IN THE CHILDREN'S COURT OF VICTORIA

CRIMINAL DIVISION

COMMONWEALTH DIRECTOR OF
PUBLIC PROSECUTIONS

v.

TK

MAGISTRATE:	HER HONOUR MAGISTRATE STYLIANOU
DATE OF HEARING: DATE OF	16 August 2018, 20 September 2018
SENTENCE: CASE MAY BE	27 September 2018
CITED AS:	CDPP v TK
MEDIUM NEUTRAL CITATION	[2018] VChC 4

REASONS FOR SENTENCE

Catchwords: Accused pleaded guilty to charges pursuant to ss.477.2(1) and 478.1(1) of the *Criminal Code Act* 1995 (Cth) – subject offending involved unauthorised access to a large American corporation's network – accused was aged between 16 and 17 years at the time of offending – charges filed with the Children's Court before the accused turned 19 years old and subsequent reinstatement of charges – applicable law when sentencing children and young persons for Commonwealth offences – construction of s.20C of the *Crimes Act* 1914 (Cth) – use of "may" in s.20C is permissive and the Court may decide to sentence a child charged with a Commonwealth offence under the sentencing regime of the *Crimes Act* 1914 (Cth) or *Children, Youth and Families Act* 2005 (Vic) (CYFA) – if the CYFA applies the Court is not constrained to the extent that its provisions are incompatible with s.16A of the *Crimes Act* 1914 (Cth) – no prior criminal history, excellent prospects of rehabilitation, early guilty plea, substantial co-operation with authorities – accused sentenced to probation order for period just over eight months, without conviction.

APPEARANCES:	Counsel
For the Prosecutor:	Mr S. Ginsberg
For the Defence:	Mr T. Isaacs

HER HONOUR:

Preliminary Issue of the Charges and the Jurisdiction of this Court

1. TK, you appear before this Court aged 19 years. The offences for which you stand to be sentenced occurred between 24 June 2015 and 17 April 2017. You were accordingly aged between 16 and 17 years at this time.

2. Eight charges were filed with this Court on 31 May 2018, just before you turned 19 years of age.

3. Section 3 (1) of the *Children, Youth and Families Act 2005* (CYFA) defines child to mean:

> *"In the case of a person who is alleged to have committed an offence, 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****."*

4. Two additional charges were filed on 16 August 2018 after your nineteenth birthday.

5. At the Hearing on 16 August 2018, the prosecution made application, without objection by the defence, for the Court to strike out charges one to eight, filed on 31 May 2018.

6. Those charges were struck out and you entered a plea of guilty to the two charges filed on 16 August 2018. The Court ordered a pre-sentence report form Youth Justice and the plea was adjourned part-heard to 20 September 2018.

7. Shortly after the adjournment, by email, the Court brought to the attention of the parties the issue regarding the jurisdiction of this Court considering the date of filing of the new charges which post-dated your nineteenth birthday. To deal with this jurisdictional issue, by agreement the parties requested by return email on 30 August 2018 that:

- Charge 2 be reinstated and amended by replacement of the words “on or about 22 November 2015” with the words “between 24 June 2015 and 5 November 2016”, and the deletion of the word “an” preceding the word “unauthorised”. The latter amendment was sought to ensure that the particulars better reflect the fact that the charge covers multiple modifications.
- Charge 8 be reinstated.
- The new charges – charge 9 and 10 be struck out.

8. On 20 September 2018 the return date of the plea hearing, the parties made a joint application as per the email to the Court on 30 August 2018.

9. Having regard to decisions such as *R v McGowan*[1], and more recently *DPP v Quick & Taylor*[2] as well as *Neuss v Magistrates' Court of Victoria and Currey*[3], it is clear that the status of charges that have been before this Court and struck out without adjudication is well settled. This Court has the power to set aside previous orders striking out an information filed in the Court and, significantly, having regard to the particular issue that arose in this case, it is also well settled that an order striking out an information does not put an end to proceedings. Accordingly, given the unfairness that would otherwise arise, this Court has acceded to the joint application of the parties and re-instated the charges making the amendments sought and has struck out the 2 new charges filed after your 19th birthday.

