

IN THE CHILDREN'S COURT OF VICTORIA
AT MELBOURNE

CRIMINAL DIVISION

CDPP

V

THOMAS CARRICK*

<u>MAGISTRATE:</u>	FLEMING
<u>WHERE HELD:</u>	MELBOURNE
<u>DATE OF HEARING:</u>	9-12 October 2023, 19 October 2023
<u>DATE OF DECISION:</u>	24 October 23
<u>CASE MAY BE CITED AS:</u>	CDPP v Carrick (a pseudonym) [2023] VChC 2

REASONS FOR DECISION

Catchwords: Children's Court, Criminal Division – Commonwealth offences – Application for a Permanent Stay – Permanent Stay of the proceedings granted – Section 138 *Evidence Act 2008*.

<u>APPEARANCES:</u>	<u>Counsel</u>
For the Respondent (CDPP)	Ms Breckweg
For the Applicant (TC)	Mr Norton and Mr Jane
For the Chief Commissioner (Victoria Police)	Mr Ginsbourg
For the Commissioner (AFP)	Mr Forsaith

* This pseudonym mirrors that used by the Supreme Court in *DPP (Cth) v Carrick (a pseudonym)* [2021] VSC 696.

HER HONOUR:

Facts

- 1 Thomas Carrick (TC) was 13 at the commencement of the police investigation. TC has autism spectrum disorder. TC's most recent IQ assessment records his intellectual capacity at 71. TC is described as an isolated child without friends and has a tendency to fixate. He resides with his parents and siblings and goes to school. His younger sibling has a disability which has been described as 'non-verbal autistic'. TC was assessed with an IQ of 56 which made him eligible for one on one teacher's aide. The more recent assessment of 71 made him ineligible for a teacher's aide because a score of 71 was above 70 which was the cut off. TC is a client of NDIS. At 13 years of age TC [redacted] was bullied at school because of his 'weird and awkward behaviour'.¹
- 2 On 3 December, 2020 protective services at the Department of Health and Human Services, Victoria (DHHS)² made a report to the Australian Federal Police (AFP) that TC was fixated on ISIS and terrorism and viewed material on the school computers. The report³ included that TC had made threats to hurt a female student and had sent a photo of a decapitated body to another student, had taken his mother's phone and posted a Tik Tok video of pictures of ISIS and shared it with another student with the message "if you tell the teacher about this I will rip your organs out". There was no protection application, the Department was content that the parents acted protectively.
- 3 On 17 April 2021 the parents of TC went to [redacted] police station. The parents asked for help from Victoria Police because TC, their 13 year old son was looking at ISIS related videos on his computer and had asked his mother to purchase bomb making ingredients such as sulphur and acetone. English is not the first language of Mr and Mrs C, the parents of TC. The father of TC told police "he was prepared to

¹ Natalie Davis bundle 034

² On 1/2/2021 Department of Health and Human Services (Vic) changed its name to Department of Families, Fairness and Housing (DFFH).

³ Exhibit 12 Information report number 1145652 at 2

sacrifice my son for the safety of the Australian community”.⁴

- 4 There is no evidence before me as to what if any action was taken by the AFP in December 2020 except to say that there is evidence that the online covert persona known as OCO 100138 (OCO) had become active on 2 December 2020. On the day before the DHHS report, 2 December 2020, the OCO established a Telegram messenger account in the name of an AFP approved and registered Overt Covert Persona (OCP).⁵ The Instagram account and the Telegram account were operated by the same online covert persona who is referred to in these proceedings as ‘OCO’. The OCO maintained exclusive control of two personas OCO1 and OCO2 for the duration of Operation Bourglinster which did not commence until July 2021.

Victoria Police CVE

- 5 In April 2021 when Victoria Police became involved a decision was made to manage TC therapeutically and so commenced a process where TC was to receive assistance and support in effect to reintegrate the child into a pro social way of life.
- 6 The family of TC was embracing of the assistance from Victoria Police and provided consent⁶ to engage in a therapeutic and rehabilitative process. The family provided to Victoria Police access to personal information including TC’s school, TC’s psychologist, TC’s devices, TC’s mother’s device, together with what appears to be unlimited access to the family home and to TC.
- 7 The Security Investigation Unit (SIU) of Victoria Police referred the family to the Countering Violent Extremism Unit (CVE) on 21 April 2021. Ms Maguigan, case manager at CVE, became engaged to provide services to rehabilitate and reintegrate TC and to provide services to mitigate risk. Ms Maguigan described herself as passionate about rehabilitation. Ms Maguigan met with the parents on 6/5/2021 and met with TC on 12/5/2021. Programs such as the CISP and NITE⁷ were proposed.

⁴ Transcript p 15.19

⁵ Exhibit 20 para 6

⁶ Exhibit 4 and 5

⁷ CISP is the Community Integration Support Program and NITE programs are specialised programs dealing

An Iman was engaged to educate TC about the Qur'an and Islam.

8 Ms Maguigan obtained advice from Operation Psychologist Nicole Moulday who reported on 13/5/2021 that "[TC]'s verbalisations need to be considered within the context of his ASD and possible cognitive impairment. One of the key diagnostic criteria for ASD is highly restricted, fixated interests that are abnormal in intensity or focus. It is suggested that ISIS represents a circumscribed interest: an intense, narrow preoccupying interest that provides intense focus, social identity for him, a topic to be researched and as well as a topic of conversation that brings him attention. TC does not demonstrate any religious-based ideology, in fact, he doesn't evidence an ideology at all (i.e. systematic body of concepts about human life, culture or a socio-political program), TC demonstrated little knowledge about Islam.⁸

9 On 30/5/2021 LSC Manno provided an information report which detailed the internet searches on TC's iPhone 6 undertaken by TC between May and August 2020. In a review of the mobile device download LSC Manno comments that TC appears fascinated with China and symbols of CCP:

"interestingly, no religious images, verses from the Qu'an were present".
"Relevant to the created and/or viewed dates 2020, it is also important to note this was undertaken during an extended period of COVID-19 lockdown in the State of Victoria".

