_Three_types)

[**7.3.4 Statutory police powers to search a child whether or not under arrest**](#_7.3.4_Statutory_police)

[**7.3.5 Personal searches of persons under arrest**](#_7.3.5_Personal_searches)

[**7.3.6 Personal searches of children in custodial institutions**](#_7.3.6_Personal_searches)

[**7.4 "Police Cautioning Program" as a means of diversion from court**](#_7.4_"Police_Cautioning)

**[7.5 Commencement of ordinary process – Securing attendance of child](#_7.5_Commencement_of)**

[**7.5.1 Charge-sheet**](#_7.5.1_Charge-sheet)

[**7.5.2 Time limits for filing a charge-sheet**](#_7.5.2_Time_limits)

[**7.5.3 Notice to Appear**](#_7.5.3_Notice_to)

[**7.5.4 Securing attendance of accused**](#_7.5.4_Securing_attendance)

[**7.5.5 Amendment of charge-sheet**](#_7.5.5_Amendment_of)

[**7.5.6 Venue of the Court**](#_7.5.6_Venue_of)

[**7.5.7 Criminal Division processing & output statistics (excluding CAYPINS)**](#_7.5.7_Criminal_Division)

[**7.6 Children and Young Persons Infringement Notice System (CAYPINS)**](#_7.6_Children_and)

[**7.7 Youth and adult offending statistics**](#_7.7_Youth_and)

[**7.7.1 Youth and adult offending in 2008/09, 2009/10 & 2010/11**](#_7.7.1_Youth_and)

[**7.7.2 Youth offending from 2008/09 to 2020/21**](#_7.7.2_Youth_offending)

[**7.7.3 Aboriginal and Torres Strait Islander young people—YJ trends since 2017**](#_7.7.3_Aboriginal_and)

[**7.7.4 Criminal Division statistics involving children aged 10-13 inclusive**](#_7.7.3_Youth_offending)

[**7.8 Warrant to arrest for failing to appear (Bench warrant)**](#_7.8_Warrant_to)

**[7.9 Representation of children in the Criminal Division of the Court](#_7.9_Representation_of)**

[**7.10 Referral for investigation by protective services**](#_7.10_Referral_for)

[**7.10.1 Referral re protection application investigation**](#_7.10.1_Referral_re)

[**7.10.2 Referral re therapeutic treatment application investigation**](#_7.10.2_Referral_re)

[**7.10.3 Report of investigation**](#_7.10.3_Report_of)

[**7.10.4 Report on outcome of application**](#_7.10.4_Report_on)

[**7.10.5 Pre-sentence report**](#_7.10.5_Pre-sentence_report)

[**7.11 The Children’s Koori Court (Criminal Division)**](#_7.11_The_Children’s)

[**7.11.1 Jurisdiction & powers**](#_7.11.1_Jurisdiction_&)

[**7.11.2 Procedure**](#_7.11.2_Procedure)

[**7.11.3 Sentencing procedure**](#_7.11.3_Sentencing_Procedure)

[**7.11.4 Sitting times and locations**](#_7.11.4_Sitting_times)

[**7.11.5 Case law**](#_7.11.5_Case_law)

[**7.11.6 Children’s Koori Court Statistics**](#_7.11.6_Statistics)

[**7.12 Cases on selected offences**](#_7.12_Cases_on)

[**7.12.1 Offensive behaviour**](#_7.12.1_Offensive_behaviour)

[**7.12.2 Insulting words in a public place**](#_7.12.2_Insulting_words)

[**7.12.3 Arson**](#_7.12.3_Arson)

[**7.12.4 Sexual touching**](#_7.12.4_Sexual_touching)

[**7.12.5 Dangerous driving causing death/serious injury**](#_7.12.5_Dangerous_driving)

[**7.12.6 Committing an act that outrages public decency**](#_7.12.6_Committing_an)

[**7.13 ‘Crossover kids’ & impact of a child’s mental development on offending**](#_7.13_‘Crossover_kids’)

## **UNLESS INDICATED OTHERWISE, ALL LEGISLATION REFERRED TO IS VICTORIAN.**

## **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* [No.96/2005] ['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'):

➊ murder;

➋ attempted murder;

➌ manslaughter;

➍ child homicide;

➎ homicide by firearm;

➏ arson causing death [s.197A of the *Crimes Act 1958*];

➐ 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* & the *Road Safety Act 1989*.

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*.

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* [as amended] are defined as indictable offences;
* s.91 of the *Crimes Act 1958* 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* 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* [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, subsection (1) applies even if only one of those ways is referred to in that subsection.

### **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* [‘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.

On 18/03/2021 the leader of the Victorian Greens introduced into the Legislative Council the *Children, Youth and Families (Raise the Age) Amendment Bill 2021* whose purpose is to raise the age of criminal responsibility from 10 years to 14 years. That Bill lapsed on 01/11/2022.

### **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:

1. the age of the accused;
2. the nature and circumstances of the alleged offence;
3. the stage of the proceeding;
4. whether the accused is the subject of another proceeding in another court;
5. any delay in the hearing of the charge and the reason for the delay;
6. whether the sentencing orders available to the Court are appropriate;
7. whether the accused prefers the charge to be heard in the Children’s Court or the Magistrates’ Court;
8. 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 Proceedings for breach of sentencing order**

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.

The starting point for a proceeding for breach of a sentencing order is the Children’s Court. Sections 423(2) to 423(4) of the CYFA provide-

“(2) A proceeding for breach of a sentence must be commenced in the Children’s Court-

(a) whether the sentence was imposed by the Children’s Court or by the Supreme Court or the County Court, on appeal or otherwise; and

(b) whether the person against whom the proceeding is commenced is aged 19 years or more.

(3) If the proceeding for breach of a sentence is against a child who is under the age of 19 years when the proceeding for breach is commenced, the Children’s Court must hear and determine the proceeding unless-

(a) the sentence was imposed by the Supreme Court or the County Court and the child does not consent to the Children’s Court hearing the proceeding for breach; or

(b) the Court considers that in all the circumstances of the case it is appropriate to transfer the proceeding to the court that imposed the sentence.

(4) If the proceeding for breach of a sentence is against a person who is aged 19 years or more when the proceeding for breach is commenced, the Children’s Court must transfer the proceeding (other than a proceeding for breach of an accountable undertaking) to the Magistrates’ Court or to the court that imposed the sentence unless the Children’s Court considers that in all the circumstances of the case it is appropriate for the Children’s Court to hear and determine the proceeding, having regard to the matters referred to in subsection (5).”

It is clear that the intention of s.423 is that there should be no age restriction on the commencement of breach proceedings in the Children’s Court against a person who has been placed on a sentencing order made under 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.392-3 [breach of YSO] & s.408 [breach of YAO], all of which now use the word “person” rather than the word “child”. Provisions for breach of YCO in s.409Q are under the heading “Revocation of youth control order”.

### **7.1.6 Proceedings for variation or revocation of sentencing order**

It appears that proceedings for variation or revocation of a sentencing order are commenced and heard in the Children’s Court irrespective of the age of the person at the time the proceeding was commenced or whether the order was imposed by the Children’s Court or by the Supreme Court or the County Court.

Pursuant to s.421 of the CYFA the Secretary DJCS or a person in respect of whom a probation order or a youth supervision order is in force may apply to the Children’s Court for a variation or revocation of the order.

Pursuant to s.409 the Secretary DJCS or a person in respect of whom a youth attendance order is in force may apply to the Children’s Court for a variation or revocation of the order.

Pursuant to s.409N the Children’s Court may vary a youth control order in respect of a child from time to time on its own motion or upon application by the child or the Secretary DJCS if the Court considers it is appropriate to do so.

Perhaps curiously, the provisions for breach of a youth control order – which are contained in s.409Q – are under the heading “Revocation of youth control order”.

## **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?**

1. 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:
   1. assault (*Slaveski v State of Victoria & Ors* [2010] VSC 441); and
   2. false Imprisonment (*Biddle v State of Victoria & Ors* [2015] VSC 275).

General powers of arrest without warrant (s.458)

1. 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))**

1. This first situation applies where:
   1. a person (including a police officer) found the other person committing an indictable or summary offence; or
   2. a person (including a police officer) believed on reasonable grounds that apprehension was necessary for one or more of the prescribed reasons.
2. 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).
3. “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).
4. Section 462 extends the point of discovery of the commission of the offence to encompass:
   1. the actual perpetration of the offence;
   2. finding a person behaving or conducting him or herself so as to create a reasonable belief of guilt; or
   3. 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).
5. The prescribed reasons are:
6. 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))**

1. 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))**

1. The third situation under s458 applies where a person (including a police officer) believed on reasonable grounds that the other person was:
   1. escaping from legal custody; or
   2. aiding and abetting another person to escape from legal custody; or
   3. avoiding apprehension by some person with authority to apprehend the person.

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

1. A person who has been apprehended under s458 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)

1. 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-
   1. an indictable offence in Victoria; or
   2. an offence elsewhere which would be an indictable offence in Victoria.
2. 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)).
3. 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)).
4. 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**

1. 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).
2. 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).
3. 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).
4. 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.
5. 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**

1. **“**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).
2. 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**

1. 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.
2. The force used must not be disproportionate to the objective that the person believed on reasonable grounds to be necessary.
3. Section 462A of the *Crimes Act 1958* 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).
4. 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).
5. 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).
6. The level of force that is reasonable is to be determined objectively.

**Arrest with Warrant**

1. 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).
2. 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**

1. 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).
2. These procedural requirements are:
   1. The other person was deprived of his or her liberty;
   2. The arrester informed the other person that he or she was under arrest; and
   3. The arrester informed the other person of the reason for the arrest.

**Deprivation of Liberty**

1. 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).
2. There will be a sufficient deprivation of liberty if the other person submits to the arrester’s control after the arrester has indicated his or her intention to effect the arrest (*Slaveski v State of Victoria & Ors* [2010] VSC 441).
3. 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

1. 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).
2. 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).
3. 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

1. 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).
2. 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).
3. An arrest for the mere purpose of questioning is unlawful (*Bales v Parmenter* (1935) SR (NSW) 182).
4. The reason for arrest does not need to be communicated using technical or precise language (*Christie v Leachinsky* [1947] AC 573).
5. 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).

1. 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).
2. 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).

## **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*](https://www.gotocourt.com.au/criminal-law/vic/search-warrants/)*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.legalaid.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*](https://www.legalaid.vic.gov.au/find-legal-answers/legal-glossary#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*](https://www.legalaid.vic.gov.au/find-legal-answers/legal-glossary#guardian)*or independent person must be with you*
* *you have a*[*cognitive disability*](https://www.legalaid.vic.gov.au/find-legal-answers/police-powers-and-your-rights/being-arrested/police-procedure-if-you-have-cognitive-disability)*or a mental illness – an*[*Independent Third Person*](https://www.legalaid.vic.gov.au/find-legal-answers/legal-glossary#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*](https://www.legalaid.vic.gov.au/find-legal-answers/legal-glossary#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.**

1. 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].
2. 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?**

1. **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]).**
2. **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)).**
3. **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)).**
4. 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]).
5. **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**

1. **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).**
2. **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**

1. **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.**
2. 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])
3. 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]).
4. Section 82 is not restricted to circumstances in which a warrant cannot be acquired under s 81: see s.81(7).
5. 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]).
6. 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).
7. 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**

1. **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).**
2. 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]).
3. **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).**
4. **However, recent Victorian judgments have entertained discussions that suggest that the law may be straying from this approach.**
5. **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]).**
6. 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:
   1. 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.
   2. Officers must believe on reasonable grounds that the articles to be seized constitute material evidence to prove the commission of the serious offence.
   3. The person in possession of the article being seized must be someone whom the officers believe on reasonable grounds is implicated in the crime.
   4. 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.
   5. 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).
7. These principles represent the outer limits of police powers of seizure considered in the United Kingdom and do not permit police offers 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).
8. 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).
9. 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* 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***

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***

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-

1. 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
2. relevant evidence is likely to be lost or destroyed if a search is delayed until a search warrant is obtained; and
3. 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***

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-

1. a search of the person or thing has been conducted under clause 4 or 5; and
2. the police officer reasonably suspects that the person has a weapon concealed on his or her person; and
3. 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-

1. a parent or guardian of the child being searched; or
2. 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***

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*
* *Terrorism (Community Protection) Act 2003*.