10. You remain within the jurisdiction of the Children’s Court.

<u>The Charges</u>

11. Both charges to which you have entered a plea of guilty are offences against the *Criminal Code Act* 1995 (Cth) (Criminal Code). The offending that forms the basis of the first charge occurred between 24 June 2015 and 5 November 2016. It is an offence against s.477.2(1) of the Criminal Code involving the unauthorised modification of data whilst knowing that the modifications were

[1] [1984] VR 1000.
[2] [2015] VSCA 273.
[3] [2013] VSC 321.

unauthorised and being reckless as to whether the modifications will impair reliability, security or operations. This section prescribes a maximum of 10 years imprisonment.

12. The offending that forms the basis of the second charge occurred between 15 April 2017 and 17 April 2017. This is an offence against s.478.1(1) of the Criminal Code involving unauthorised access and or modification of restricted data intending to cause that modification and knowing that the modification was unauthorised. This section prescribes a maximum of 2 years imprisonment.

13. Pursuant to s.4J(1) of the *Crimes Act* 1914 (Cth), indictable offences punishable by imprisonment for a period not exceeding 10 years may be heard and determined summarily.

14. In accordance with s.4J(3) of the *Crimes Act* 1914 (Cth), when these two indictable offences are dealt with in a Court of summary jurisdiction, the Court may impose sentences of imprisonment for periods not exceeding 2 years and 12 months respectively.

The Offending

15. The circumstances of your offending in respect of both charges is detailed in the prosecution 'Statement of Facts'[4]. I do not intend to repeat that statement of facts in its entirety. In summary, in November 2016 the presence of unauthorised users was detected in a large American corporation's network (the Corporation). The Corporation's network records showed that the devices used to access its internal systems were associated with customer accounts for yourself and another youth. The Corporation referred the matter to the FBI. The Internet Protocol (IP) addresses associated with this intrusion were located in Australia. On 21 April 2017 the Corporation detected further unauthorised access into its internal systems which it terminated on 22 April 2017. The Australian Federal Police executed search warrants at your home and at the home of the other youth on 7 May 2017. Two apple Mac Book laptop computers were seized from your premises and the serial numbers of both devices matched the serial

[4] Exhibit 1 on the Plea.

numbers of the devices which had accessed the Corporation's internal systems. The IP address of your home internet connection also matched records of IP addresses associated with intrusions into the Corporation.

16. A virtual Private Network (VPN) used by the Corporation, software referred to by the acronym "AC", allowed persons with proper credentials who had been allocated a username and password to access the Corporation's internal systems. Analysis of your computer revealed that "AC" had been installed on your device on 24 June 2015. The purpose of "AC" was to connect remotely into the Corporation's internal systems. An unauthorised user accessing the Corporation's internal networks would impair the Corporation's security. On 22 November 2015 you created a username on the Corporation's internal systems which would allow you to use "AC" software.

17. On 10 December 2015 you, with the assistance of the other youth, created a new Secure Shell Tunnel to a Microsoft server called Microsoft Azure, using "AC". On 29 December 2015, you sent a computer script into the Corporation's internal system. This script was sent via a third party website. The website used was a temporary cloud data storage site, and it was alleged by the prosecution that your purpose in using the third party website was to help conceal your identity. When the script was executed, albeit not until the following year in November 2016, it instructed the Corporation's internal systems to download a file containing communication software and then unzip the file resulting in the creation of the Secure Shell Tunnel. The creation of this tunnel enabled you to more rapidly remove data from the Corporation's internal systems. It also provided you with an alternative route to enter the Corporation's systems should your "AC" Virtual Private Network be detected.

18. Analysis of a Lacie hard drive seized by the police from your bedroom identified a folder called "Hacky Hack Hack Methods Exclude". In this folder were 12 files outlining methodologies to infiltrate or bypass security features within the Corporation's systems.