10 The author of the report states "conversely, albeit that [TC] has had possession/usage of the same [device] since 2020 there has been no apparent interest in 2021, relevant to the topic he viewed on his phone last year".

11 Further in the document DS Collins comments:

"IR reviewed and concur with DLSC Manno's comments in comment box 2. There is no information which was previously unknown to CTCSIU investigators. [TC] is being managed by CVE to assist and manage his complex mental health/cognitive issues."⁹

12 Ms Maguigan could not recall when she was made aware of the engagement of the

with mental health and religious ideation.

⁸ Exhibit 3 p 159

⁹ Information report dated 30/5/2021

OCO. Ms Maguigan stated her role was to disengage a person from violent extremism and “if they were actively talking to someone online about violent extremism, that’s going to have a negative impact on the interventions”.

School

- 13 On 26/8/2021 Informant DLSC Cunha (JCTT¹⁰) met with the Principal and Assistant Principal of [redacted] High School. At the end of year 6 [redacted] TC’s student disability funding was reviewed by the Department of Education (DET) as per DET protocols. By the end of year 6 TC had been suspended 6 times, 2 suspensions due to physical or threatening behaviour and 4 in relation to disruptive behaviour. TC had a teacher’s aide in year 6. After the DET review he was assessed ineligible for the aide. “[redacted] High School and TC’s parents were extremely surprised by this decision because of the nature of his disability and severity of his fascination with ISIS”.¹¹ In her professional opinion Assistant Principal [redacted] stated that the school was not addressing any academic education with TC because he is unable to function at the same level as his peers:

“[TC] has very few friends and due to that appears isolated. [TC] deals with his frustrations by deregulating- he soothes himself by searching and viewing extremist jihadist material or following his interest in aviation”.¹²

- 14 Assistant Principal [redacted] described TC as:

“trying to be funny or cool and impress other students in an effort to gain their approval and friendship, the school fraternity view TC as a sweet boy and that his behavioural incidents are a product of his disability and specialist needs. TC cannot understand social cues, he is awkward, he is clumsy and cannot process things that other children at his age can.”

- 15 The Assistant Principal stated that TC is respectful to teachers including female teachers, he has never espoused any radical views while at school, he shows remorse for his actions when confronted by teachers but does not have the cognitive ability to process or learn from his behaviour due to his condition”.¹³

¹⁰ Joint Counter Terrorism Team

¹¹ Natalie Davis bundle p 033

¹² Ibid 034

¹³ Natalie Davis bundle 035

Psychologist Dr R

- 16 On 22/7/2021 Dr R¹⁴, TC's private psychologist, reported to Ms Maguigan that "the school is known for handing out suspensions instead of dealing with the problem". The parents were frustrated with the school's management of TC's behaviour. Dr R reported that:

"[TC] has been compliant, respectful and cooperative during his time with me. He is open about his violent ideation and fantasies about terrorism and appears to respond best when I have an open and calm discussion about it with him. I have found it useful to frame his fantasies as being related to his experiences of social isolation from his peers and feelings of unfairness as well as his concerns about social issues such as Islamophobia and global politics. He is quite aware of such issues and is interested when it is discussed. He seemed to use terrorism as a shock tactic[sic] at the start of our relationship. He also seems to bring it up after he talked about his frustration of not being able to manage at school or receiving punishment there. The extent and depth of ideation seems to have waned [sic] since VicPol has become involved as I think that he feels that his concerns are taken more seriously now. His relationship with the Iman has helped too... I am concerned about the school's attitude and responses to [TC]. They have been quite rigid in their approach to him and seem too readily use suspension rather than listening to him and noticing when he has become agitated in class... and preventing an escalation where he becomes belligerent and inappropriate".¹⁵

- 17 Each time TC is suspended or receives a detention at school there is an escalation in his behaviour.

Religious Education

- 18 The Iman who was engaged by CVE had regular meetings with TC, providing him with homework¹⁶ and information about Islam. The Sheikh's involvement was described as positive and TC was able to ask questions and to have them answered.

Information sharing between CVE and JCTT

- 19 Ms Maguigan described the therapeutic process as a long process and one that required the building of trust. Ms Maguigan stated that she had built a positive rapport with the family which was trusting of Ms Maguigan and the CVE team. Ms

¹⁴ Exhibit 3 p 129

¹⁵ Exhibit 3 p 129

¹⁶ Exhibit 18

Maguigan requested that the JCTT provide CVE with authority to share information to Dr R, TC's psychologist, TC's parents and the school to assist in a more updated and comprehensive regime of rehabilitation and to reduce the risk. Ms Maguigan gave evidence that Dr R's treatment of TC would be able to be more targeted if Dr R had all of the information. JCTT did not authorise the information exchange. Ms Maguigan requested the removal of TC's devices so as to enhance the rehabilitation program. Ms Maguigan's request was refused.

