

IN THE CHILDREN'S COURT OF VICTORIA

FAMILY DIVISION

Department of Health & Human Services

and

Jonathon (name has been changed)

<u>MAGISTRATE:</u>	J. Gibson
<u>DATE OF HEARING:</u>	2 - 4 and 6 March 2015
<u>DATE OF DECISION:</u>	6 March 2015
<u>CASE MAY BE CITED AS:</u>	DoHHS and J
<u>MEDIUM NEUTRAL CITATION:</u>	[2015] VChC1

REASONS FOR DECISION

Catchwords:

Child protection – application for Therapeutic Treatment Order – children engaging in sexually abusive behaviours towards each other in residential unit – definition of “sexually abusive behaviours” – whether Therapeutic Treatment Order necessary to facilitate attendance at an appropriate therapeutic program.

PARTY	COUNSEL
DoHHS	Mr Kune
Jonathon	Mr Waters

1. Jonathon is now 11 years old. He is a child who has experienced significant trauma in his young life. He has been exposed to family violence, his parents have failed to prioritise his needs, he has suffered rejection by carers, and he has endured much placement instability. He is currently the subject of a Custody to Secretary Order (CTSO).

2. Between 27 September 2013 and 2 January 2014, when he was 10 years old, Jonathon was housed by DoHHS in an Anglicare Residential Unit with some of the State's most traumatised children in the 7 – 10 age group. This was a particularly unsettling 3-month period for him.

3. Jonathon now resides with his paternal grandmother in country Victoria. With her, Jonathon has found a secure and stable home where he is loved, protected and his rights promoted. As the Advanced Child Protection Practitioner, Ms K said in her evidence, this placement has allowed Jonathon to be a child and has given him a sense of belonging he has not experienced before.

The Application before the Court

4. The proceedings conducted before me between 2 – 4 March 2015 and on 6 March 2015 concerned an application by DoHHS for a Therapeutic Treatment Order (TTO) in respect of Jonathon. The application was made after Jonathon was charged with numerous sexual offences against his co-residents in the Anglicare Residential Unit.

What occurred in the Unit?

5. Having viewed the Video Audio Recorded Evidence Statements (VARES) of Jonathon's co-residents, I am satisfied on the balance of probabilities that:

- Jonathon and two female co-residents (A who was 7 years old and B who was 9 years old) engaged in acts of fellatio whereby A and B performed oral sex on Jonathon on numerous occasions.
- These activities of oral sex performed by A and/or B on Jonathon often occurred in the presence of the other girl and in the presence of male co-residents (C and/or D who were both 9 years old).
- Jonathon and D engaged in an act of simulated anal sex whereby Jonathon acted out the motions of anal sex with D while both boys were fully clothed.
- Jonathon and D attempted to engage in an act of anal sex whereby D attempted to insert his penis into Jonathon's anus.

6. Detective Senior Constable S described Jonathon as the "Alpha-male" in the Unit, and as someone who exercised power and control over his co-residents. In my view, to describe a 10 year old in this way is both unhelpful and inappropriate. Further, I do not consider that the evidence supports such a characterisation of Jonathon or of his role in the sexual activities that were engaged in by the children in the Unit.

7. Jonathon was certainly the eldest child in the Unit (by 5 months) and the tallest. He was a physically robust and active child, described by Unit staff

as tending to behave in a bullying manner to his co-residents at times. In their VARES, the children alleged that Jonathon could be a bully, and they stated that the sexual activity that occurred between them did so because he requested it, with D saying it was because he was scared of Jonathon. I note DoHHS records indicated that Jonathon had a history of engaging in violent and aggressive behaviours towards foster carers, and a diagnosis of ADHD, General Anxiety Disorder and Oppositional Defiance Disorder had been made in 2013.

8. I am also aware that the other children in the Unit had extremely difficult and troubled behaviours. I was provided with some limited information about their backgrounds, which indicated they had all experienced significant trauma and neglect, and B and C in particular had concerning histories for engaging in violent behaviour towards carers, teachers and children. Unit staff described B as being aggressive and intimidating towards children in the Unit, including Jonathon, C was described as being a bully to A, and A was described as engaging in annoying behaviour including towards Jonathon. The children in their VARES, and Jonathon in his Record of Interview, identified others apart from Jonathon as engaging in bullying behaviour. B, C and D also described A as someone who initiated sexual activity, with C stating that he felt “very very unsafe” that A would do “it” (oral sex) to him, D stating that A would say ‘I will suck your willie” and B stating that A would “gang up” on Jonathon “push” him in the room and “lock the door so he couldn’t get out”.

9. Very significantly, I was made aware that prior to Jonathon being placed in the Unit, a number of the children had engaged in sexualised behaviours. A was known to have had experienced significant sexual abuse. B had been exposed to sexual abuse, including being sexually assaulted by an older boy who had previously resided in the unit. D had also experienced or been exposed to sexual abuse, and there were allegations that he had engaged in anal sex with his younger brother.