19. On 4 November 2016 and 5 November 2016 you connected to the Corporation's internal systems and you accessed a number of different systems within the

Corporation, including an internal site containing the Corporation's internal security policies. While connected to the Corporation's systems between 28 October 2016 and 5 November 2016, you accessed and saved 'authentication keys' used by the Corporation's internal servers to restrict access to authorised users only. At some stage around this time you lost access to the Corporation's internal systems.

20. On 14 April 2017, the other youth notified you that he had regained access. After communication with this youth, on 15 April 2017 you regained access to the Corporation's internal systems. You continued to access the Corporation's internal networks until 17 April 2017. On 22 April 2017 your presence was detected by the Corporation and you were blocked from reconnecting.

Applicable Law and General Deterrence

21. Whilst the offences before this Court are Commonwealth offences, by virtue of s.20C of the *Crimes Act* 1914 (Cth), the Children's Court is specifically enabled to deal with you, TK, as if each offence was an offence against a State law. Section 20C provides:

> *"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."***[5]

22. By written submissions dated 15 August 2018, tendered on the plea[6], the prosecution argues that the use of the word "may" in s.20C makes its terms permissive rather than mandatory. The prosecution argues that the section "empowers the Children's Court to impose one of the sentencing options under s.360 (1) of the CYFA, but does not require it to do so". The prosecution relies on the second reading speech of the Bill that became the *Crimes Act* 1960 and inserted s.20C in submitting that s.20C is merely enabling. As to what s.20C 'enables' the Children's Court to do was further agitated on 20 September 2018.

[5] Emphasis added.
[6] Exhibit 2.

23. During further argument, the prosecution maintained that the effect of s.20C is that the *sentencing options* under s.360 of the CYFA, may be available to children who commit federal offences. The prosecution further initially submitted that s.362 of the CYFA (matters to which the Court must have regard in determining which of the sentencing options in s.360 is most appropriate) has no applicability to the sentencing of children for federal offences. The prosecution then resiled from that submission and maintained, instead, that s.362 is only applicable to the extent that it is not inconsistent with the sentencing considerations in s.16A of the *Crimes Act* 1914 (Cth).

24. The prosecution submitted that the "principles that apply to surrogate federal law" as summarised by the prosecution with reference to various cases including the High Court case of *R v Pham*[7], "have at least two important consequences for the sentencing of federal offenders by the Children's Court". The first, "is that these factors require the Court to treat s.360(1) as adding to, rather than replacing, the Court's sentencing options for federal offenders"[8] and that therefore, the prosecution argued, the Children's Court remains empowered to impose dispositions under the *Crimes Act* 1914 (Cth).

25. Secondly, that "these factors *require* the Court to determine the appropriate sentence in accordance with the sentencing considerations set out in s.16A of the *Crimes Act* 1914"[9] and that accordingly, general deterrence is a relevant sentencing consideration.

26. By contrast, the defence submits that Parliament's use of the word "may" in s.20C does not provide such a limited and constrained discretion to the relevant State or Territory Court dealing with a child or young person charged with federal offences. The defence submits that the effect of s.20C is that this Court is enabled to deal with the child as it would a child charged with an offence against this State, or the Court can deal with the child pursuant to Part 1B of the *Crimes Act* 1914 (Cth). The defence submits that the exercise of this discretion will be

[7] (2015) 256 CLR 550, this Court noting that in *Pham* the Court was considering the need to have regard to current sentencing practices throughout the Commonwealth, not just at State level, in determining the appropriate range of sentence – a distinct and separate issue to the issue at hand.
[8] Prosecution Written Submissions, Exhibit 2 on the Plea.
[9] Ibid. Emphasis added.

influenced by the circumstances of the matter before the Court. It is further submitted by the defence that should the Court exercise its discretion to deal with the child or young person under the relevant state laws, it is then bound by the relevant sentencing laws, procedures, practices and principles of this State – in this case, the CYFA. Should the Court not exercise its discretion under s.20C (1), it must then deal with the accused pursuant to part 1B of the *Crimes Act* 1914 (Cth) as it would any other federal offender. Accordingly, the defence submits that s.20C operates "as an exception to s.16A which is necessitated by the lack of sentencing provisions for juveniles under Part 1B"[10] of the *Crimes Act* 1914 (Cth).