Operation Bourglinster

- 20 JCTT (Joint Counter Terrorism Team) comprises members of AFP, the relevant State or Territory police force, in this case Victoria Police, and the Australian Security Intelligence Organisation. On 23/7/21 Operation Bourglinster commenced.¹⁷
- 21 Between 29/7/2021 and 6/10/2021 the online covert operative known as OCO 100138 (OCO) commenced engaging online with TC. The OCO presented to TC using 2 personas. The first persona (OCO1) was a 24 year old Muslim man from NSW. The second more extreme persona (OCO2) was offshore.
- 22 In the first chat¹⁸ on 29/7/21 TC asks 'are you a spy', 'do you work with the asio' and OCO1 replies 'I hate these killab'. Killab means dog. OCO1 asks 'should I ask the same of you akhi' and TC replies 'I am 13 years old'.
- 23 The OCO was certified to conduct a controlled operation as prescribed in the Major Controlled Operation authority dated 11/8/2021.¹⁹ The OCO's central function was to investigate terrorism offences and in relation to Operation Bourglinster to investigate TC for the offence of acts done in preparation for or planning terrorist acts contrary to section 101(6) *Criminal Code 1995* (Cth).²⁰ The strategy was to collect intelligence and information²¹ for use in a criminal investigation. The explanation for the gap

¹⁷ Exhibit 20

¹⁸ Exhibit 22 Volume 1 p 0030

¹⁹ Exhibit 16

²⁰ Exhibit 23

²¹ Transcript 459

between the commencement of the OCO (29/7/21) and the MCO (11/8/21) was provided by the OCO²² as “it just took time to get an MCO up and decisions that were um, above me and at that time we’re trying to formulate our online plan”.

- 24 The OCO commenced communicating with TC online from 29/7/2021 “the broad role was to locate [TC] online and engage him in chat to ascertain his intent if any”.²³ OCO’s evidence was that he was not qualified to provide a therapeutic service, he was not qualified to rehabilitate. OCO was guided by the JCTT team. Natalie Davis, Operational Psychologist provided advice as to how best to communicate effectively online with a 13 year old autistic boy with a fixation on ISIS.
- 25 In the period of OCO engagement commencing 29/7/2021 and concluding 6/10/2021 (71 days) there were 55 days when the OCO engaged with TC. The engagement occurs regularly and frequently and often more than once in a day. TC will chat with OCO in a break at school and then later in the day, in the morning, and late at night.
- 26 The OCO’s evidence is that he commenced gently with TC. In the first exchange on 29/7/2021, using the persona of OCO1 (with the avatar the wolf on the sand dune, depicted in orange) the OCO1 formally greets TC and then says to TC that he prefers to use telegram because the ‘brothers use it in bilad al shams” which translates to ISIS occupied Middle East territories. The OCO says that while it looks quite savage to begin with that he wanted to get on the same pathway as TC.²⁴
- 27 On 29 July 2021 the OCO reported that TC had pledged allegiance to Islamic State on Twitter. The OCO reported to Ms Davis “this guy is a kid on the spectrum, I’m letting him do all the talking just building rapport”.²⁵ There are 1,400 pages of chats between TC and OCO online.²⁶ The online relationship grows quickly in its intensity and candour. There is a sharing of personal information about family, likes and dislikes, aspirations. TC sends a photo of himself and a voice message of himself to

²² Transcript 456.31

²³ Transcript p 450

²⁴ Transcript 464

²⁵ Natalie Davis Bundle p 015

²⁶ Exhibit 22 Vol 1 and 2

the OCO. TC is concerned about the OCO's mother, he expresses concern for the OCO after the police have come to his home.²⁷ On one occasion TC sends a copy of his homework to the OCO.

- 28 Natalie Davis Associate Professor, Principal Operational Psychologist who was engaged to advise the JCTT observed having read some of the chats provided by the OCO that TC:

“clearly has a connection with you although is making up a narrative that doesn't appear true (broken ribs of another person, made a bomb). However, this may be to attempt to endear himself to you and promote himself as a worthy connection and collaborator suggesting a need to be seen as important and special”.²⁸

- 29 The OCO evidence was that some of the chats involved TC's fantasies or exaggerations about girls, bikies and 'bashing people'.²⁹ In a discussion with Natalie Davis and the JCTT the OCO summarises the chat on 22/8/21 saying “I'll have another crack with [TC] tonight”.³⁰

- 30 An analysis of the chats between OCO and TC reveal that the vast majority of chats relate to food, girls, school, aviation, football, aspirations. The OCO reports:

“I'm going to have to talk about food and Emirates Airlines as he always gravitates to those subjects. He's mentioned military aircraft only once (wants to be a fighter pilot for ISIS) and never mentioned use of aircraft in 9/11 type attacks. I'll let him be the subject matter expert and comment on his knowledge (which is pretty impressive I must say) and go from there. As for the jihad stuff, is it best to ignore or comment in the negative on? I have to be careful here as not to show approval and thus encourage, tho I sort of need to fit with my persona”.³¹

- 31 The strategy used by the OCO to engage TC, to gain evidence from him and to continue to get him to speak included the OCO encouraging TC not to give up³². OCO1 the less extreme persona introduced TC to OCO2 the more extreme persona. The chats between OCO2 and TC are less frequent. There are chats where OCO2

²⁷ Exhibit 22 p 184

²⁸ Ibid p 026

²⁹ Transcript p 473.23

³⁰ Natalie Davis bundle 027

³¹ Natalie Davis bundle 028

³² Exhibit 22 p 693

encourages TC and tells TC his plan to make a bomb or kill a member of AFP is a good plan.³³ The OCO2 tells TC that he will make a good sniper or suicide bomber.³⁴ The OCO stated that TC had limited capability to commit either a suicide bombing or a sniper attack. The OCO stated that TC was “living a bit of a fantasy life online”³⁵ The evidence of the OCO was that TC exhibited naivete when he asked “why can’t America go to Woollies or Safeway to get their oil” or in another chat whether he could be in “the kids section of ISIS if he joined”.