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***

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—*

* + 1. *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;*
    2. ***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;***
    3. *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;*
    4. *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;*
    5. *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;*
    6. *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 and Corrections Act 1986***

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-
  + 1. in the interests of the security or good order of the facility; or
    2. 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:

1. they are entitled to be kept separate from adults who are detained there;
2. they are entitled to be kept separate according to their sex;
3. 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;
4. 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;
5. 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;
6. 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 Program" 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. A caution can only be given if the child admits to having committed the offence and the child and a parent or guardian both consent.

There is no specific legislative basis for the police cautioning programme but details of it are contained in the Victoria Police Manual: 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.

Whether police will offer a caution depends on factors like the seriousness of the offence(s), the child’s and the victim’s circumstances, how much damage or injury the child caused and whether a caution would act as a deterrent to the child. 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. 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 **Part 10.8** of these materials.

After a caution has been given, no charge for the offence can be filed in court. 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.

Victoria Police statistics for the numbers of cautions issued to juvenile offenders in 2010/11 & 2008/09 are shown in the table below. They do not include cautions issued for traffic or transit offences.

In June 2021 a Parliamentary Inquiry into Victoria’s criminal justice system was told: “Police are using diversion options less over time, bringing more people further into the criminal justice system. The proportion of young offenders given a caution or warning by police has been steadily decreasing over the past 10 years from 37% in 2010/11 to 20% in 2019/20”. In its report dated March 2022 the Inquiry found: “Victoria Police’s use of cautions for both children and adults has declined over the past decade and remains inconsistent across the community. Young Aboriginal people and young people in lower socio-economic communities are less likely to receive a caution – as opposed to a charge – than other Victorians.”

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **CAUTIONS ISSUED TO JUVENILE CRIMINAL OFFENDERS** | | | | | | |
| **2008/09** | | |  | **2010/11** | | |
| **Total Offences** | **Cautions** | **Offence** | | | **Cautions** | **Total Offences** |
| 17 | 1 | **Homicide** | | | 0 | 7 |
| 76 | 0 | **Rape** | | | 0 | 81 |
| 422 | 23 | **Sex (non rape)** | | | 13 | 291 |
| 1204 | 36 | **Robbery** | | | 30 | 1056 |
| 4671 | 672 | **Assault** | | | 609 | 4523 |
| 39 | 0 | **Abduction/Kidnap** | | | 0 | 42 |
| 441 | 154 | **Arson** | | | 76 | 295 |
| 5839 | 1411 | **Property Damage** | | | 1148 | 4083 |
| 181 | 3 | **Aggravated Burglary** | | | 6 | 181 |
| 3694 | 876 | **Burglary** | | | 651 | 2703 |
| 506 | 96 | **Deception** | | | 37 | 326 |
| 707 | 633 | **Handle Stolen Goods** | | | 51 | 542 |
| 1905 | 244 | **Theft from M/Vehicle** | | | 206 | 1875 |
| 5818 | 3580 | **Theft (Shop Steal)** | | | 2793 | 4803 |
| 2230 | 251 | **Theft of M/Vehicle** | | | 167 | 1577 |
| 2226 | 633 | **Theft (other)** | | | 512 | 1885 |
| 90 | 14 | **Drugs-Cult. Manuf. Traff.** | | | 11 | 76 |
| 608 | 281 | **Drugs-Possess, Use** | | | 375 | 698 |
| 93 | 8 | **Going Equip to Steal** | | | 4 | 63 |
| 1057 | 72 | **Justice Procedures** | | | 94 | 1069 |
| 1202 | 345 | **Regulated Public Order** | | | 181 | 568 |
| 904 | 257 | **Weapons/Explosives** | | | 151 | 660 |
| 78 | 19 | **Harassment** | | | 27 | 86 |
| 599 | 93 | **Behaviour in Public** | | | 97 | 469 |
| 1317 | 547 | **Other** | | | 399 | 1015 |
| **35924** | **9679** | **TOTAL** | | | **7632** | **28793** |

In July 2021 the Victorian Crime Statistics Agency released the results of some research into the use of police cautions for youth in Victoria. The research found that 56% of the study cohort received a caution and the remaining 44% were charged by police. In the following 12 months 36% of young people who received a caution reoffended, compared with 48% of those who were formally charged by police. After 12 months half the young people who were charged by police were recorded for 5 or more further offences, while only one-third of those who were cautioned reoffended with the same intensity. The research also found that charged young people were more likely to commit all offence types within the 12 month-follow-up period than young people who received a caution. The largest differences were recorded in the reoffending rates of theft, property damage and assault offences, which were up to 56% higher for charged young people compared with cautioned young people.

In *The Cautious Approach: Police cautions and the impact on youth reoffending* (September 2017) Kimberley Shirley referred to studies which had found that the Police Cautioning Program provided benefits both to the cautioned child and to the community generally:

“The use of police cautions has been associated with several potential benefits to both the individual cautioned and the justice system (Cunningham, 2007; Jordan & Farrell, 2013). Cautions are used as a method of serving a formal warning to the juvenile about their behaviour while avoiding the stigma associated with going to court. Reductions in criminal justice costs and time have also been attributed to the use of cautions, making them an attractive policy option (Dennison et al. 2006; Jordan & Farrell, 2013). Studies examining the use of police cautions have found that they have a more positive impact on reoffending compared to more formal criminal justice processes, such as charge or summons.”

See https://files.crimestatistics,vic.gov.au/2021-07/20170925\_in%brief9%20FINAL.pdf.

In the light of this consistent objective evidence of the benefits of early cautioning, it is unfortunate that the rate of police cautioning in Victoria has declined in the last decade.

### **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-

1. by filing a charge-sheet containing a charge with a registrar of the Children’s Court; or
2. 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
3. if a summons is issued under s.14, at the time the charge-sheet is signed.

Although the overwhelming majority of charge-sheets are filed by police, s.6(1) is broad enough to permit a person to commence a private criminal prosecution against another person. In that rare event s.22(1)(b)(ii) of the *Public Prosecutions Act 1994* (Vic) gives the Director of Public Prosecutions a discretion to take over and conduct any proceedings in respect of any summary or indictable offence. See *Harkness v Banks* [2023] VSC 588 for a discussion whether that discretion is amenable to judicial review.

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* are taken to have been met.

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

1. be in writing; and
2. be signed by the informant personally; and
3. 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 negatived 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* [‘VPA’]: “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-

* 1. state the offence that the accused is alleged to have committed; and
  2. 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.”

In *DPP v Lamb* [2021] VSC 615 the drafter of four charges of unauthorised disclosure of police information put the word “not” in the wrong place. Instead of alleging in each charge that the accused was “under a duty not to disclose” the relevant information, the charge stated that the accused was “not under a duty to disclose” the information. The drafter’s mistake was an obvious one having regard to the terms of the relevant statutory provision — s 227 of the VPA — to which the charge-sheets correctly referred. At [36] Beale J held “there is much force in the plaintiff’s submission that the first defendant’s interpretation of the charges ‘is an example of someone striving conscientiously to fail to understand the information in the charge’”. Accordingly his Honour concluded at [37] that the “magistrate erred in finding that the charges were invalid for failing to disclose an offence known to the law.” His Honour was satisfied that the particulars of the charges were sufficient.

### **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-

* 1. otherwise provided by or under any other Act; or
  2. 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* 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-

1. a summons to answer the charge directed towards the accused; or
2. a warrant to arrest in order to compel the attendance of the accused.

However, an application for summons or warrant may be made at the same time the charge-sheet is filed: see *Fiore v Magistrates’ Court of Victoria* [2020] VSC 92 at [113] per Niall J:

“Section 6(1) of the CPA provides that a criminal proceeding is commenced by filing a charge-sheet containing a charge with the registrar of the Magistrates’ Court. In allowing for an application to be made ‘on the filing a charge-sheet’, the language of s 12(1) permits an application to be made at the same time as a charge-sheet is filed.”

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 *Dawson v Magistrates' Court of Victoria & Anor.* [2003] VSC 336 at [9]-[11] per Warren J. and cases cited therein; *DPP v Diamond* [2004] VSC 35 per Kaye J. |
| 16, 17(1) & 391 | Personal service of summons. The requirements in predecessor to s.16 were mandatory: see *Platz v Barmby* [2002] VSC 531 at [9] per Byrne J; *Nitz v Evans* (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 *DPP v Fodero* [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* as to service by post. See the *Electronic Transactions (Victoria) Act 2000* 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-

1. the charge-sheet before the amendment sufficiently disclosed the nature of the offence; and
2. the amendment does not amount to the commencement of a proceeding for a new offence; and
3. the amendment will not cause injustice to the accused.”

In *Kuksal v Mioch* [2023] VSC 624 at [48] Ginnane J – citing as an example the High Court’s judgment in *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135 – confirmed that “Charge sheets can be amended during the course of a prosecution”. Accordingly, his Honour held that “the Magistrates’ Court was not required to determine, at the commencement of the hearing, whether the charge sheet was a nullity or defective because it did not allege a jurisdictional fact which was said to be an element of the charge. If the Court considered it appropriate to do so, it could postpone answering that question until after the evidence had been led or tendered.”

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."

Section 8 CPA is partly based on s.50 *Magistrates’ Court Act 1989*. In *DPP v Kypri* (2011) 33 VR 157; [2011] VSCA 257 the Court of Appeal (Nettle, Ashley & Tate JJA) said at [24] in relation to s.50:

“A charge which lacks an essential element of the alleged offence is defective and, at common law, may be described as a nullity. If, however, the true nature of the offence is apparent from the face of the charge, and the defendant has not been misled or otherwise prejudiced by the omission, the charge may be amended under s 50 (even out of time) to include the missing element – *Broome v Chenoweth* (1946) 73 CLR 583, 601 (Dixon J); *DPP Reference No 2 of 2001*; *Collicoat v DPP* (2001) 4 VR 55, 58–59 [12], 68 [40] – on the basis that such an amendment does no more than clarify what is already apparent from the face of the charge.”

In *Fazal v Beauchamp & Anor* [2021] VSCA 103, the Court of Appeal refused to grant leave to appeal a decision of Beale J upholding an order of a County Court judge to amend a charge under s.49(1)(e) of the *Road Safety Act 1986*. Holding at [28] that the applicant’s construction was without merit and the ground was not arguable, McLeish, Niall & Kennedy JJA stated:

[18] “Starting with the text, it is clear that [s 8(1)](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/cpa2009188/s8.html) confers a broad power of amendment. An amendment to a charge-sheet may be made ‘at any time’ and ‘in any manner’ thought necessary. Further, the amendment permitted by [s 8](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/cpa2009188/s8.html) is to the charge-sheet and not to a charge. Self-evidently, an amendment to a charge-sheet may involve amendment to an existing charge, but would also allow the addition of a charge without any alteration to existing charges contained on the charge-sheet. The ability to add an additional charge is made explicit by the terms of [s 8(3)](http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/cpa2009188/s8.html) which is predicated on an amendment that has the effect of charging a new offence. The CPA allows for multiple charges on the same charge-sheet.”

[22] “Section 8(3), and the use of the phrase ‘new offence’, arises in a particular context and is designed to prevent an amendment that would infringe a limitation period. The phrase ‘new offence’ is used to distinguish between an amendment to a charge already on the charge-sheet, including an amendment that overcomes a defect in the formulation of an existing charge, and an amendment that introduces a new offence. The phrase ‘new offence’ does not carry with it any general limitation on the scope of the power to amend in s 8(1) and merely informs the exercise of the power in the context of limitation periods.”

In *DPP v Lamb* [2021] VSC 615 Beale J had held that the impugned charges were valid [see 7.5.1 above]. However, his Honour went on to discuss whether they could be amended had he held them to be invalid notwithstanding that the limitation period had expired. At [53] his Honour held that “applying *Kypri* (2011) 33 VR 157; [2011] VSCA 257, if there was evidence which satisfied the learned magistrate that, prior to the expiration of the limitation period, the prosecution made it clear to the accused in writing that it was alleged that he had breached a duty not to disclose the police information, it would have been open to the court to find that s.8(4)(a) of the CPA was satisfied.” In so holding, Beale J expressly disagreed with the reasoning of Ginnane J in *Glenister v Baiada Poultry Pty Ltd* [2014] VSC 265 and the reasoning of Zammit J in *Walters* [2015] VSC 88, concluding at [66]:

“Relying on *Kypri*, I consider the notion that ‘there is no real difference between the test for validity and the test for amendment’ to be plainly wrong but that is the gist of both *Glenister* and *Walters*.”

