

IN THE CHILDREN'S COURT OF VICTORIA
AT MELBOURNE

CRIMINAL DIVISION

VICTORIA POLICE

v

HW

Defendant

JUDGE: GRANT
WHERE HELD: MELBOURNE CHILDREN'S COURT
DATE OF HEARING: 16 DECEMBER 2009
DATE OF DECISION: 2 FEBRUARY 2010
CASE MAY BE CITED AS: VICTORIA POLICE v HW
MEDIUM NEUTRAL CITATION: [2010] VChC 1

REASONS FOR DECISION

Catchwords: Therapeutic Treatment Order (TTO); orders to be made on related criminal proceedings where there is an application to extend TTO; interpretation of s 354(4) of Children, Youth and Families Act 2005.

APPEARANCES: Counsel
For the Police Mr M Higginbotham Victoria Police
For the Defendant Ms D McKeown Victoria Legal Aid

HIS HONOUR:

- 1 HW (the child) is 16 years old. He was born on 10 December 1993.
- 2 He appeared at the (location removed) Children's Court on 30 September 2008 charged with two counts of incest, four counts of wilfully committing an indecent act and one count of bestiality. The matters were adjourned to 25 November 2008 for contest mention. On that date, the magistrate adjourned the matters to the Melbourne Children's Court for a mention hearing on 5 December 2008 and requested a report from the Secretary of the Department of Human Services (the Secretary) pursuant to s.349 of the Children, Youth and Families Act 2005 (the Act).
- 3 A detailed and comprehensive report was provided to the Court on 5 December 2008 advising that the Department of Human Services (the Department) would apply to the Family Division of the Court on 8 December 2008 for a 12 month Therapeutic Treatment Order (TTO).
- 4 The hearing in the Criminal Division was adjourned to 8 December 2008 to allow the Department to proceed with the application for a TTO.
- 5 The application for a TTO was granted in the Family Division on 8 December 2008. The child was placed on a TTO until 7 December 2009. The following two conditions applied to the Order –
 - The child is to permit reports of his progress and attendance at the program to be given to the Secretary.
 - The child must attend and participate in the program.
- 6 On the same day, the magistrate sitting in the Criminal Division of the Court was advised that a TTO had been made in respect of the child. The magistrate, acting in accordance with the direction in s.352 of the Act, adjourned the criminal proceedings to 7 December 2009.

- 7 Section 255 of the Act allows the Secretary to apply to the Family Division for one extension of a TTO. Such an application was issued by the court on 27 November 2009. Section 255(4) of the Act provides, “If an application is made under this section to extend an order, the order continues in force until the application is determined.”
- 8 The application was determined on 17 December 2009. By virtue of s 256 of the Act, the court has the power to extend the order for a period not exceeding 12 months if it is satisfied that the child is still in need of therapeutic treatment. Acting pursuant to this power, the court extended the TTO until 16 December 2010. The child consented to the making of this order.
- 9 On 7 December 2009, the criminal proceedings were adjourned to 16 December 2009 for legal argument on the interpretation of s 354(4) of the Act. That section states, “If the Court is satisfied that the child has attended and participated in the therapeutic treatment program under the therapeutic treatment order, it must discharge the child without any further hearing of the criminal proceedings.”
- 10 I have read the reports provided to the Family Division on the application for extension of the TTO. One was prepared by Ms B, Team Leader, Sexual Abuse Counselling and Prevention Program, Child Protection Society. Ms F, Child Protection Worker, Department of Human Services, prepared the other report. They indicate that although the child has been attending and participating in the therapeutic treatment program under the original TTO, the therapeutic treatment has not been completed and the child needs to continue to attend and participate in the program for a further twelve months.
- 11 Ms McKeown, appearing for the child, submits that s 354(4) is clear in its meaning. Once the Court is satisfied that a child has attended and participated in the program under the order, it must discharge the child. This is the case even though there is an application for extension before the Family

Division.

- 12 The police prosecutor submits that the Court must look at the “rationale” for therapeutic treatment orders and ask, “What is the threshold for discharge?” In this case, the Secretary has properly applied for an extension of the TTO in accord with s 255 of the Act. It is accepted that the child is still in need of therapeutic treatment. Given these facts, the appropriate order is to adjourn the criminal proceedings until the period of extension is completed and the Court advised of compliance with the TTO.
- 13 In the second reading speech for the *Children Bill* on 15 November 2005, the Minister for Aged Care spoke of a new response to children aged 10 – 14 exhibiting sexually abusive behaviour. In the Minister’s words, “the Bill provides a new basis for intervening earlier with young people who exhibit sexually abusive behaviour to help prevent ongoing and more serious sexual offences. For children aged 10 -14, the criminal justice system does not provide a reliable pathway into treatment. For this age group, it is often difficult to prove the necessary mental intent to secure a conviction.¹ The Bill therefore provides two new Children’s Court orders for children aged 10-14 years who are exhibiting sexually abusive behaviour. The Court will be able to order a child into therapeutic treatment and, where necessary for that treatment, place the child in out-of home care. This is an important early intervention if we are to stop these children from becoming adult offenders. This reform is intended to supplement, not replace, voluntary access to treatment.”
- 14 Clearly, the intention of the legislation is to offer young people who allegedly engage in sexually abusive behaviours an opportunity to engage in treatment as a way of assisting them and, at the same time, protecting the community. The process allows a child to avoid the stigma and difficulties that may attach

¹ Interestingly, if the rationale for a TTO was the *doli incapax* presumption, one would have expected such orders to be available only to 10 – 13 year olds.

to processing through the Criminal Division of the Court.

15 Section 349(2) of the Act is in the following terms – “If – (a) a child appears as defendant in a criminal proceeding in the Court; and (b) the Court considers 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 Secretary for investigation.” Referral is discretionary. The Act makes no reference to the factors that guide the exercise of discretion. Presumably, the age of the offender and the seriousness of the offences would be important considerations for a court. With a child under the age of 14 the possible application of *doli incapax* would be a matter for consideration.

16 In this case the child was charged with very serious criminal offending. The offending is alleged to have occurred when the child was 13 years of age. Notwithstanding the seriousness of the allegations, the magistrate determined the matter should proceed, not as a criminal prosecution but as a proceeding in the Family Division with its focus on therapeutic treatment.

17 In my opinion, the police prosecutor is correct. Given the purpose of a TTO, parliament would not have intended that a child be discharged on serious criminal offences in circumstances where the child was considered to require on-going treatment by way of an extension of the TTO. As already discussed, the legislative regime recognises that there will be cases where the Department will apply to extend the order and the court will grant the extension because the child is still in need of therapeutic treatment. The fact that such orders may only be extended once, and for a period of up to twelve months, is acknowledgment of the onerous nature of the orders and the need for appropriate time limitations on treatment.

18 The only way of interpreting s 354(4), consistent with the clear purpose of the Act, is to recognise that the words “attend and participate in the therapeutic

treatment program”, mean attend and participate in the program until the therapeutic treatment program is completed. If, as in this case, the TTO has been extended for a period, the appropriate order on the associated criminal proceedings is to adjourn those proceedings for a period that is not less than the period of extension of the order. Accordingly, I adjourn these proceedings to the same date as the return of the TTO, namely, 16 December 2010.

- 19 Finally, if the therapeutic treatment is completed prior to 16 December 2010, it would be possible for the criminal proceedings to be abridged on the application of either party in order for the Court to hear an application pursuant to s 354(4) of the Act.

Judge Paul Grant
President
Children’s Court of Victoria