- 32 When the covert criminal investigation of TC was conducted (JCTT) it ran parallel to the therapeutic process (CVE) that TC was undertaking.
- 33 The family was not informed about the OCO or the criminal investigation. It is unknown if the family were aware of the notification by DHHS to AFP in December 2020 and what if any involvement the AFP had at that time.
- 34 On 8/8/2021 TC posted a photo³⁶ to the OCO online which depicted TC wearing his school uniform, a hoodie and a face mask and holding a knife with the word ISIS written in texta.

The Search

- 35 On 13/8/2021 Ms Maguigan attended on the family at their home with 2 members from SIU who searched TC’s bedroom and discovered a knife. The purpose of Ms Maguigan’s visit was to conduct a search. There is no record in the documents as to who authorised the search. Ms Maguigan could not recall except that she did not take notes and that her senior Superintendent Cruse usually took notes. Ms Maguigan said that she was uncomfortable about being put in the position.³⁷ She was at the home under the guise of a therapeutic intervention when in reality the purpose was to undertake a search. She had built a rapport with the family, there

³³ Ibid 836

³⁴ Ibid 842

³⁵ Transcript p 481.6

³⁶ Exhibit 22 Volume 1 p 0098

³⁷ Transcript p 58

was a trusting relationship that had been achieved. Superintendent Cruse rejected Ms Maguigan's characterisation of the circumstances surrounding the search.

- 36 The parents of TC were not aware that the purpose of the visit by CVE and SIU on 13/8/2021 was to search for a knife. Ms Maguigan was prohibited from discussing anything to do with the criminal investigation.
- 37 The child turned 14 in September 2021 and was charged with the offences before the Court on 6 October 2021.

Charges

- 38 1. *Between 19/9/2021 and 6/10/2021 in the State of Victoria the accused was, contrary to section 102.3(1) of the Criminal Code (Cth), intentionally a member of an organisation, namely, Islamic State, knowing that the organisation was a terrorist organisation.*³⁸
2. *Between 19/9/2021 and 6/10/2021, in the State of Victoria, the accused did engage in advocating terrorism, contrary to section 80.2C(1) of the Criminal Code (Cth).*³⁹

The Conduct of the AFP

- 39 The AFP was at all times aware of TC's age, his complex mental health issues, and his fixation on ISIS. Child Protection reported its concerns "as [TC's] age and disability significantly increase his vulnerability online, and his potential to be groomed if he is continuing to access Islamic State material".⁴⁰
- 40 Assistant Commissioner Lee (AFP) first became aware of this matter on 29/6/2021. AC Lee attended a meeting of the Victorian Joint Management Committee on 22/7/21⁴¹ a briefing minute recommending the endorsement of the commencement

³⁸ Criminal Code section 102.3 (1)

³⁹ Criminal Code section 80.2 C (1)

⁴⁰ Exhibit 7 p 2E

⁴¹ Exhibit 8

of a criminal investigation of TC for the offence of acts done in preparation for terrorist acts contrary to section 101.6 of the *Criminal Code*, in parallel to ongoing diversion activities.⁴² AC Lee was aware that TC was 13 and had autism and a limited capability to give effect to the desires he was reported to have expressed. He was provided with information on TC's engagement with CVE and was advised that the attempts to deradicalize TC through counselling and early intervention had seen no improvements in TC's behaviour. TC not only had limited personal capability to give effect to his fixations, he had limited legal capacity for a prosecution:

"As [TC] was at that time 13 and shortly to turn 14, there was discussion about whether he was considered to have legal capacity to be charged with a criminal offence. I recommended legal advice be obtained on this point"⁴³

41 JMC endorsed the recommendation to commence a criminal investigation in parallel with diversion activities.

42 Detective Superintendent Johnston (with a rank of Inspector at the relevant time) gave evidence that she was advised on 22/7/2021 that the investigation into TC was to commence.⁴⁴ The investigation was to run parallel to CVE, CVE was to have primacy. The investigation was heavily reliant on the use of the OCO.

43 On 11/8/2021 a Major Controlled Operation (MCO) was authorised by Deputy Commissioner McCartney.⁴⁵ It was endorsed "given the age of [TC] AFP operational psych will provide advice to the COO in engaging [TC] online". The MCO provided authorisation for a 3 month period from 5.54 pm on 11/8/2021. It authorised among other things:

"(c) any unlawful conduct involved in conducting the controlled operation will be limited to the maximum extent consistent with conducting an effective controlled operation".⁴⁶

44 On 6/9/2021 DS Johnston recommended to continue the targeted criminal investigation of TC parallel to ongoing diversion activities of CVE. In the document

⁴² Ibid para 7

⁴³ Ibid para 8

⁴⁴ Exhibit 10 para 9

⁴⁵ Exhibit 16

⁴⁶ Exhibit 16

there is a summary of the chats between OCO and TC⁴⁷:

“he briefly reacted to the incident which occurred in NZ on 3/9/2021 making a couple of references to martyrdom. He acknowledged his young age, but stated that he resembles an adult. He also advised that he ‘doesn’t feel mentally right’. He engaged with OCP2 and asked if it was ‘alright to kill primary schoolers’. He was immediately admonished by OCP2 for this....[TC] asked OCO about conducting an attack on a brothel in Hobart. This was likely a fantasy of his and not based on any realistic planning. He has recently connected via Facebook and Telegram with a ‘mujahid’ identified only as ‘khatib shaman’ with the handle ‘adam adam’. This user appears to be located in Syria and has engaged with [TC] about vague planning attacks in locations such as Japan and Europe. [TC] was also asked by him to send \$2k via PayPal. [TC] seems to be anxious around the time of CVE and other psych visits advising that it ‘scares’ him, because there are five police officers who are armed (this has been confirmed by CVE)”.