In the jointly heard *Appeals of Fox, Bant & Nunn* [2022] VSCA 38 the Court of Appeal (Kennedy, Walker & Whelan JJA) granted leave to appeal but dismissed each of the appeals against judgments of Beale J & Richards J which involved similar but not identical issues concerning the adequacy of a charge for a summary offence laid under the *Criminal Procedure Act 2009 [CPA]*:

*Fox v DPP* [2021] VSC 226: A speeding charge stated the date but did not state the time of day of the alleged offence. It also misstated the place of the offence. A magistrate had held that the charge was invalid. Beale J held that the charge was valid and capable of amendment in relation to the place of the offence notwithstanding that it was more than 12 months after the alleged offence.

*Bant v Grant* [2021] VSC 276: A speeding charge misstated the place of the offence as ‘Princes Hwy Camperdown between Rowans Rd & Jubilee Park Rd’ rather than ‘Princes Hwy Allansford between Rowans Lane and Jubilee Park Rd’. It also did not state the time of day or the description of the vehicle other than stating the registration number. More than 12 months after the alleged offence a magistrate had given leave to amend the charge in the manner sought by the prosecution and had ruled with written reasons that the charge as amended was valid. Richards J held that the arguments pressed on behalf of Mr Bant were without merit, stating:

* The charge-sheet before amendment sufficiently described the nature of the offence.
* The amendment did not have the effect of charging a new offence.
* The time of day was not an essential element of the offence.

*Nunn v Pezzimenti* [2021] VSC 313: In two related drug driving offences the drug was not named. The second charge also contained the duplicitous words ‘or in charge of’. The magistrate found both charges valid but amended both by including the name of the drug (methylamphetamine) and deleting the words ‘or in charge of’ from the second charge. Beale J held that the magistrate had the power to amend the charges after the expiration of the amendment period.

In upholding the validity of each of the impugned amendments and dismissing each of the appeals the Court of Appeal applied dicta of the Court of Appeal in *Baiada Poultry Pty Ltd v Glenister* [2015] VSCA 344, discussed with approval the judgment of Nettle JA in *DPP v* *Kypri* (2011) 33 VR 157; [2011] VSCA 257 and “respectfully disagreed” with the judgment of Ginnane J in *Glenister v Magistrates’ Court of Victoria* [2014] VSC 265. At [73]-[74] the Court of Appeal summarised its conclusions on the adequacy of the charge-sheet and charge and on the amendment issue as follows:

[73] “…[S]ome of the questions concerning the interpretation of the provisions of the *CPA*, and the interaction of those provisions with one another, are complex. However, in light of the above discussion, we can summarise our conclusions as follows:

(a) Filing a charge-sheet confers jurisdiction on the Magistrates’ Court to hear and determine the charges on the charge-sheet.

(b) A charge-sheet must comply with sch 1 of the *CPA*: s [6(3)(c)](https://jade.io/article/281812/section/246337). However, a charge-sheet that does not comply with sch 1 is not invalid simply by reason of that failure: s 9(1).

(c) Clause 1(b) of sch 1 supplies a statutory test for determining the adequacy of the particulars furnished as part of the charge: that it provides the particulars ‘necessary’ to provide ‘reasonable information’ about the ‘nature of the charge’. The common law informs the content of that statutory test. It is not necessary, in order to comply with cl 1(b), for the charge to set out all the matters that the prosecution may need to prove at trial.

(d) A charge-sheet may contain an error and yet comply with cl 1 of sch 1. In such a case, a magistrate would have jurisdiction to hear and determine the charge without amendment. However, if an error of this kind is identified, it would usually be preferable for the charge-sheet to be amended to correct the error.

(e) Where a charge-sheet or a charge fails to comply with cl 1 of sch [1](https://jade.io/article/281812/section/32), it may be able to be amended pursuant to s 8 of the *CPA*, subject to the limitations found in that section.

(f) A charge-sheet may be amended under s 8 of the *CPA*even if the charge fails to include an essential element of the offence or otherwise fails to disclose an offence known to law. More generally, the fact that a charge may have been invalid at common law does not mean that it cannot be amended under s 8 of the *CPA*.  However, such a charge would be ineffective unless amended.

(g) If the limitation period for the offence has not expired, the power of amendment is broad, but constrained by the requirement to ensure that there is no injustice to the accused: s 8(1). In those circumstances a charge-sheet can be amended in such a manner as to add a new charge.

(h) If the limitation period for the offence has expired, there are greater constraints on the power to amend, namely:

(i) The unamended charge must sufficiently disclose the nature of the offence: s 8(4)(a). This is different from, and broader than, the requirements in cl 1 of sch 1 concerning the statement of the offence and the provision of reasonable information concerning the charge. The fact that a charge does not comply with cl 1 of sch 1 does not mean that the charge necessarily fails to sufficiently disclose the nature of the offence.

(ii) The amendment cannot amount to the commencement of a proceeding for a new offence: ss 8(3) and 8(4)(b). An amendment that cures a defect that would have caused a charge to be invalid at common law does not necessarily involve the commencement of a proceeding for a new offence. The fact that an amendment cures a failure to comply with cl 1 of sch 1 does not necessarily mean that it involves a proceeding of that kind. Whether an amendment amounts to the commencement of a proceeding for a new offence is a case-specific inquiry, and will require consideration of the particular offence initially alleged, compared with the offence alleged after the amendment.

(iii) The amendment cannot cause injustice to the accused: s 8(4)(c). Whether an amendment causes injustice to an accused will be a question of fact in each case.

1. A magistrate has a duty to consider whether to amend a charge-sheet even if no application is made to amend, and a power to amend the charge-sheet on his or her own motion. Even where no application to amend has been made, if the power to amend is available then the prosecution ought to assist the magistrate in formulating an appropriate amendment.
2. If a charge is ineffective and an amendment cannot be, or is not, made under s 8 then the charge should be dismissed.

[74] We also wish to emphasise that, when confronted with an argument that a charge or a charge-sheet is invalid, or should be dismissed because it fails to comply with cl 1(b) of sch 1, it will often be the case that the first step that a magistrate should take is to consider whether the issue that has been taken with the charge or charge-sheet can be addressed by amendment. It is only if the issue cannot be addressed by amendment that it would be appropriate for a magistrate to dismiss or strike out the charges (assuming the complaint about the charge has merit).”

See also *DPP Reference No 2 of 2001* (2001) 4 VR 55; [2001] VSCA 114; *John L Pty Ltd v Attorney General (N.S.W.)* (1987) 163 CLR 508; *Johnson v Miller* (1937) 59 CLR 467; *Southgate Management Pty Ltd v Nitschke* [2018] VSC 236; *Wells v Stillman & Anor* [2020] VSC 51; *DPP v Fogarty* [2021] VSC 392; *Whedlock v Flaws* [2022] VSC 359.

### **7.5.6 Venue of the Court**

Section 505 of the CYFA provides that the Court may sit at any time and place.

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:

(i) the place of residence of the child; or

(ii) the place where the offence is alleged to have been committed.

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

Section 505A(1) provides that without limiting s.505, the Court may order that a hearing be held at an appropriate place that is not the “proper venue” for the hearing if the Court considers that-

1. for any reason it is appropriate that the hearing not be held at the proper venue; and
2. it is in the interests of justice that the hearing not be held at the proper venue.

Section 505A(2) provides that in determining an appropriate place to hold a hearing, the Court must first have regard to-

1. places closest to the proper venue for the hearing; and
2. the views of the parties to the proceeding.

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.

### **7.5.7 Criminal Division processing & output statistics (excluding CAYPINS)**

**Table 1A** shows the total number of criminal charges (excluding the Children and Young Persons Infringement Notice System) initiated, finalised and pending in the Children’s Court Criminal Division for each of the financial years from 2013/14 to 2022/23.

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **TABLE 1A – CRIMINAL DIVISION MATTERS (excluding CAYPINS)** | | | | | |
|  | **2013/14** | **2014/15** | **2015/16** | **2016/17** | **2017/18** |
| **Initiations** | **9678** | **10217** | **10014** | **10477** | **9277** |
| **Finalisations** | **10839** | **11728** | **11555** | **12201** | **9530** |
| **Pending** | **2311** | **2389** | **2452** | **2573** | **1914** |
|  | **2018/19** | **2019/20** | **2020/21** | **2021/22** | **2022/23** |
| **Initiations** | **9339** | **10154** | **7715** | **6683** | **7458** |
| **Finalisations** | **9230** | **8142** | **7708** | **8444** | **8197** |
| **Pending** | **2400** | **4512** | **4410** | **3085** | **2798** |

There was an overall 9% increase in initiations from 2018/19 to 2019/20. This was followed by a decrease of 24% in 2020/21, a further decrease of 13% in 2021/22 and an increase of 12% in 2022/23. The writer wonders whether a factor contributing to the decline in the overall rate of charges initiated against youth in 2020/21 & 2021/22 was the COVID-19 pandemic. However, the number of initiations in 2022/23 is still 27% lower than the number in 2019/20.

The writer also speculates that the lockdowns associated with the COVID-19 pandemic may have contributed to the increase in the number of pending cases in 2019/20 & 2020/21. But in any event, in 2021/22 & 2022/23 there has been a significant decline in the number of pending charges: a reduction of 30% in 2021/22 and a further reduction of 9% in 2022/23.

**Table 1B** shows the total number of criminal matters (excluding CAYPINS) which were initiated, finalised and pending in each of the 13 Court regions for the years 2018/19, 2019/20 & 2020/21. In the 2020/21 financial year 50% of criminal matters were processed within 3 months of initiation and 24% were processed within 3-6 months of initiation.

|  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **TABLE 1B – CRIMINAL DIVISION MATTERS (excluding CAYPINS)** | | | | | | | | | |
| **Court region** | **2018/19** | | | **2019/20** | | | **2020/21** | | |
| **Initiated** | **Finalised** | **Pending** | **Initiated** | **Finalised** | **Pending** | **Initiated** | **Finalised** | **Pending** |
| Melbourne | 1605 | 1552 | 354 | 2110 | 1622 | 799 | 1698 | 1762 | 703 |
| Grampians | 440 | 466 | 84 | 445 | 314 | 198 | 280 | 365 | 108 |
| Loddon Mallee | 531 | 526 | 122 | 683 | 608 | 257 | 541 | 589 | 198 |
| Broadmeadows | 499 | 423 | 146 | 500 | 383 | 274 | 495 | 402 | 379 |
| Dandenong | 796 | 781 | 144 | 1084 | 831 | 388 | 814 | 810 | 384 |
| Frankston | 856 | 914 | 228 | 903 | 728 | 435 | 637 | 578 | 484 |
| Barwon  South West | 790 | 810 | 152 | 750 | 634 | 270 | 568 | 559 | 275 |
| Heidelberg | 737 | 661 | 207 | 733 | 617 | 331 | 484 | 560 | 269 |
| Gippsland | 764 | 730 | 247 | 682 | 596 | 334 | 505 | 493 | 327 |
| Ringwood | 858 | 876 | 234 | 932 | 791 | 376 | 614 | 667 | 306 |
| Hume | 716 | 700 | 168 | 511 | 444 | 199 | 414 | 404 | 210 |
| Sunshine | 735 | 778 | 296 | 810 | 558 | 647 | 656 | 512 | 762 |
| NJC-C’wood | 12 | 13 | 18 | 11 | 16 | 4 | 9 | 7 | 5 |
| **TOTAL** | **9339** | **9230** | **2400** | **10154** | **8142** | **4512** | **7715** | **7708** | **4410** |

**Table 2** shows the total number of final orders – both the most intensive sentencing order made in each particular case or ‘supercase’ and diversion orders – made by the Criminal Division from 2018/19 to 2022/23. As a comparison of tables 1A, 1B & 2 shows, there is a very large discrepancy between the number of matters initiated and the number of final orders made by the Criminal Division. However, the discrepancy is not indicative of error but is a consequence of different methods of measuring as is explained below.