27. The defence referred the Court to a number of cases in support of the interpretation of s.20C advanced by them, including *Newman v A*[11]*,* where the Supreme Court of Western Australia said in respect of s.20C, that "*The provision in its terms is concerned to make it clear that the law to be applied by a State Court, upon which jurisdiction has been conferred to deal with charges of federal offences against children, is State law"*[12]*.*

28. Both the defence and the prosecution referred this Court to *Putland v R*[13], to support their respective interpretation of s.20C, in particular the passage wherein Gleeson CJ said "*If a Commonwealth law expressly or by implication made contrary provision, or if there were a Commonwealth legislative scheme* relating *to the sentencing of the appellant which was "complete upon its face" and can "be seen to have left no room" for the operation of [the State legislative power]..."* The prosecution argued that this supports the contention that this Court's jurisdiction in its application of the CYFA is limited to the extent that it is not incompatible with s.16A of the *Crimes Act* 1914 (Cth). The defence argued that this passage and ensuing comments from the High Court clearly support the defence contention that s.20C is a specific exception provided by federal legislation, and that the Children's Court is therefore not so limited.

[10] Exbibit F; Defence Submissions concerning the principle of General Deterrence dated 19/9/18 [20].
[11] 67 A Crim 342.
[12] Ibid at 346.
[13] (2004) 218 CLR 174 at p.7.

29. I accept that s.20C, by use of the word “may” is permissive and that this Court may, therefore, ostensibly decide to sentence a child charged with a federal offence under the regime of the *Crimes Act* 1914 (Cth). However, I am not persuaded by the prosecution submission that s.20C merely enables this Court to access the sentencing options in s.360 of the CYFA but otherwise constrains this Court to the extent that any aspect of the CYFA conflicts with s.16A of the *Crimes Act* 1914 (Cth).

30. Part 1B of the *Crimes Act* 1914 (Cth), in conjunction with the conferred jurisdiction on States and Territories by the *Judiciary Act* 1903 (Cth), form the mechanism for sentencing offenders by State and Territory Courts.

31. Section 68(1) of the *Judiciary Act* 1903 (Cth) provides that the laws of the State or Territory with respect to an offender’s arrest and custody and the procedure for their summary conviction, examination and commitment for trial on indictment, their trial and conviction on indictment and hearing and determination of appeals, apply and shall be applied “*so far as they are applicable”* to persons charged against the laws of the Commonwealth.

32. Section 68(11) of the *Judiciary Act* 1903 (Cth) provides that “nothing in this section excludes *or limits* any power of arrest conferred by, *or any jurisdiction vested or conferred by, any other law,* including an Act passed before the commencement of this subsection.

33. Section 79 of the *Judiciary Act* 1903 (Cth) provides that the laws of each state or territory including the laws relating to procedure shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that state or territory *in all cases to which they are applicable*. Section 79 of the *Judiciary Act* 1903 is entitled “State or Territory laws govern where applicable”. Section 20C of the *Crimes Act* 1914 (Cth), a federal law, makes provision for State and Territory Courts to deal with a child federal offender as if the offence was committed against the laws of that jurisdiction. Put simply, it makes state laws applicable. The CYFA provides the legislative framework by which children are dealt with for offences against State law in Victoria.

34. Section 20C by its clear terms enables this Court to deal with TK as if the offences were offences against a law of this State. Nowhere in its terms does s.20C limit the application of State law in the way contended for by the prosecution.

35. The prosecution submission (as to the effect of s.20C) would obviously be more persuasive if that submission was instead being made in respect of s.20AB of the *Crimes Act* 1914. This section is titled "additional sentencing alternatives". Here, the legislature made it clear that where a State Court imposes any one of the alternative sentences for a federal offence as specified in that section, "*the provisions of the laws of the State… with respect to such a sentence…that is passed….or made under those laws shall, so far as those provisions are capable of application and are not inconsistent with the laws of the Commonwealth, apply, by virtue of this subsection to and in relation to the sentence or order passed or made under subsection 1*." Such restriction or qualification is notably absent from s.20C.