- 45 The chats reveal that it was the OCO who initiated the discussion about the NZ attacks. DS Johnston did not report to CVE that TC was not feeling ‘mentally right’.
- 46 On 27/9/21 DS Johnston reported to the Operations Coordination Group (OCG) an escalation in TC’s online demeanour and stated that the therapeutic engagements were not having an impact. On 30/9/2021 DS Johnston reported again to the OCG of an escalation in TC’s online behaviour and recommended the investigation move to an overt phase which was endorsed by OCG and TC was arrested on 6/10/2021.
- 47 DS Johnston provided the briefing note to AC Lee recommending overt action. The evidence of DS Johnston was that the diversionary program undertaken by CVE was not working despite taking primacy over the criminal investigation. DS Johnston’s view was that in terrorism cases a criminal prosecution is the preferred outcome.⁴⁸
- 48 The briefing minute from DS Johnston dated 30/9/2021 provided the detail upon which AC Lee relied to endorse the overt phase of the investigation. The document⁴⁹ reports that TC’s online demeanour has shifted and his behaviour has escalated. DS Johnston includes in the document advice that she has obtained from AFP Principal Operational Psychologist, Natalie Davis. Ms Davis reports if TC was charged

⁴⁷ Exhibit 11 p 011

⁴⁸ Exhibit 10 para 10

⁴⁹ Exhibit 11 at p 015

“becoming aware that his friend (OCO) was not his friend may result in him seeking more extreme online information”. Ms Davis says:

“his parents appear to have been assisting the youth officers and intervention program. If they were to believe that ‘government’ had been investigating their son the whole time they were actively engaged with the program, this may impact on the relationship they have with law enforcement, education and the program. They may be less trustful of government and departments and less inclined to assist law enforcement, or openly discuss their son’s behaviour, including with education and CYMHS”⁵⁰

49 AC Lee attended the meeting on 30/9/2021 when DS Johnston presented the briefing minute recommending the investigation move to overt action to arrest, interview and charge TC. AC Lee was not aware of JCTT receiving information that the OCO was having a negative impact on the diversionary program. AC Lee’s evidence is that he would not approve an investigation that would incite TC to an act of terrorism.⁵¹ AC Lee relied on the briefing note from DS Johnston when he made the overt action order.

50 The JCTT did not charge TC until after his 14th birthday. The issue of doli incapax would not be a barrier to the prosecution if he was charged after that date but could be a significant factor, potentially fatal to a successful prosecution if he was charged prior to turning 14. Detective Superintendent Johnston denied that this was ever a consideration. The evidence is implausible.

Findings

51 The OCO was not engaged as a diversionary measure. The OCO role was not to rehabilitate TC, the OCO was at all times engaged to gather evidence and intelligence to support a criminal investigation.

52 The CVE’s role to divert and rehabilitate TC was destined to fail due to the presence of the online covert operator. The CVE did not have primacy, it was at best, secondary to the criminal investigation being undertaken by JCTT. The CVE was a

⁵⁰ Ibid p 015

⁵¹ Transcript p 150.16

useful and necessary tool in the investigation by JCTT. Superintendent Cruse gave evidence of 'deconfliction' a process whereby the police entities would ensure the compatibility of processes engaged in by the relevant investigating entities. The process in this proceeding did not operate to include information sharing between JCTT and CVE, however it did operate to provide JCTT with all of the information that CVE obtained.

- 53 It is a nonsense to expect this Court to accept that an effective rehabilitation process can be undertaken when there is a seasoned covert operator online engaging TC, encouraging TC's fixation and that TC's rehabilitation team, his parents and his psychologist are oblivious to the existence of the OCO. The rehabilitation of TC was doomed once the OCO connected online on 29/7/2021. The OCO befriended TC and fed his fixation, providing him with a new terminology, new boundaries and an outlet for him to express, what was in part, his fantasy world.
- 54 AC Lee did not have a full and complete account when he forwarded the MCO to the Deputy Commissioner for authorisation. The account provided by DS Johnston was incomplete and inaccurate.
- 55 In her statement DS Johnston says that on 13/9/2021⁵² she reported to the OCG a change in TC's online behaviour. The change was directly attributable to the influence of two online personas engaging with TC. On 27/9/2021⁵³ [some] days after TC's 14th birthday, DS Johnston refers to the NZ terror attack but fails to state that it was the OCO who initiated the chat about the incident and that it was not TC who raised it. DS Johnston refers to the attacks in Hobart, Japan and Europe as a basis upon which she asserts an escalation in behaviour. The evidence is that this chat was considered to be reflective of one of TC's fantasies. A close reading of the paragraph is warranted. There is a conflation of matters relied on to arrive at a conclusion of an escalation. There is a lack of particulars. TC was alleged to be sending a photo of a decapitated body to another student in December 2020, if this is

⁵² Exhibit 10 p 002D

⁵³ Ibid para 14

what DS Johnston is relying upon and it is unclear in her statement, then it cannot be asserted to demonstrate that TC's online behaviour is escalating, it would be misleading to assert it.

56 The OCG relied upon information that was lacking in particulars and generalised in nature. The OCG having relied on this information ordered the arrest of TC.