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **TABLE 2 – FINAL ORDERS MADE** | | | | | |
|  | **2018/19** | **2019/20** | **2020/21** | **2021/22** | **2022/23** |
| **MATTERS WHERE THE MOST INTENSIVE SENTENCING ORDER IS NON-DETENTION** | **1867** | **1469** | **1094** | **1047** | **838** |
| **MATTERS WHERE THE MOST INTENSIVE SENTENCING ORDER IS YOUTH DETENTION** | **210** | **161** | **119** | **90** | **48** |
| **DIVERSION ORDER** | **1582** | **1595** | **1166** | **N/A** | **1454** |
| **TOTAL** | **3659** | **3225** | **2379** | **N/A** | **2340** |

Causes of this discrepancy include–

* Where an offender pleads guilty to one or more charges in two or more matters, the Court usually consolidates the charges into a single ‘supercase’. For instance, in 2020/21 a total of 3956 individual cases were consolidated into ‘supercases’.
* Most of the sentencing orders available in the Criminal Division can be made against multiple charges. For instance, a single undertaking, bond, probation order, youth supervision order, youth attendance order or youth control order can be made in respect of multiple proved offences in any case or ‘supercase’. And an aggregate sentence of detention can be imposed in respect of multiple proved offences in the circumstances set out in s.362B CYFA.
* Similarly, where an offender acknowledges guilt and is placed on a diversion order, a single diversion order is almost always made whether there is one proved offence or multiple proved offences.
* The statistics for final sentencing orders shown in Table 2 – and broken down in the tables shown in **section 11.7.1** of these Research Materials – are not a count of every sentencing order made in a particular case or ‘supercase’. Due to limitations of the Court’s Courtlink computer system they are counts of the most intensive sentencing order made in a particular case or ‘supercase’. So, for example, if in a particular case–
* a child was fined on some charges and placed on a youth supervision order on others, only the youth supervision order – the most intensive of the orders – is counted;
* a child was placed on a bond on some charges and placed on a youth justice centre order on another, only the youth justice centre order – the most intensive of the orders – is counted.
* Matters where the charges are dismissed or struck out or where the offender is discharged are not included in Table 2.

However, although the limitations of Table 2 and the associated broken-down statistics in **section 11.7.1** mean that they are not an exact measure of the output of the Criminal Division, the writer believes that they provide an accurate enough measure of the operation of the Division to make them worthwhile including in these Research Materials.

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## **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* 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-

(a) an offence for which an infringement notice or a penalty notice within the meaning of Schedule 3 could be issued; or

(b) 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

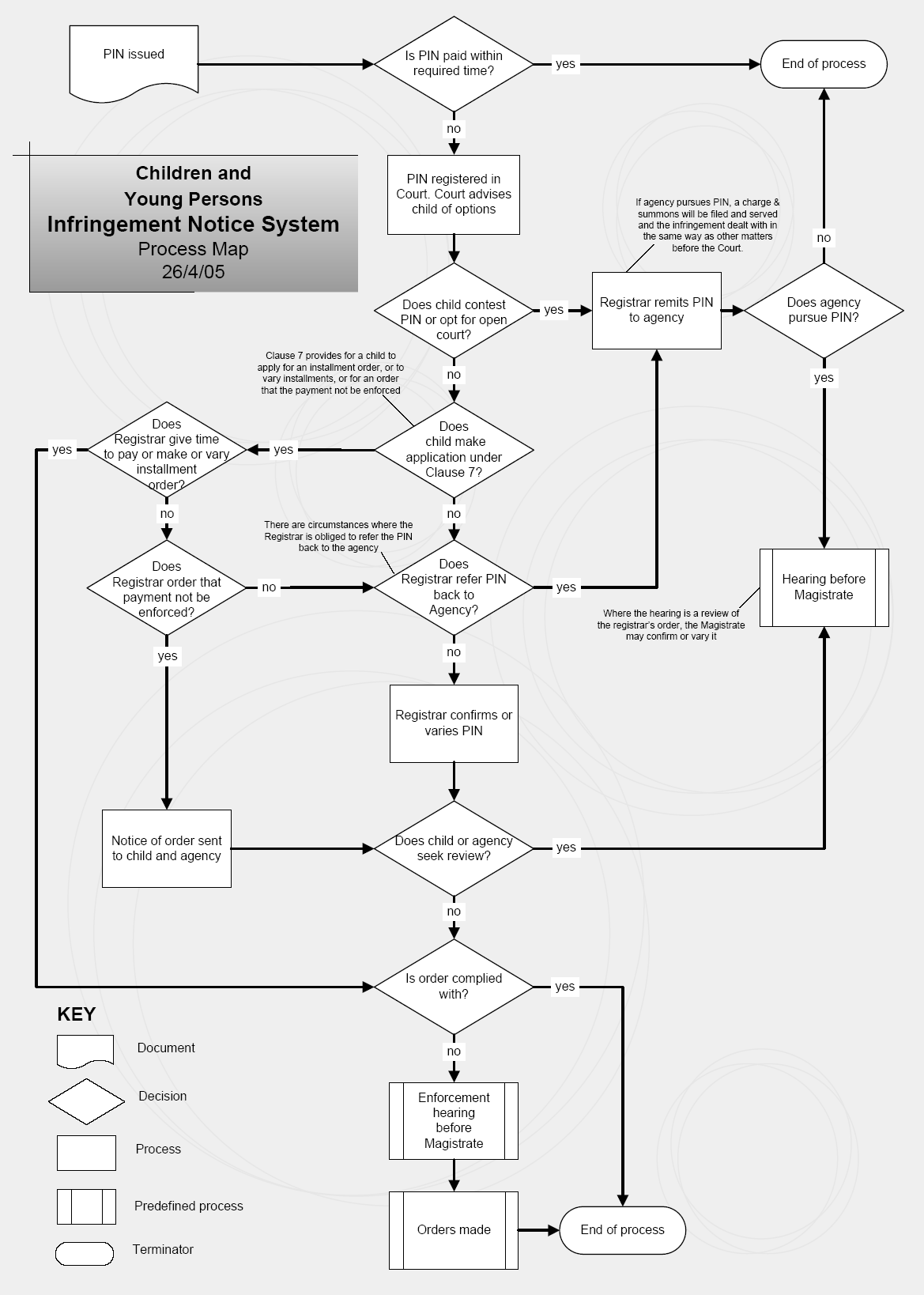
14. Application of Part 2 to penalty notices

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. Since then the numbers of finalized CAYPINS cases are as follows:

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **2009/10** | **2010/11** | **2011/12** | **2012/13** | **2013/14** | **2014/15** | **2015/16** | **2016/17** |
| 9,879 | 7,588 | 8,865 | 10,392 | 10,441 | 9,247 | 14,163 | 8,590 |
| **2017/18** | **2018/19** | **2019/20** | **2020/21** | **2021/22** |  |  |  |
| 3,787 | 2,963 | 1,955 | 1,195 | 2,196 |  |  |  |

The CAYPINS system is necessarily relatively complex, as can be seen from this “simplified” process map.



## **7.7 Youth and adult offending statistics**

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

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

Most of the statistics in this section and the commentary on the overall Victorian crime rate in these years were taken from [www.police.vic.gov.au](http://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**  ➌ | **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** | **29,1075** | **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** ➋ | **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)** ➊ | **5,892** | **5,951** | **12,333** | **13,084** | **18,340** | **19,176** | **31.0%** | **68.2%** |
| **Theft of motor vehicle** ➎ | **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)** ➍ | **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**





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”.

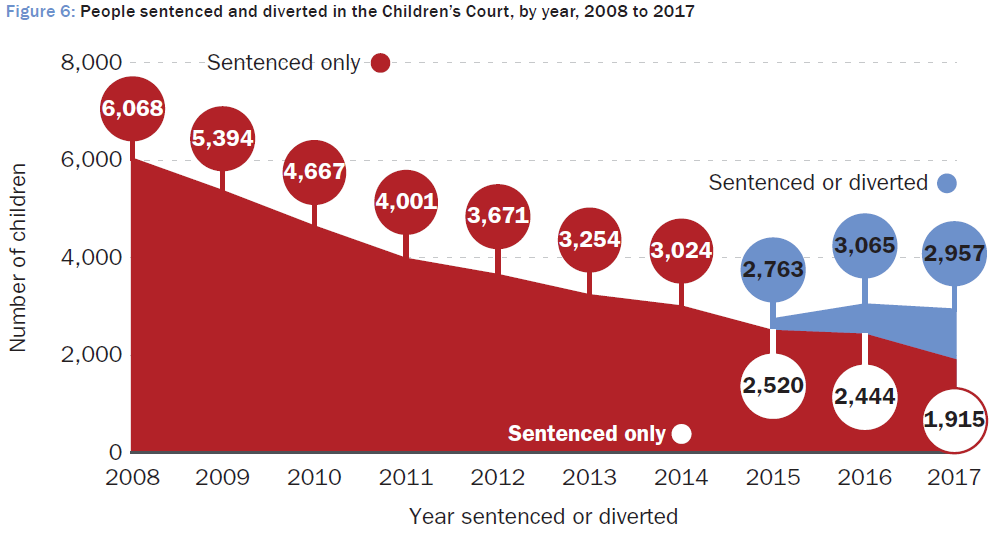
***Australian youth offender rates per 100,000 from 2008-2011***



### **7.7.2 Youth offending from 2008/09 to 2020/21**

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**



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](http://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 noteworthy that the number of alleged offender incidents recorded in the year ending March 2021 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** child offenders aged 10‑17 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 **Part 10.7**.

This reducing trend for 10-17 year old offenders continued in 2019/20 when **1,630** were sentenced and **1,170** acknowledged guilt and were placed on diversion. The reduction intensified in 2020/21 when **1,213** were sentenced and **1,166** acknowledged guilt and were placed on diversion.

This reduction of 64% in the number of children who were processed in the main-stream Criminal Division of the Children’s Court between 2008/09 and 2020/21 occurred despite an increase in the demographic of the 10-17 year old cohort in Victoria during that period.

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

A statutory review pursuant to s.492B of the CYFA of the *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (‘the *YJ Reform Act*’) and dated May 2022 (‘[the May 2022 statutory review](https://files.justice.vic.gov.au/2022-05/Youth%20Justice%20Reform%20Act%20Review%20Report%20%282022%29.pdf)’) provided at pp.16-20 the following analysis of Victorian youth justice trends from 2010:

* Between 2010 and 2015 the number of young people sentenced in the ChCV decreased by 43%.
* Over the five years to 2016/17, the number of young people under supervision on an average day fell by 22%, while the rate for those aged 10–17 fell from 16 to 13 per 10,000. At the same time, there was an increase in the number of convicted young people aged 10–17 years who were responsible for a disproportionate number of incidents of offending in the community, with increases in the number of individual young people who were responsible for multiple incidents of offending.
* In 2016 and 2017 there were a number of high-profile incidents in the community and in youth justice facilities which increased community concerns about youth crime. In July 2017, the Armytage and Ogloff Youth Justice Review reported that Victoria had the highest recorded rates of assaults in custody compared with other Australian jurisdictions. In the general community, there was also a sense of growing concern about youth crime. The Armytage and Ogloff Youth Justice Review in 2017 noted “the constant and high volume of media attention on violent crime”. However, since 2017, there has been a steady reduction in the rate of offending by children and young people in Victoria as the following charts show:

*Youth offending 2016–21 (10–17 year olds): Crimes against the person and property and deception offences*

5,000

10,000

15,000

20,000

0

Jul 2016–Jun 2017 Jul 2017–Jun 2018 Jul 2018–Jun 2019 Jul 2019–Jun 2020 Jul 2020–Jun 2021 Crimes against the person Property and deception offences

*Youth offending 2016–21 (10–17 year olds): Drug offences, public order offences, justice procedures offences and other offences*

0

500

1,000

1,500

2,000

2,500

3,000

3,500

Jul 2016

–

Jun 2017

Jul 2017

–

Jun 2018

Jul 2018

–

Jun 2019

Jul 2019

–

Jun 2020

Jul 2020

–

Jun 2021



The

start

of COVID

-

19

Pandemic

Drug Offences Public order and security offences Justice procedure offences Other offences (including breach of public health order offences introduced in 2020 in response to the COVID-19 pandemic)

* Data from the Crime Statistics Agency indicates that the rate of alleged youth offender incidents in Victoria (year ending March 2021) was 17% lower than the year ending March 2012 and 12.3% lower than the year ending March 2017.
* In addition, in 2019/20 the average number of young people in youth justice custody decreased by 8% compared with 2017/18 and 3% compared with 2018/19. The average number of young people under youth justice supervision in the community also decreased by 11% compared with 2017/18 and 3% compared with 2018/19.
* Since June 2018, there has been a gradual increase in the number of young people on remand in youth justice each year, until 2020/21 when these numbers decreased. Prior to the enactment of the YJ Reform Act, there had been a decreasing trend in the annual number of children and young people on remand. Compared with the pre-reform period of 2017/18, the number in 2018/19 increased by 12%. In 2019/20, the numbers reached a peak of 612 children and young people, jumping by 20% compared with pre-reform period of 2017/18.
* In Victoria in 2020/21, when only young people aged 10–17 are considered, about 81% of those in detention on an average day were unsentenced.
* In terms of reoffending, the number of youth recidivists has been declining since 2014, and the rate of non-recidivism increased from 14% in 2014/15 to 24% in 2018/19.