36. Section 20C must be taken to mean what it says, not what it does not say. That being so, this Court is empowered to deal with this case "as if the offence were an offence against a law of the State".

37. When this Court determines to invoke the power vested in it by s.20C and therefore to deal with a young offender under State law, the CYFA comes into play. Under the CYFA, *in determining the appropriate sentence available under s.360*, the Court *must* apply "as far as practicable"[14] the considerations in s. 362(1).

38. The language of s.362(1) and the nature of the matters to which regard *must* be had, are such as to preclude any consideration of general deterrence. As the Court of Appeal said in *CNK v R*[15]:

> "…*if a sentence were increased – for the purposes of general deterrence – beyond what would otherwise have been imposed on the child, the sentencing Court would have breached its obligation to secure "as far as*

[14] S.362(1).
[15] (2011) 32 VR 641.

practicable" the objectives set out in s 362(1). More particularly, to treat a child as a vehicle for general deterrence would amount to "making an example" of the child, for the purpose of deterring others. This would, in our view, be in direct conflict with the Court's obligation under s 362(1)(d) to "minimise the stigma to the child" resulting from the Court's determination."[16]

39. The Court of Appeal determined that the language of s.362 CYFA conveys a clear legislative intention to exclude general deterrence. That conclusion did "*not depend upon s362(1) being treated as an exhaustive statement of the sentencing considerations to be applied where a child is being sentenced. Rather, the analysis turns on the singularity of general deterrence as a sentencing consideration and…its incompatibility with the clear objectives and plain language of s 362(1)*".[17]

40. If this Court is 'enabled' to deal with TK as it would have, had he stood to be sentenced for a State offence, in so doing, for this Court then also to apply the sentencing considerations set out in s.16A of the *Crimes Act* 1914 (Cth) as argued by the prosecution, would be in direct conflict with the Court's obligation under the terms of the CYFA. Amongst other factors, s.16A requires consideration of general deterrence, a concept entirely inconsistent with the provisions of the CYFA.

41. *DPP (CTH), DPP v Hutchison*[18], dealt with an accused charged with both federal and state offences. Consistent with this Court's interpretation of the applicable sentencing principles in the present case, the Court of Appeal in *Hutchison* said, by way of *obiter*, "if the respondent's offending had been detected at or about the time of its commission, he would have fallen to be sentenced under the provisions of the *Children Youth and Families* Act 2005, where general deterrence would have played no part in the sentencing process". In argument, the prosecutor in the present case submitted that insofar as the Court of Appeal in *Hutchison* included the Commonwealth offence in this statement of *obiter*, it

[16] Ibid at [14].
[17] Ibid at [38].
[18] [2018] VSCA 2018 per Priest, Beach, Ashley JJA [56].

was an incorrect statement. I am not persuaded by this submission of the prosecution.

42. Pursuant to s.20C of the *Crimes Act* 2014 (Cth), this Court has determined to deal with you, TK, in respect of the two offences to which you have entered a plea of guilty, as if those offences were an offence against a law of this State. The dispositions available to this Court are stipulated by s.360 of the CYFA, and the matters to which the Court must, as far as practicable have regard to in determining which sentence to impose are stipulated by s.362.

43. The Children's Court approaches its sentencing task on the basis that the rehabilitation of the accused is the primary consideration. As a general principle, the sentencing regime applicable to adults and the sentencing regime applicable to children are strikingly different. As Vincent JA said in *R v Evans*[19]:

> *"An elaborate system has been developed to deal with the problem of offending by children and young persons in our community, with a separate court, separate detention facilities, supervisions systems and so forth…Underlying this system is the attribution of considerable significance to the general immaturity of the young people who appear before the Children's Court and the need, in the interests of the community and the young persons concerned, to endeavour to divert them from engagement in anti-social conduct at that early stage in their lives. These considerations can and do lead to dispositions which would be regarded as entirely inappropriate in the case of older and presumably more mature individuals".*[20]

Sentence

44. TK, you are now 19 years of age. You remain, albeit only by virtue of a few days, within the jurisdiction of the Children's Court. As this Court has determined to deal with you under State law you stand to be sentenced as a child, in accordance with the provisions of the CYFA. That being so, I do not consider general deterrence to be a relevant consideration. I do however, as I must, under

[19] [2003] VSCA 223 at [44]-[45].
[20] Emphasis added.

s.362 of the CYFA, take into account together with all the other factors, the need to ensure that you are aware that you must bear responsibility for the actions you took against the law.