57 At no stage were the parents of TC informed about Operation Bourglinster or the OCO. In the early stages of police involvement TC was open and disarmingly honest about his fixation. TC did not tell his parents about his online relationship with the OCO. The inference is that they would not approve and would terminate the access for TC.

58 There was sufficient evidence of criminal conduct in the possession of investigators prior to TC turning 14 for TC to be charged enlivening the principle of *doli incapax*. A delay in charging TC until after his 14th birthday would obviate the need for the prosecution to rebut the presumption of *doli incapax* in the Crown case. The JCTT in full awareness of the importance of the age of TC waited until the child was 14 to charge him thereby avoiding a claim of *doli incapax*.

59 There are 3 applications before the Court:

- 1) Application for a Permanent Stay
- 2) Application pursuant to section 138 *Evidence Act*
- 3) Application pursuant to section 90 *Evidence Act*.

Application for a Permanent Stay

60 TC was a 13 year old socially isolated autistic child with a fixation on ISIS and an IQ of 71. TC's problem behaviour was of such concern that his parents sought assistance from Victoria Police. A diversionary program (CVE) was created and the parents consented to the engagement of TC in the comprehensive rehabilitation program. As part of the Joint Counter Terrorism team investigation into the child an

OCO was appointed and engaged with the child secretly online. TC's parents were unaware of the existence of the OCO. TC's psychologist was unaware of the existence of the OCO. TC's online behaviour escalated, a knife with ISIS written on it was found in his bedroom and after he turned 14 he was charged with the offences before this Court.

61 The evidence is that TC had limited capability to enact any of the behaviour discussed in the online chats.

62 A permanent stay of proceedings is a last resort. It is ordered where there is no other way to protect the integrity of the system of justice administered by the court. It is of fundamental importance that, unless the interests of justice demand it, courts should exercise, rather than refrain from exercising their jurisdiction to try a person charged with criminal offences, unless the interests of justice demand otherwise.⁵⁴

63 It is extremely rare to make an order to permanently stay a proceeding and such an order will only be granted in exceptional cases because to exercise the power results in the refusal to exercise jurisdiction where the primary responsibility for deciding whether criminal proceedings should be maintained lies with the Executive and not with the court.⁵⁵

64 In determining the application the Court must balance the public interest factors;

- 1) the need to ensure that an accused receives a fair trial;
- 2) the need to hear and determine charges for serious offences;
- 3) the need to maintain public confidence in the administration of justice and
- 4) the seriousness and nature of the offences.

65 There is a greater public interest in the fair prosecution of serious offences than less

⁵⁴ *Hines (a pseudonym) v The Queen* (2015) 45 VR 816, 839

⁵⁵ *Hermanus (a pseudonym) v The Queen* [2015] VSCA 2

serious offences.⁵⁶

- 66 The test for granting a permanent stay is “whether, in all the circumstances, the continuation of the proceedings would involve unacceptable injustice or unfairness”.⁵⁷
- 67 The power exists to enable the courts to protect themselves and thereby safeguard the administration of justice.⁵⁸
- 68 The scope of the impugned conduct is wide and varied. The circumstances which give rise to a court ordering a permanent stay vary. In determining the application I have had regard to the submissions of the Respondent and the Applicant.
- 69 At 13 years of age TC was arguably an innocent.⁵⁹ At 13 it was open to TC to claim *doli incapax* given his age, his complex mental health and cognitive functioning. TC’s fixation on ISIS was a concern that the family and the school had been attempting to manage, albeit unsuccessfully. The commencement of the CVE in May 2021 was welcomed by the family, the wrap-around supports were implemented and the rehabilitation process commenced. In July 2021 the OCO became active. The OCO encouraged TC to be secretive, encouraged him to use derogatory words and encouraged him to engage in behaviour that undermined his rehabilitation. The OCO

⁵⁶ *Barton v The Queen* (1980) 147 CLR 75; *R v Clarkson* [1987] VR 962

⁵⁷ *Walton v Gardiner* (1993) 177 CLR 378

⁵⁸ *Dupas v The Queen* [2010] HCA 20

⁵⁹ See *R v Priest* [2011] ACTSC 18 at [62]-[66]:

“[65] ... Certainly the criminal justice system involves more rules based on fairness than any game or sport I can think of, but those rules are aimed at protecting “the integrity of the administration of criminal justice” (*Ridgeway* at 33), at ensuring that police officers and other officials do not abuse their powers, and at ensuring that innocent people are not wrongly convicted. In *Ridgeway*, Mason CJ, Deane and Dawson JJ, in describing the support provided by some American cases for the recognition of a judicial discretion to exclude evidence of an illegally procured offence, said at 33-34 that the cases concerned:

explain the doctrine of entrapment as resting not upon a perception of the innocence of, or unfairness to, the induced offender but upon the inherent powers of the courts to protect the integrity of their own processes.

[66] If these propositions are correct, then police actions could justifiably be criticised, for instance, for inducing an initially innocent person to act in a criminal way (the “virtue-testing” rejected by Lord Nicholls, quoted at [49] above), or for involving abuse of official power, but they cannot be criticised for failing to give, to a person who commits an offence voluntarily and without inducement, a sporting chance of avoiding prosecution or conviction.”

See also *Ridgeway v The Queen* (1995) 184 CLR 19, 33

was tasked with gathering intelligence and evidence in the pursuit of a criminal investigation. The chats reveal that the OCO groomed TC and drew him into discussions about ISIS and violent extremism, bringing to his attention the terror attack in New Zealand, sending TC information about an 11 year old who committed murder. TC was a willing participant his fixation fed by the OCO, his isolation assuaged by a new friend. The OCO used racist and offensive language that TC later adopted, mimicking the OCO. The OCO encouraged TC not to give up and told TC that he would make a good suicide bomber and or sniper. The OCO did encourage a potential innocent (if the principle of doli incapax was enlivened) not to give up the cause, the cause being to promote the ISIS ideology. TC was not an ISIS ideologue, he had no religious ideology and little knowledge of Islam and the Qur'an.