The May 2022 statutory review stated at pp.4-5 [citations removed]:

“In the year ending December 2021, Victoria had the lowest number of youth alleged offender incidents (10–17 years) in a decade, and the lowest rate per 100,000 population over the same period. There has been a steady reduction in incidents over the last ten years.

In 2020–21 Victoria also had: the lowest rate of total young people under youth justice supervision in Australia (7.3 per 10,000 young people aged 10–17); the lowest rate of total young people under community supervision in Australia (5.7 per 10,000 young people aged 10–17); and the lowest rate of young people in sentenced detention in Australia (0.3 per 10,000 young people aged 10–17). The sentenced detention rate for young people reduced by 75% over the five years from 0.8 in 2017 to 0.2 in 2021.

Some of the data reported by the review reflects very small numbers of people and cases. For example, on an average day in Victoria in 2020–21 there were 102.1 young people aged 10–17 in detention. Out of the total number of young people in detention on an average day, just 19.1 of those aged 10–17 had been sentenced (convicted of an offence and sentenced to youth justice custody), the remainder being young people on remand, or young adults aged 18–21 serving a ‘dual track’ sentence in youth justice. Behind these small numbers are victims, accused or sentenced young people, their families and communities.

Experiences of remand remain challenging. In Victoria on an average day in 2020–21, 81 per cent of young people aged 10–17 in detention were unsentenced. The high proportion of unsentenced young people in detention is a national trend, with almost three in four young people aged 10 and over in detention being unsentenced on an average day in 2020–21 nationally.

Extended periods on remand are often unstable periods for a young person, and for any victim who is also waiting for an outcome. This instability can be detrimental to victim recovery and to the young person’s rehabilitation. There is further work to do to build a system that drives away from such outcomes.”

### **7.7.3** **Aboriginal and Torres Strait Islander young people—youth justice trends since 2017**

The May 2022 statutory review was required under section 492B(3)(f) of the CYFA to consider “whether the incarceration of Aboriginal or Torres Strait Islander children and young people has increased or decreased as a proportion of the total incarcerated population of young people in Victoria’ since the *YJ Reform Act* received Royal Assent on 26 September 2017. The review stated at pp.20-22 [citations removed]:

“The number and rate of Aboriginal young people aged 10–17 under youth justice supervision in Victoria has decreased in recent years.

In 2016–17 Aboriginal young people accounted for 16.9 per cent of all young people in youth detention. The non-Aboriginal detention rate was 1.8 per 10,000 young people (10‑17 years) in Victoria, while the Aboriginal youth detention rate was 23.2 per 10,000, 12.7 times the non-Aboriginal rate.

In 2020–21, Aboriginal young people accounted for 16 per cent of all young people in youth detention. The non-Aboriginal detention rate was 1.5 per 10,000 (10–17 years) in Victoria, while the Aboriginal youth detention rate was 9.6 per 10,000, 6.4 times the non-Aboriginal rate.

[The graph] below shows the number of Aboriginal children and young people aged 10 to 17 under youth justice supervision on an average day from 2016–17 to 2020–21.

From 2016–17 to 2019–20 the rate of Aboriginal young people aged 10–17 under youth justice supervision on an average day compared to non-Aboriginal young people (rate of over-representation) reduced by 28 per cent. The rate per 10,000 population of Aboriginal children and young people aged 10– 17 under youth justice supervision on an average day reduced by 36 per cent. Nevertheless, the over-representation of Aboriginal children and young people in youth justice remains concerning. On an average day in 2019–20, Aboriginal children and young people aged 10–17 were:

* 10 times more likely than their non-Aboriginal counterparts to be under youth justice supervision;
* 9 times more likely than their non-Aboriginal counterparts to be in youth justice detention;
* 10 times more likely than they non-Aboriginal counterparts to be under youth justice community based supervision.”

*The number of Aboriginal children and young people aged 10 to 17 under youth justice supervision on an average day*

120

106

99

81

70

100

88

81

65

59.5

20

18

18

16

10.5

0

20

40

60

80

100

120

140

2016

–

17

2017

–

18

2018

–

19

2019

–

20

2020

–

21

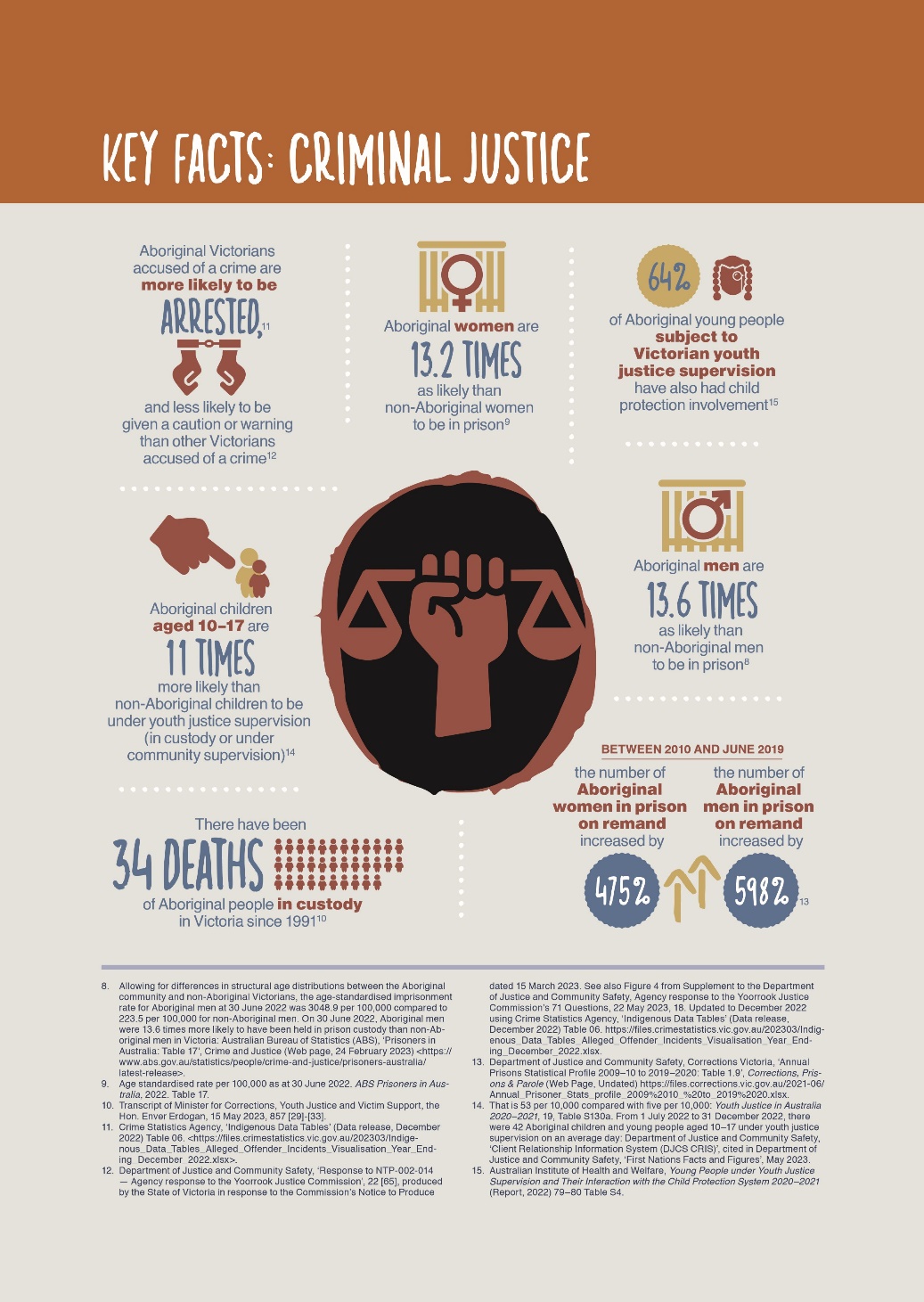
Overall

Community-Based

Custody

Source: (Historical tables 2016-17 to 2019-20): AIHW, (2021), Youth Justice in Australia 2019-20

### The following chart in the Yoorrook Justice Commission second interim report tabled on 04/09/2023 – [Report into Victoria’s Child Protection and Criminal Justice Systems](https://yoorrookforjustice.org.au/wp-content/uploads/2023/08/Yoorrook-for-justice-report.pdf) – details some comparative statistics in relation to First Peoples (both adults and children) in the Victorian criminal justice system.



### **7.7.4 Criminal Division statistics involving children aged 10-13 inclusive**

**NOTE: Each entry in the two tables below which are headed**

|  |  |  |
| --- | --- | --- |
| **FINANCIAL YEAR** | **2018/19 (Age at date of offence)** | **2017/18 (Age at date of offence)** |
| **FINANCIAL YEAR** | **2020/21 (Age at date of offence)** | **2019/20 (Age at date of offence)** |

**relates to the order made in a particular case involving a child aged 10-13 at the date of the offence. Some cases consist of a single offence. Some cases consist of multiple offences. Further, the writer understands that a number of the children whose cases are represented in the tables have been involved in more than one case in the Criminal Division in a particular year. Accordingly, these two tables over-represent the numbers of individual children aged 10-13 who were involved in criminal offending. However, the writer does not have access to statistics which would enable this over-representation to be accurately quantified.**

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 cases involving 10‑12-year old children and the majority of the cases involving adolescents who allegedly offended at age 13 were struck out, not proven 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 First Peoples children, one First Peoples 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** |
| First Peoples | 0 | 1 | 1 | 3 | 11 | 23 | 0 | | 0 | 0 | 1 | 3 | 3 |
| Non-First Peoples | 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 |

The figures in the following table for 2019/20 & 2020/21 show that the trend is continuing. The numbers of cases involving 10-13 year old offenders continue to decrease – **from 1040 in 2018/19 to 797 in 2019/20 to 715 in 2020/21** – and very few children charged with offending between the ages of 10-12 were placed on CCV sentencing orders. In both 2019/20 & 2020/21 the vast majority of the cases involving 10‑12-year old children and the majority of the cases involving adolescents who offended or allegedly offended at age 13 were struck out, not proven or were adjourned for participation in a diversion program.

|  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **FINANCIAL YEAR** | **2020/21 (Age at date of offence)** | | | | **2019/20 (Age at date of offence)** | | | |
| **ORDER 🡻 AGE🡺** | **10** | **11** | **12** | **13** | **10** | **11** | **12** | **13** |
| Not proven | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 14 |
| Struck out | 10 | 44 | 170 | 349 | 11 | 67 | 130 | 400 |
| Diversion program | 1 | 2 | 7 | 61 | 0 | 1 | 15 | 53 |
| ROPES program | 0 | 0 | 0 | 1 | 0 | 1 | 0 | 3 |
| Discharged | 0 | 2 | 2 | 8 | 0 | 2 | 6 | 27 |
| Committal order | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 |
| Proved and dismissed | 0 | 0 | 5 | 3 | 0 | 0 | 0 | 0 |
| Undertaking | 0 | 0 | 1 | 2 | 0 | 0 | 0 | 2 |
| Good behaviour bond | 0 | 1 | 6 | 12 | 0 | 1 | 3 | 22 |
| Fine | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 |
| Probation | 0 | 0 | 1 | 10 | 0 | 0 | 7 | 18 |
| Youth Supervision Order | 0 | 0 | 2 | 8 | 0 | 0 | 1 | 9 |
| Youth Attendance Order | 0 | 0 | 1 | 1 | 0 | 0 | 1 | 0 |
| Youth Detention | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 2 |
| **TOTALS** | **11** | **49** | **195** | **460** | **11** | **72** | **164** | **550** |

This data in the above tables demonstrates that if, during the 4 year period from 2017/18 to 2020/21–

* the age of criminal responsibility had been 12, it would not have had any significant impact on the CCV sentencing, diversion or remand statistics;
* the age of criminal responsibility had been 13, it would have impacted on the final outcomes in a total of 36 cases leading to youth justice involvement for 12 year old child offenders [34 supervisory orders and 2 youth detention orders]; this is an average of approximately 1 case every 6 weeks.
* the age of criminal responsibility had been 14, it would have impacted on the final outcomes in a total of 177 cases leading to youth justice involvement for 13 year old child offenders [154 supervisory orders and 23 youth detention orders]; this is an average of less than one case per week in the entire state which result in youth justice supervision in one form or another.