45. Your offending spanned from 24 June 2015 to 5 November 2016 and from 15 April 2017 to 17 April 2017. That is a period of over 16 months, although, the prosecution concedes that you were not actively offending throughout this period, rather, your offending is limited to the dates referred to in the Prosecution Statement of Facts. Nonetheless, your offending is serious. It was sustained, sophisticated and a successful attack on the security of a major multinational corporation. You, together with another youth, persisted in re-establishing access to the Corporation's systems in April 2017 after you were detected and blocked by the corporation in November 2016. You knew that what you were doing was wrong and used a third party website to help conceal your identity. Your counsel submits that this was in part to facilitate your offending and in part to conceal your identity.

46. It was submitted on your behalf that your offending began 'innocently' by your fascination with this Corporation, triggered by your love of information technology. It was accepted by your counsel that it could not be said that you remained commercially disinterested for the remainder of the period of your offending. No time frame was allocated to "the remainder of the period of your offending". This was not relied on by the prosecution as an aggravating factor to your offending. Significantly, the prosecution conceded that there is no evidence before the Court that you benefited financially or 'commercially' from your offending.

47. To your credit, you made full and frank admissions during a four-hour interview with the Australian Federal Police in November 2017. Amongst other things, you told the police that part of what you and the other youth did was just being in the Corporation pretending you were employees. You also told the police that you found accessing the Corporation's internal networks very addictive and that you felt you could not stop yourself from doing it. A warrant was executed at your home earlier that year in April 2017. It was a stressful and challenging time for you and your family. You were in the midst of your VCE studies.

48. I have taken into account the letter from your parents[21], their observation of the impact of this offending on you, including that this matter had a significant negative effect on your grades at school and your final ATAR score.

49. I have considered the report from Ms Pamela Matthews, forensic psychologist, dated 20 July 2018 together with Ms Matthews' supplementary report dated 2 August 2018 wherein, amongst other things, she concludes that your risk of re-offending in a similar manner is very low. I have also had regard to the letter from Associate Professor Melita Kenealy dated 7 July 2018 in relation to the health of your father and the letter from Dr Anna Richards dated 4 July 2018 in relation to you.

50. In sentencing you I have taken into account your substantial co-operation with the authorities, and the undertaking you gave under oath in this Court on 20 September 2018 to give evidence in accordance with a statement you have made to the police. Also relevant is the further undertaking you gave under oath to provide another statement should that be asked of you by the police, and to give evidence in accordance with any such additional statement. I have of course also taken into account the letter from the Australian Federal Police dated 13 June 2018 of your assistance provided to them as at the date of that letter.[22]

51. Your early plea of guilty and the undertaking you have given to assist the authorities with the further investigation of this matter are both strongly indicative of your remorse and are significant matters in mitigation for which leniency must be extended.

52. You were aged between 16 and 17 years when the offending occurred. You have no prior criminal history and there are no matters pending. Despite the difficulties in your VCE year which you sustained as a result of your own offending, you were able to secure a place at university. You are the eldest of 3 children and I am satisfied that you have the strong support of your family. I have taken into account the report from Youth Justice dated 18 September 2018

[21] Exhibit B on the Plea.
[22] Exhibit 3 on the Plea.

and also the addendum to that report dated 26 September 2018. I find your prospects of rehabilitation to be excellent.

53. I do not intend to convict you. I consider that this would be detrimental to your future and unnecessary to achieve the sentencing objectives under the CYFA. On both charges you will be placed on a probation order for a period of just over 8 months.

54. I conclude this matter by explaining to you the conditions of the order that has been made. (Conditions read to the accused). If this order is breached by further offending or non-compliance, you will be returned to Court and dealt with again for these offences.