70 Ms Maguigan and the OCO were witnesses who were able to provide direct and credible evidence of the progress of TC. The therapeutic road for TC was littered with obstacles and the obstacles were personified in OCO1 and OCO2 (the 2 personas of the OCO). The OCO was performing his role as an online covert operative tasked with the brief to gather evidence, authorised by the JCTT leadership and endorsed by the Major Controlled Operation authority, and that is what he did. The obstacles became so great for TC that he expressed that he did not feel mentally right. The escalation in his behaviour online had a low starting base. At the commencement of his relationship with the OCO in the first chat on 29/7/2021 TC says to the OCO "I asked⁶⁰ u bcos ive never met a brother in Australia". The OCO replies "be very careful akhii bcos the kuffar dogs are fkn everywhere thats why I use telegram I think its safer" and TC replies "I thought u work with the asio dogs bcos ok they r everywhere".⁶¹ The OCO sets the tone, introduces the language of 'dogs' to describe police, is the first ISIS sympathiser in Australia that TC has met and cautions TC to be careful because there are spies everywhere.

71 The evidence of Superintendent Cruse was in part in contradiction to Ms Maguigan.

⁶⁰ Exhibit 22 Volume 1 p 0030

⁶¹ Ibid 0030

S Cruse gave evidence of 'deconfliction'. He described this process as one where separate police entities work compatibly with each other. The CVE process was operating with a completely different focus to the JCTT investigative process. How the two processes were ever meant to work compatibly is a question that has not been answered, the answer is that it was not possible for the therapeutic process to succeed as long as the OCO was actively engaging TC. DS Johnston's evidence included briefing AC Lee with incomplete and misleading content, content upon which AC Lee relied. S Cruse and DS Johnston provided answers that were at times opaque, non responsive to the question or contradictory to an earlier answer given. I am not satisfied that I can rely on the answers given by Superintendent Cruse and Detective Superintendent Johnston.

- 72 There is no doubt that terrorist activities are an abomination that strike fear into every citizen. It is right that the Prosecution describes the case before the Court as one of national security. The community is right to expect police entities to do all that they can to identify, investigate and prosecute offenders. The community also has a right to expect police entities to engage in conduct that is beyond reproach.
- 73 The diversionary program engaged in was tailor-made for TC. The evidence is that rehabilitation does not progress in a straight line, particularly when children are involved and especially when there are complex mental health factors in play. There will be lapses in a participant's progress. This is to be expected. The AFP and Victoria Police are experienced in assessing risk and managing risk. Significantly, the first stage of police involvement with TC was to set up a rehabilitation program. It was the intention of Ms Maguigan to support TC and his family. I have no doubt that Ms Maguigan's priority was rehabilitation. The JCTT never intended to prioritise the rehabilitation program and TC's reintegration into a pro social way of living. The intention of the police entities became evident when the OCO was appointed.
- 74 The potential risk in relation to terrorism offences is of the highest order because the outcomes can be of the highest harm. The JCTT relied on the diversionary program undertaken by Victoria Police to assist it in the criminal investigation and in the

gathering of evidence against TC.

75 Once the OCO commenced TC's rehabilitation was thwarted. The evidence is that TC's risk of committing an act of terrorism escalated.⁶² The rehabilitation program was undermined by the contamination of the OCO. Competing forces were at play which pulled TC in opposite directions. The JCTT approached this case as though the threshold test was that no risk is acceptable when dealing with the grave threat of terrorism. It is through this lens that the JCTT engaged in the conduct it has engaged in to detect the risk, assess it and act to ensure the protection of the community. The means however do not justify the end.⁶³ The conduct of the JCTT must be moderated by the circumstances of each case. The evidence obtained in the way it has been obtained has not worked itself pure.⁶⁴

76 In *Clark v The Queen* [2016] VSCA 96, Weinberg, Ashley and Coghlan JJA, describing the principles underpinning the granting of a permanent stay in criminal proceedings, said at [13]-[19]:

[13] 'These principles are well settled. The power to order a permanent stay derives from the inherent (or, in some cases, implied) power of a court, including the County Court, to protect the integrity of its processes where the administration of justice so requires. It is a remedy that is invoked in order to prevent an abuse of process.

[14] The concept of abuse of process extends to the use of the court's processes in a way that is inconsistent with two fundamental requirements arising in criminal proceedings. These are, first, that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that unless the court protects its ability to function in that way, its failure will lead to an erosion of public confidence. The court's processes will be seen as lending themselves to oppression and injustice.

[15] The continuation of proceedings that are unjustifiably and unfairly oppressive will, of itself, amount to an abuse of process. Moreover, as is well understood, a prosecution can be stayed if it has been instituted and maintained for an improper purpose.

[16] In a criminal context, the term 'abuse of process' encompasses not only circumstances within the narrowest conception of that term (such as bringing a prosecution for an improper purpose or maintaining one that is clearly

⁶² Exhibit 10

⁶³ *Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325, para 106

⁶⁴ An expression borrowed from *Omychund v Barker* (1744) 1 Atk 21 at 33 [26 ER 15 at 23]

foredoomed to fail), but also pursuing a criminal proceeding in a manner that is unfair and gives rise to oppression.