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## **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*.

### **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 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 DFFH 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 DFFH 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 DFFH 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 DFFH under s.349, the Court may also order the Department of Justice and Community Safety (Youth 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 DJCS 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 First Peoples 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* [No.89/2004] was assented to on 07/12/2004. Section 1 provides that the purposes of the Act are-

1. to establish a Koori Court (Criminal Division) of the Children’s Court; and
2. 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:

1. is descended from an Aboriginal person or Torres Strait Islander; and
2. identifies as an Aboriginal person or Torres Strait Islander; and
3. is accepted as an Aboriginal person 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; or

(iv) intends to consent to the adjournment of the proceeding under s.356D to enable the child to participate in a diversion program; 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 **subsection 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 about whom the Children’s Court of Victoria 2022/23 Annual Report notes at p.23:

“The Elders and Respected Persons (ERPs) play a significant role in the Children’s Koori Court hearings. They provide cultural advice to Koori Court magistrates while helping participants acknowledge the underlying issues contributing to their offending and its impact on the community. This extends to engaging and communicating with young people to ensure they do not have to tell their story multiple times at each separate hearing. This helps to deliver better justice outcomes for the Koori community.”

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 extending 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.”

See also *Kowski v The King* [2024] VSCA 3 at [14]-[19].

### **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**

The Children’s Koori Court is currently sitting at 12 locations across Victoria. The Court’s first location commenced 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.

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]*, 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-

1. a proceeding may be transferred to the Koori Court, whether sitting at the same or a different venue; and
2. 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:
   1. demonstrate his or her remorse for offending;
   2. demonstrate insight into the reasons for, and the seriousness and effect of, the offending; and
   3. 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.

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### **7.11.6 Children’s Koori Court 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 Vly** | **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** |
|  | **2020/21** | | **2021/22** | | **2022/23** | |  | |  | |
| **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** | **3** | **7** | **0** | **0** | **1** | **0** |  |  |  |  |
| **Geelong** | **6** | **14** | **1** | **3** | **5** | **21** |  |  |  |  |
| **Heidelberg** | **14** | **7** | **10** | **17** | **1** | **10** |  |  |  |  |
| **Latrobe Vly** | **2** | **1** | **1** | **3** | **1** | **2** |  |  |  |  |
| **Melbourne** | **21** | **45** | **39** | **99** | **31** | **46** |  |  |  |  |
| **Mildura** | **3** | **29** | **6** | **0** | **7** | **3** |  |  |  |  |
| **Shepparton** | **5** | **4** | **13** | **13** | **4** | **5** |  |  |  |  |
| **Swan Hill** | **1** | **1** | **1** | **1** | **2** | **7** |  |  |  |  |
| **Warrnambool [+ Portland & Hamilton]** | **1** | **0** | **2** | **2** | **1** | **0** |  |  |  |  |
| **TOTALS** | **56** | **108** | **73** | **138** | **53** | **94** |  |  |  |  |

## **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*:

[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 uncontemplated) 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.”

### **7.12.4 Sexual touching**

In *AB v Paulet* [2022] VSC 414 on appeal (by hearing de novo) against conviction by the Magistrates’ Court, the County Court found AB guilty of two charges of sexually assaulting CD and one charge of stalking her and fined AB $10,000 without conviction. AB had met CD for the first time on a tram. After 30 minutes of friendly conversation on the tram CD declined AB’s invitation to date. At CD’s stop, AB followed CD off the tram, well before his stop, and chatted further with her on the footpath. After declining AB’s request for her phone number, CD put AB’s details into her phone and promised to text him. The County Court judge had found that, as they went to part, CD offered her hand to shake but AB pulled her closer and kissed her cheek. They then bid each other good evening. In cross-examination, CD agreed AB leant in to kiss her cheek but did not actually do so, whereas, in re‑examination, said she misunderstood the earlier question and confirmed the kiss occurred.

On application by AB for judicial review, Croucher J quashed all three findings of guilt, held that the evidence was incapable of warranting a finding or conclusion that either instance of touching was sexual and remitted the stalking charge to the County Court for rehearing. At [3]-[4] Croucher J summarised his reasons as follows:

“Necessary to his decisions on sexual assault were the judge’s conclusions that AB’s kiss to CD’s cheek and his fleeting touch to the side of her waist over heavy clothing each amounted to ‘sexual’ touching, an element of that offence. True it is that the applicable statutory test potentially allows a broad range of physical contact to amount to sexual touching. However, on no rational application of that test to the facts as found, or to the evidence before his Honour, could either instance of touching be classified as sexual. Strikingly, the judge failed even advert to the provisions in which a key part of the statutory test is found. Instead, his Honour must have applied the wrong test, or misapplied the right test, which explains his otherwise inexplicable conclusions on this element.

In addition, on all three charges, the judge erred by failing to have regard to relevant matters, including critical parts of AB’s account, and by giving inadequate reasons. Further, there was no evidence for his finding on a material particular of the charge of stalking.”

Elaborating on the above summary Croucher J said at [17]-[29]:

[17] “On 1 July 2015, the offence of indecent assault was abrogated and replaced with the offence of sexual assault. By s 40(1) of the *Crimes Act 1958* (Vic) (“the VCA”), sexual assault is committed if:

a) a person (‘the accused’) intentionally touches another (‘the complainant’);

b) the touching is sexual;

c) the complainant does not consent to the touching; and

d) the accused does not reasonably believe that the complainant consents to the touching.

[18] In the main, this application concerns the second element: sexual touching. In relation to the cheek-kiss, AB also challenges the judge’s findings and reasons in respect of the first and third elements of the offence. On the meaning of “‘sexual’, in relation to touching,” s 35(1) of the VCA directs attention to s 35B. Section 35B(2) provides that:

Touching may be sexual due to—

(a) the area of the body that is touched or used in the touching, including (but not limited to) the genital or anal region, the buttocks or, in the case of a female or a person who identifies as a female, the breasts; or

(b) the fact that the person doing the touching seeks or gets sexual arousal or sexual gratification from the touching; or

(c) any other aspect of the touching, including the circumstances in which it is done.

[19] Section 48B(a) provides that it is no defence to sexual assault that the accused was under a mistaken but honest and reasonable belief that the touching was not sexual.

[20] Sexual assault was designed to replace “the outdated and ambiguous concept of ‘indecency’ with the clearer concept of sexual touching without consent”. As we shall see, however, the new provisions are, in some respects, not so easily construed, and do not lend themselves to a simple statement of the test for when touching will be sexual.

[21] Nevertheless, I have concluded that the question whether an instance of touching was sexual is to be determined objectively, having regard to the considerations mentioned in s 35B(2), and to the overriding requirement in s 40(1)(b) itself that the touching be ‘sexual’. However, some subjective considerations may be relevant to that determination. One example is whether the accused had a sexual purpose specified in s 35B(2)(b). Another is whether the accused had a non-sexual purpose for the touching (as distinct from a belief of the kind mentioned in s 48B(a)).

[22] In my view, neither the judge’s findings of fact nor any aspect of the evidence could allow either instance of touching to be held to be sexual. I have scoured the evidence and the judge’s reasons for something that might justify or explain the impugned conclusions. But I have found nothing.

[23] Only by application of the wrong test, misapplication of the right test, irrational reasoning and/or guesswork could the conclusions that these instances of touching were sexual be reached. Limited though they are, the judge’s reasons show that he erred in these ways. Astonishingly, his Honour made no mention of s 35B(2) or its terms either in his reasons or during the hearing (nor, for that matter, did counsel raise this provision). The facts as found by the judge were incapable of warranting a conclusion, in law, that either instance of touching was sexual. No aspect of the evidence, absent speculation, was capable rationally of establishing any fact that might justify a conclusion of sexual touching.

[24] I also consider that the judge erred by failing to have regard to AB’s explanations for the charged instances of touching. In particular, his Honour did not even mention that AB told police that he went to kiss CD on the cheek ‘as a gesture … of a good way, not like it’s a man and a woman’, or that he said that he was just trying to get CD’s attention when he touched her waist.

[25] Further, the judge did not adequately explain why he concluded that these instances of touching were sexual, and I find that his Honour fell into error in this respect, too.

[26] Accordingly, the findings of guilt on the sexual assault charges are vitiated by jurisdictional error and error of law on the face of the record.

[27] I accept that the finding of guilt of stalking is also tainted with vitiating legal errors.

[28] One example arises out of the judge’s finding that, during their interaction on the second occasion, despite CD telling him not to follow her, AB did just that — by following her onto the tram she took shortly thereafter. But, on closer analysis, CD’s own evidence was incapable of proving that AB had boarded the same tram at all. Instead, it showed that, after CD’s remarks, the two went their separate ways.

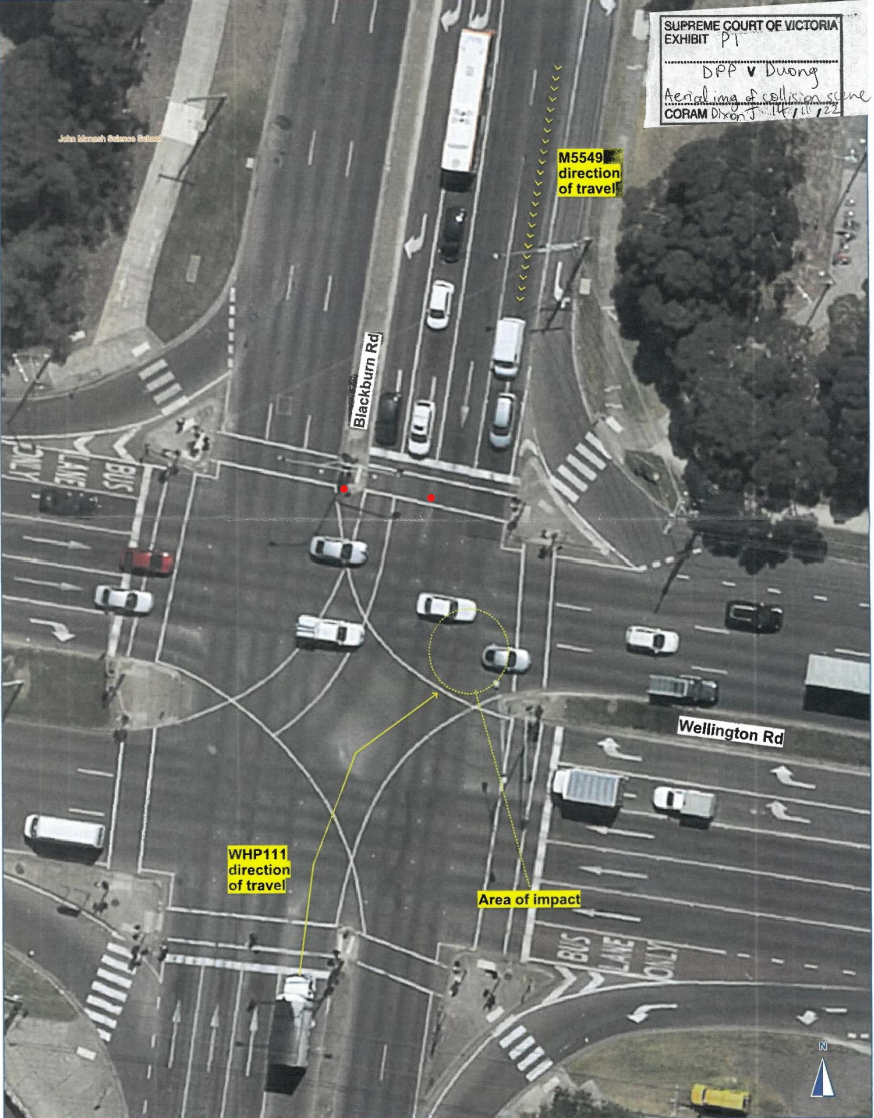
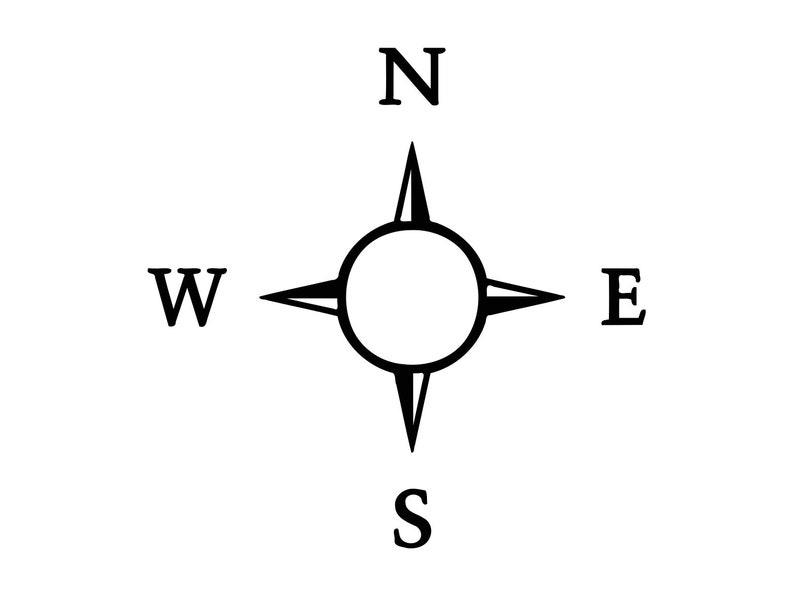
[29] The judge’s reasons on stalking were inadequate as well. For example, it is at least unclear whether his Honour found that AB hit the tram during his final interaction with CD, an allegation for which, the Director conceded, there was in the end no evidence. For this reason, and others, it is unclear on which of the instances of conduct alleged the judge reached the finding of guilt of stalking.”

### **7.12.5 Dangerous driving causing death/serious injury**

***R v Duong*** [2022] VSC 816 was a judge-alone trial in the Supreme Court in which the accused, Kevin Duong, was charged with one count of dangerous driving causing death contrary to s.319(1) *Crimes Act 1958*. The trial was heard in the Supreme Court rather than the County Court due to backlogs caused by the COVID-19 pandemic. The focus of the charge was that Mr Duong drove in a manner (not a speed) that was dangerous to the public having regard to all the circumstances of the case. Jane Dixon J dismissed the charge.

At [13]-[36] her Honour summarised the general directions given in a criminal trial which a judge sitting alone must apply. In particular at [21]-[30] her Honour detailed the basis on which she was required to assess the credibility and reliability of each witness (including at [24]-[30] the special requirements for expert witnesses) and the appropriate weight to be attached to their evidence.

On the evening of Saturday 20 July 2019 at approximately 8:40pm Mr Duong – then aged 25 – had driven his Holden Astra vehicle [WHP111] out of a service station at the south-west corner of the intersection of Blackburn and Wellington Roads in Clayton and had crossed three northbound traffic lanes in Blackburn Rd before entering the right turn lane. With a green light facing him he then commenced to turn right in order to head east in Wellington Rd.

The 18 year old deceased, David Dang, was sitting in a wheelchair restrained in the rear of a Maxi Cab M5549 which was travelling south in the left hand lane of Blackburn Rd. The Maxi Cab was “probably travelling at a speed of between 50 to 70 kilometres per hour before [the driver] apprehended the risk of a collision”. The speed limit governing the Maxi Cab was 70kph. Jane Dixon J was satisfied that the Maxi Cab entered the intersection on a green light and had right of way to proceed straight through the intersection. A collision occurred between the two vehicles and Mr Dang sustained life-threatening injuries from which he died in hospital early the following day.

The accused's driving was not adversely impacted by drug or alcohol use, sleep deprivation, tiredness, poor eyesight, inattention through being distracted by others, or use of a phone. He was not driving at an excessive speed and speed was not a contributing factor in the collision. Jane Dixon J accepted evidence that the accused's usual manner of driving was, and is, generally careful and attentive, that he had no prior criminal history nor any recorded traffic violations. Her Honour was satisfied that the accused was familiar with and experienced in using the intersection and that there was no evidence of poor driving behaviour by him prior to the moment before the collision.

In dismissing the charge Jane Dixon J said at [281]-[290] [emphasis added]:

[281] “An error involving a failure to give way may, but will not always, involve a failure to keep a proper lookout for oncoming vehicles. The act of driving on a public highway usually involves a multiplicity of decisions about when it is safe to enter or traverse through a lane of traffic. A driver may be keeping a lookout but misjudge the speed of oncoming traffic or its distance away.

[282] In my opinion, this case is similar to the case of *McBride v The Queen* (1966) 115 CLR 44 where Barwick CJ said at 49: ‘Beyond the inference which could be drawn from these basic facts there was no direct evidence that the applicant was driving inattentively, and particularly no specific evidence that he was so inattentive that his driving was dangerous to the public.’

[283] … I was persuaded…, based on the evidence of D/Sgt Williams, that the design of traffic signals at the time of the collision was less than ideal, having regard to the applicable speed limits for cars travelling along Wellington Road and Blackburn Road, and bearing in mind the degree of difficulty for drivers in judging the speed of an oncoming vehicle (relative to a vehicle viewed from the side). I appreciate that the difficulty of this exercise would be even greater at night time…

[285] In considering whether the accused’s driving was dangerous, I am conscious that there must be some feature which is identified not as a want to care, but which subjects the public to some risk over and above that ordinarily associated with the driving of a motor vehicle, including driving by persons who may on occasions drive with less than due care and attention: *Jiminez* (1992) 173 CLR 572 (Mason CJ, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

[286] This case is different from the facts and evidence present in *Georgiou v The Queen* [2022] VSCA 172…[where the] trial judge made a finding that the driver was inattentive to the roadway ahead of her for nine seconds, and that because of that prolonged period of inattention she was guilty of dangerous driving.

[287] In the present case, I am not satisfied that the accused's manner of driving prior to the collision created risks that significantly exceeded the risks ordinarily associated with driving (which is an inherently risky activity). I have kept in mind that people do not always drive as they should. **The mere fact that a collision occurred due to an error in the accused's driving does not mean that driving must have been dangerous***: see* Criminal Charge Book at #7.2.6. There was nothing intrinsically dangerous about the accused’s manner of driving, taking into consideration the particular circumstances surrounding it. **Negligence, even in some glaring respect, is not enough to make out dangerous driving**: *McBride* at 51.

[288] In order for the prosecution to establish dangerous driving, it must be proven beyond reasonable doubt that Mr Duong’s driving involved such a serious breach of the proper conduct of a vehicle upon the highway so as to be in reality – and not speculatively – dangerous to others. **This does not involve a mere breach of duty however grave to a particular person having significance only if damage is caused thereby**: *McBride* at 50.

[289] Whilst various scenarios might account for the accused's failure to give way when he proceeded to turn through the lane in which Mr Singh was travelling – thereby leading to the collision – **I cannot exclude the reasonable possibility that the accused acted as a result of a relatively spontaneous and momentary error of judgment or perception or some combination of the two.**

[290] The evidence does not satisfy me that the accused drove in a manner dangerous to the public, having regard to all the circumstances of the case. I am not satisfied that the prosecution have discharged their onus to establish guilt of dangerous driving to the very high standard of proof required in criminal cases, being proof beyond reasonable doubt.”

Since Jane Dixon J found that Mr Duong’s driving was not dangerous, her Honour did not consider it necessary to determine the additional issue of whether the impact from the collision was the substantial and operating cause of Mr Dang’s death or whether the collision impact was merely ancillary to the improper fastening of his seatbelts and was not legally causative of his death.

### **7.12.6 Committing an act that outrages public decency**

In *Pusey v The King* [2024] VSCA 110 the applicant had pleaded guilty to an offence of committing an act which outraged public decency. At the scene of an accident in which four police members were fatally injured, the applicant had engaged in voyeuristic filming and callous commentary on the condition and plight of the severely incapacitated victims. In refusing the applicant’s application for leave to appeal against conviction, the Court of Appeal (Emerton ACJ, Beach & Kaye JJA) affirmed that the offence of outraging public decency was part of the law of Victoria and that the conduct of the applicant constituted such an offence. In so deciding their Honours considered a number of authorities including *R v Madercine* (1899) 20 LR (NSW) 36; *R v Black* (1921) 21 SR (NSW) 748; *R v Udod* [1951] SASR 176; *R v Towe* [1953] VLR 381; *R v Fonyadi* [1963] VR 86; *R v Reinsch* (1978) NSWLR 483; *R v Gibson; R v Sylveire* [1990] 2 QB 619; *R v Hamilton* [2008] 1 QB 224; *Knuller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 435; *R v Anderson* [2008] EWCA Crim 12; *R v Mayling* [1963] 2 QB 717; R v Wellard (1884) 14 QBD 63

## **7.13** [**‘Crossover**](#_7.12_Cases_on) **kids’ & impact of a child’s mental development on offending**

(1) In the last 30 years there has been a great deal of research into psychological and social growth and associated brain development of children and adolescents. One well-known writer in the area of developmental psychology is American psychologist and teacher Dr Laurence Steinberg who is the author or co-author of approximately 400 articles on growth and development during the years of adolescence. Dr Steinberg’s own research has included a range of topics in the study of contemporary adolescence, including parent-adolescent relationships, risk-taking and decision making, mental health, adolescent brain development, school-year employment, academic achievement and juvenile crime and justice.

(2) Social scientists who study adolescence differentiate between **early adolescence** (about ages 10‑13), **middle adolescence** (about ages 14-17) and **late adolescence** (about ages 18-21). In discussing development during adolescence Steinberg considers it is important to differentiate not only between adolescence and childhood or between adolescence and adulthood but also between the various phases of adolescence itself.

(3) Describing adolescent brain development, Steinberg says at pp.55-56 of *Adolescence* (12th ed., 2020) [citations omitted and emphasis added]:

*“The brain undergoes significant changes in both structure and function during adolescence. These changes alter the way adolescents think and process information, as well as how they interact with others.*

***Changes in Brain Structure During Adolescence****: During adolescence, the brain is ‘remodelled’ through synaptic pruning and myelination in particular brain regions. One part of the brain that is pruned dramatically in adolescence is the prefrontal cortex, the region of the brain most important for sophisticated thinking abilities, such as planning, thinking ahead, weighing risks and rewards, and controlling impulses. Pruning also takes place in other parts of the cortex during adolescence. There is also continued myelination of the cortex throughout adolescence, which also leads to many cognitive advances. Myelination is stimulated by puberty but also by experiences such as education and exercise.*

*Although scientists initially focused on the thinning of gray matter as the main feature of structural change in the brain at adolescence, there has been increasing interest in the importance of the increase in white matter, which improves the efficiency of connections within and across brain regions. Better connectivity between different parts of the cortex allows us to think faster and better. Better connectivity between the prefrontal cortex and the limbic system, an area of the brain involved in the processing of emotions, social information and rewards and punishment, leads to improvements in our ability to regulate our emotions and coordinate our thoughts and feelings.* ***Structural maturation of the prefrontal cortex is not complete until the mid-20s.***

***Changes in Brain Function During Adolescence:*** *The two most important changes in brain function involving the prefrontal cortex in adolescence both lead to greater efficiency in information processing. First, patterns of activation* within *the prefrontal cortex generally become more focused. For instance, in experiments in which participants are presented with a rapid succession of images and asked to push a button when a certain image appears, but refrain from pushing it when a different image appears (a process known as* ***response inhibition****), adolescents are less likely than children to activate prefrontal regions that are not relevant to performing the task well. As adolescents grow into adulthood and these brain functions further mature, self-control improves, as does performance on tests that measure other aspects of advanced thinking, often referred to as* ***executive function****.*

*Second, over the course of adolescence, individuals become more likely to use multiple parts of the brain simultaneously and coordinate activity between prefrontal regions and other areas …[T]his is especially important on difficult tasks, where the task demands may overtax the prefrontal cortex working alone, and especially on tasks that require self-control, where it is necessary to coordinate thinking and feeling.* ***In fact, when adolescents who are tested for self-control are told that they will be rewarded for controlling themselves, they perform better than when no such rewards are offered.****”*