[17] It is only in an extreme case that a permanent stay of proceedings will be ordered. Necessarily, such cases will be rare. It follows that an applicant for a permanent stay must discharge a heavy onus if a court is to be persuaded to grant that remedy.

[18] In determining whether a permanent stay should be granted, a court must have regard to the substantial public interest in having those charged with serious criminal offences brought to trial. A stay of that kind is tantamount to an immunity from prosecution and is not therefore lightly to be granted.

[19] There is more to a court's decision as to whether a trial should proceed than fairness to the accused. An applicant for a stay must establish that the continuation of the proceedings would, not merely could, involve unacceptable injustice or unfairness. It must be shown that the continuation of the proceedings would be so unfairly and unjustifiably oppressive as to itself constitute an abuse of process.⁶⁵

- 77 A permanent stay may be ordered where there are no other means to protect the integrity of the court's processes. Edelman J stated in *Strickland*:

“‘Abuse of process’ may not be the best language to describe the category where the focus is upon the integrity of the court generally rather than its particular processes. The rationale for this category has been described in various ways. The rationale has been described as being ‘a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law’. It has been described as avoiding ‘an erosion of public confidence’. It has also been described as arising where a trial would bring the administration of justice into disrepute. Each of these verbal formulations attempts to capture a concern for the systemic protection of the integrity of the court within an integrated system of justice. The possibility of an unfair trial, or a degree of unfairness in a trial, may be a factor contributing to that concern. But an unfair trial is not a prerequisite for a permanent stay in this category”.⁶⁶

- 78 The chats between the OCO and TC were obtained in circumstances that do not meet the minimum standard that society expects of law enforcement officers.
- 79 The community would not expect law enforcement officers to encourage a 13-14 year old child towards racial hatred, distrust of police and violent extremism, encouraging the child's fixation on ISIS.
- 80 The community would not expect law enforcement to use the guise of a rehabilitation

⁶⁵ See also *DPP v Tuteru* [2023] VSCA 188 at para 63 - 69

⁶⁶ *Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325 at para 249 (citations omitted)

service to entice the parents of a troubled child to engage in a process that results in potential harm to the child.

- 81 By its conduct in attempting to radicalise TC for the purposes of gaining evidence to prosecute TC for the offences with which he has been charged, the AFP has completely and inevitably undermined the therapeutic process initiated by TC's parents and the CVE to seek help to engage TC in the therapeutic and rehabilitative process.
- 82 The conduct engaged in by the JCTT and the AFP falls so profoundly short of the minimum standards expected of law enforcement offices that to refuse this application would be to condone and encourage further instances of such conduct.
- 83 I am satisfied that to allow this proceeding to continue would not only be unjustifiably and unfairly oppressive to TC but would also lead to an erosion in public confidence in the Court's processes. The re-radicalisation of TC which was created by JCTT in the guise of OCO's chats with TC were obtained in circumstances that fall far short of the minimum standard that society expects of law enforcement officers.
- 84 There is no other way to protect the integrity of the system of justice administered by the Court except to grant the application and order that the proceedings be permanently stayed.

Section 138 Evidence Act

- 85 Given my ruling in relation to the Permanent Stay it is not necessary for me to rule on Section 138. However given Counsel have taken the trouble to address me on the issue I make the following ruling.

S 138 Exclusion of improperly or illegally obtained evidence

(1) Evidence that was obtained –

a) improperly or in contravention of an Australian law; or

b) in consequence of an impropriety or of a contravention of an Australian law – is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained. ...

86 The search conducted on 13/8/2021 was described as consensual. The consent provided by the parents in May 2021 was not informed consent. The CISP consent form signed by the parents on 27/5/2021 was a document that provided consent to share information to the Board of Imams Victoria and the Victoria Police and other service providers to deliver various forms of support to clients. In the conditions of participation there is a provision for CISP staff to disclose information about “prior unreported or planned future offences”.⁶⁷ In the NITE consent form it provides “if I disclose information about prior unreported or planned future offences this information may be forwarded to the appropriate authorities”. The parents were not asked if the SIU could search their son’s bedroom at any time. Were the parents to be asked for their consent to search their son’s bedroom, it seems likely that they would have provided consent, given their willingness to work co operatively with the authorities and their absolute trust in the authorities. There is no evidence that they provided consent to SIU to search. The SIU gained entry to the home by exploiting the relationship that had been developed between the CVE and the family. There was no warrant to search. There was a deliberate, invasive and totally inappropriate search of TC’s bedroom without lawful excuse. The search involved multiple Victoria Police members under the guise of attending to provide support to the family within the CVE framework. The conduct of the law enforcement officers involved subterfuge. The high degree of impropriety counts significantly against the admission of the evidence.

87 In relation to the evidence of the chats online between OCO and TC were obtained in circumstances that do not meet the minimum standard that society expects of law enforcement officers. The community would not expect law enforcement officers to encourage a child towards racial hatred, distrust of police and violent extremism, encouraging the child’s fixation on ISIS.

88 The community would not expect law enforcement to use the guise of a rehabilitation service to entice the parents of a troubled child to engage in a process that results in

⁶⁷ Exhibit 5 p 3E

potential harm to the child.

89 I am not satisfied on the submissions of the Prosecutor that it has discharged its burden to satisfy this Court that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence obtained in this way. To be clear the OCO's evidence in its entirety revealed an orchestrated litany of communications between the seasoned covert operator and the child over an extended period of time in frequency and regularity which was so highly improper to count significantly against the admission of the evidence.

Section 90 *Evidence Act*

90 It is not necessary for me to rule in relation to section 90 given my earlier findings.