(4) Steinberg’s comment about the value of rewards for enhancing self-control raises related questions about the value of – or risk inherent in – any sort of deterrence (with its underlying connotation of punishment) as a sentencing principle for adolescents. It underpins the decision of the Victorian Court of Appeal (Maxwell P, Harper JA & Lasry AJA) in *CNK v The Queen* (2011) 32 VR 641; [2011] VSCA 228 that general deterrence is not an applicable sentencing principle under the CYFA. Referring to *Improving the Transition: Reducing Social and Psychological Morbidity During Adolescence*, Report to Prime Minister of New Zealand by Chief Scientific Advisor (May 2011), 28 which cited Laurence Steinberg, *‘Adolescent Development and Juvenile Justice’* (2009) Annual Review of Clinical Psychology 47, 65–68, their Honours said at [77]:

*“The risk that a period of detention will be counter-productive for an offender – and hence for the community – is never higher than in relation to a young offender who has not previously been in custody. Research to which the Chief Scientist of New Zealand has recently drawn attention has highlighted the potential for the immature brain to respond to punitive punishments in such a way as to make recidivism more rather than less likely.”*

(5) Steinberg’s interesting analysis continues at pp.56-58 with a discussion of ***Risk and Reward*** [citations omitted]:

*“A different type of functional change results from changes, especially in the limbic system, in the ways in which the brain is affected by certain neurotransmitters, including* ***dopamine*** *(which plays an important role in our experience of reward) and* ***serotonin*** *(which plays an important role in the experience of different moods). These changes, which are partly caused by puberty, make adolescents more emotional, more responsive to stress, more sensitive to rewards and more likely to engage in sensation seeking than either children or adults. They are also thought to increase individuals’ vulnerability to substance abuse, because they seek higher levels of reward; to depression, because of their increased vulnerability to stress; and to other mental health problems, because of their easily aroused emotions, including anger, anxiety and sadness. One other negative consequence of this increase in emotional reactivity is an increase in adolescents’ sensitivity to feeling threatened, which may prompt some adolescents to lash out at others or deliberately seek out experiences that are frightening. As adolescents mature towards adulthood, these trends begin to reverse, and individuals become less easily aroused by positive or negative stimuli, and better able to regulate their emotions.*

*These changes in the functioning of the limbic system occur relatively early in adolescence, in contrast to developments in the prefrontal cortex, which are still ongoing in early adulthood. Unlike the changes that occur in the limbic system, which have been directly linked to the impact of pubertal hormones on the brain, the development of cognitive control is more or less independent of puberty. This relatively late maturation of the prefrontal cortex, particularly compared to the changes that take place in the limbic system at puberty, has been the subject of much discussion among those interested in risk taking and behavioral problems in adolescence, because this gap in timing may help explain the dramatic increase in risky behaviour that takes place between childhood and adolescence, as well as the decline in risk taking that occurs as individuals mature into adulthood.*

*In essence, the brain changes in ways that may provoke individuals to seek novelty, reward, and stimulation several years before the complete maturation of the brain systems that regulate judgment, decision making, and impulse control. In the words of one team of writers, it's like ‘starting the engines with an unskilled driver’. As the ‘braking system’ improves, in part because of maturation of the prefrontal cortex and its connections to other brain regions, and as reward seeking declines, individuals become less likely to engage in risky behaviour.”*

(6) The CCV Youth Diversion Service report dated 08/10/2018 stated that 285 [20%] of the 1,404 diversion orders made by the Victorian Children’s Court Criminal Division in the 2017-18 financial year were for children aged 10-14. Of these 206 [72%] were for children aged 14 and 60 [21%] were for children aged 13. Unsurprisingly, the breakdown figures for the 285 diverted children who offended at aged 10-14 evidence significant levels of disadvantage:

* 53% had current or historical child protection involvement;
* 13% were in out of home care;
* 37% had a parent, sibling or other close relative who was reported to have engaged in offending behaviour;
* 19% had a cognitive impairment; and
* 20% were not in education, training or employment at all and 47% had a previous suspension or expulsion.

(7) The relatively high level of disadvantage observed in this sample of 10-14 year old offenders is also generally consistent with the Victorian youth justice supervision statistics for what have been termed **‘crossover kids**’, namely those children with experience of both the child protection and criminal justice systems. A Sentencing Advisory Council [SAC] report, *Crossover Kids: Vulnerable Children in the Youth Justice System* (2019), stated at paragraph 4.19 [citations omitted]:

*“Children under youth justice supervision in Victoria were the most likely in Australia to have also received a child protection service during the same 4 year period (60.4%). This is just over 10 times the rate of child protection among the age equivalent Victorian population.”*

The particular ‘**crossover kids**’ referred to here are most likely to have offended when aged between 13 & 17 since very few child offenders aged 10-13 are placed on sentencing orders involving youth justice supervision. For example, in 2019-20 only 38 of the 744 children placed on sentencing orders involving youth justice supervision were aged 10-13 on the date of the offending.

(8) High disadvantage levels are also consistent with a 2017 Victoria Youth Parole Board survey and with a 2015 Victorian study by Jesuit Social Services – relating to children in the criminal justice system generally – referred to in the SAC report at paragraph 4.20 as follows [citations omitted]:

*“A Victorian Youth Parole Board survey of 209 males and 17 females detained on sentence and remand on 1 December 2017 showed that 37% were currently and/or previously subject to a child protection order. Similarly a 2015 Victorian study by Jesuit Social Services found that vulnerable and disadvantaged children and young people were highly overrepresented among those who were on remand. The study found that all 27 children who were first remanded aged 10-12 were known to the child protection service, and 14 of the 27 children were known to the child protection service before their 3rd birthday.”*

(9) In addition there are high rates of mental health issues observed in the **crossover** population generally. Comprehensive research conducted by Monash University in conjunction with the CCV into the characteristics of ‘**crossover kids**’ shows significant complexities and comorbidities in those children. The Monash report of Baidawi, S and Sheehan, R, *Cross-over kids: Effective responses to children and young people in the youth justice and statutory Child Protection systems*, Report to the Criminology Research Advisory Council (2019) notes at pp.8-9, 34 & 68-69 that:

* 61% of children in the cohort experienced mental health problems;
* 73% engaged in substance misuse;
* 72% had challenging behaviours;
* at least 50% had a family member with a mental illness; and
* 16% had both parents with a mental illness.

The study also noted that *“[a]round half of the children (48%) had a diagnosis of intellectual disability, borderline intellectual functioning, attention deficit hyperactivity disorder/attention deficit disorder…learning or communication disorder, or other diagnosed neurodevelopmental or neurological condition.”* Further, more than 25% of these children experienced comorbidity with diagnoses of two or more conditions.

(10) The high rates of mental health issues observed in the **crossover** population are consistent with the enormous overrepresentation of neurodevelopmental disorders [NDD] in the youth justice population generally. Dr Katrina Harris is a paediatrician who is the head of Developmental and Community Paediatrics at Monash Children’s Hospital and Head of the Victorian Fetal Alcohol Service. She has classified the causes of NDD as falling within six categories:

* **Genetic**: e.g. Down syndrome, fragile X;
* **Antenatal toxin exposures**: e.g. alcohol -> Fetal Alcohol Spectrum Disorders [FASD];
* **Birth/prenatal trauma**: e.g. cerebral palsy;
* **Medical**: e.g. meningitis, brain tumours;
* **Childhood injury**: e.g. acquired brain injury;
* **Psychological trauma**: e.g. abuse.

Citing Hughes 2012, Young 2018, Bower 2018 & Holland 2021, a chart provided by Dr Harris graphically illustrates a strong causal relationship between various types of NDD and offending:

|  |  |  |
| --- | --- | --- |
| **NEURODEVELOPMENTAL DISORDER** | **POPULATION PREVALENCE (%)** | |
| **General** | **Youth justice cohort** |
| Intellectual disability | 2 | <25 |
| Autism | 1 | 15 |
| Traumatic Brain injury | 5 | 40 |
| Language disorder | 1 | 60 |
| FASD | 1 | 36 |
| ADHD | 5 | <18 |

In relation to her own special subject of FASD, Dr Harris refers to the prevalence of FASD in vulnerable populations as discussed by Popova et al in *Prevalence of fetal alcohol spectrum disorder among special subpopulations: a systemic review and meta-analysis*: *Addiction* 2019 Jul 114(7): 1150, 1172. She notes that while the general population prevalence of FASD is 1%, the FASD prevalence in vulnerable populations in various parts of the world is vastly higher:

|  |  |  |
| --- | --- | --- |
| **POPULATION** | **LOCATION OF STUDY** | **FASD PREVALENCE (%)** |
| Children in care | USA | 25 |
| Correctional facilities | West Aust’n youth detention | 36 |
| Indigenous | Canada | 18 |
| Fitzroy Valley | 19 |
| Special education | Chile Special Schools | 8 |

Dr Harris also notes that chronological age is not necessarily a good indicator of other aspects of a child’s neurological development, including language, reasoning/judgment, attention/impulsivity, IQ or social communication. She concludes that:

* knowing the age of a child is not sufficient to understand their abilities;
* domains of development are measurable;
* children in vulnerable groups are likely to have multiple impairments;
* there is an increased prevalence of FASD in aboriginal children; and
* better understanding of a child’s developmental age and their disability enables an informed appropriate response to their needs.

(11) Further expert opinion on the impact of a child’s mental development and mental health on offending includes the following [from which citations have been omitted and emphasis added]:

* *“Research also suggests that children make decisions differently from adults due to ‘psychosocial immaturity’ and that ‘the part of our brain responsible for impulse control, planning and decision-making (the prefrontal cortex) is not fully developed until we are about 25 years of age’.* ***Children's brain development is also affected by maltreatment, exposure to violence or other trauma, neglect, disrupted family bonds and attachment, and poverty. This is particularly relevant to children in the youth justice system.****”* [SAC, *Crossover Kids: Vulnerable Children in the Youth Justice System* (2019), paragraph 4.12.]
* *“****Considerable evidence demonstrates an association between child maltreatment and youth offending****…The prior exposure of a child to severe maltreatment, neglect, offending and violence may increase the likelihood of the child engaging in trauma-related behaviour that may also constitute an offence (such as substance abuse or aggression). Childhood trauma influences children’s development and ability to regulate their behaviour. This might result in, for example, heightened vigilance, stress intolerance, antisocial behaviour and ‘fight or flight’ responses to triggers.”* [SAC, *Crossover Kids: Vulnerable Children in the Youth Justice System* (2019), paragraphs 4.25-4.26].
* *“****We must bear in mind that children’s cognitive capacity develops gradually from the age of around 10 right through young adulthood which is usually regarded as concluding at around 24 years of age.”*** [M Warren, *‘Responding to young people offending’*: Remarks of the Hon. Marilyn Warren AC, then Chief Justice of Victoria delivering the Hon Austin Ashe AC, QC Oration in Law and Governance, Charles Darwin University, 11/10/2016.]
* *“Normal adolescent development provides challenges to any institution working with children and young people. Adolescents do not weigh the relative risks and consequences of their behaviour rationally and often make choices by gut feeling. For children and young people who have suffered trauma, abuse or neglect, this impulsive behaviour is even more apparent. Trauma, abuse and neglect influence children’s physiological, emotional, cognitive and social development in many ways. This makes them vulnerable to involvement with the criminal justice system.*

*Early and persistent trauma affects the structure and functioning of the brain. When a child’s brain is focused on survival, this comes at a cost for the developing cortex. An underdeveloped cortex is associated with poor impulse control and difficulties with higher level thinking and feeling tasks. Children who have experienced trauma often remain in a state of vigilance after the traumatic events have passed. The neural pathways have become sensitised to threat, so they may perceive everyday situations as threats – triggering feelings such as anger, powerlessness, shame or fear – and they have limited capacity to calm themselves or regulate their emotions…*

*These factors can result in behaviours such as poor impulse control or substance abuse and can lead to children and young people being involved in criminal behaviour.”* [Commission for Children and Young People, *‘The Same Four Walls’*: Inquiry into the use of isolation, separation and lockdowns in the Victorian Youth Justice system (Report 2017), page 37].

(12) The huge over-representation in the criminal justice system of ‘**crossover kids**’ and children suffering from neurodevelopmental disorders is easily explicable by modern neuroscientific research. From this research and from the dicta of the Court of Appeal in *CNK v The Queen* it appears to the writer that the community is likely to benefit in the long run if risks posed by child criminal offending/misbehaviour were addressed by minimising, as far as possible, stigma to and traumatisation – or re-traumatisation – of children, having regard to their neurological development.