10. At the time Jonathon came to live with his co-residents, he had no such history of sexual abuse or sexualised behaviours.

11. On balance, the evidence suggests that it is likely that Jonathon himself was exposed to the sexualised behaviours of one or more of the other children in the Unit, and then became involved in a culture or secret game of collusion in which they all participated. I accept that on a number of occasions Jonathon sought out the sexual activity, however the evidence does not support a positive finding that he used bullying behaviour, power or control to enable it to occur. Only D made this specific allegation, and it is equally likely that D said this in an attempt to understand his own behaviours in the Unit. In all the circumstances, to classify Jonathon as the sexually dominant child, the controller of sexual activity, or the aggressor, is to demonise him and fails to acknowledge the dynamics that existed between the children in the Unit.

12. As the only child of the age of criminal responsibility, Jonathon has been charged with criminal offences and treated as an offender. It is my firm view that he should have been regarded (and treated) as much as a victim as the other children in this very disturbing series of events.

13. The acts of fellatio and attempted anal sex engaged in by the children were types of sexualised behaviours that went well beyond the bounds of normal sexual development for them, and had great potential to place all the children at risk of harm, including harm of a cumulative nature. It is imperative that Jonathon and his co-residents are given the opportunity to process what occurred for them in the Unit and to learn from it so that, individually, they can go on to have sexually appropriate relations in the future. The issue for the Court is whether a TTO should be made to achieve this therapeutic outcome for Jonathon.

Preconditions for a TTO

14. Section 248 Children, Youth and Families Act 2005 (the Act) provides that a Court may make a TTO in respect of a child who is above the age of 10 years and under the age of 15 years if it is satisfied-

- (a) that the child has exhibited sexually abusive behaviours; and
- (b) that the order is necessary to ensure the child's access to, or attendance at, an appropriate therapeutic program.

Has Jonathon exhibited sexually abusive behaviours?

15. The phrase “sexually abusive behaviours” is not defined in the Act or in any other legislation. Further, I am unaware of any judicial consideration of the meaning of the phrase.

16. It is clear from the Second Reading Speech in the Legislative Council, wherein the rationale for the power to make TTOs was explained, the phrase describes sexual behaviours of children aged 10-14 which require intervention to prevent on-going and more serious sexual offences. The power was considered necessary given that the criminal justice system often failed to ensure such intervention by virtue of the principal of doli incapax. It is apparent therefore that not all sexual behaviours would attract the “sexually abusive” description. It is sexual behaviours of the kind considered (by the Court) to require intervention.

17. In submissions, I was referred to the working definition of the phrase as used by the Therapeutic Treatment Board;

“A child may exhibit sexually abusive behaviours by using their power, authority or status to engage another party in sexual activity that is unwanted or where, due to the nature of the situation, the other party is not capable of giving informed consent (this may include sexual behaviour with a family pet or other animal, or sexual behaviour involving a child who is younger or who has a cognitive impairment). Physical force or threats may sometimes be involved but it is not a required feature. Sexual activity may include exposure, peeping,

fondling, masturbation, oral sex, penetration of a vagina or anus using a penis, finger or object, or exposure to pornography. This list is not exhaustive”

18. If this working definition were adopted by the Court as a complete description of the phrase, Jonathon would not be found to have exhibited sexually abusive behaviours, as he has not used power, authority or status. I would be surprised and troubled by such an outcome, given the views I have expressed in paragraph 12 herein, and consider it would be contrary to the expressed purpose for which the Court was given the power to make TTOs.

19. In her evidence, Ms W from the Australian Childhood Foundation (the agency responsible for providing counselling services to children on TTOs in the region closest to Jonathon’s home) said that she understood the word ‘abusive’ in the phrase described the harmful effect of the behaviours on the young person and/or others rather than a description of the young person exhibiting the behaviour. She also explained that the context in which the sexual behaviours took place was vital in determining whether the behaviours fell within the ambit of the phrase. I found her evidence of great assistance.

20. I am satisfied that Jonathon has exhibited sexually abusive behaviours. This is not because he used any power, authority or status to engage the others in the Unit in sexual activity. Nor is it because I view him as an abuser. It is because I consider that the behaviours he engaged in with his co-residents were abusive to himself and to the others, and he would benefit by

engaging in therapeutic treatment. I would have also found that the other children in the Unit (perhaps with the exception of C) had exhibited sexually abusive behaviours, however only Jonathon was of an age that brings him within the ambit of such a finding for the purposes of a TTO.

Is a TTO necessary to ensure Jonathon's access to, or attendance at, an appropriate therapeutic program?

21. Jonathon is not currently attending a therapeutic treatment program.

22. He has been on a waiting list to attend the "Horses for hope" program (and I understand was accepted into that program during the course of the current proceedings). I am not aware whether this is an appropriate program to provide treatment for the sexually abusive behaviours that have been exhibited.

23. On the other hand, The Australian Childhood Foundation does conduct an appropriate program. It is available to Jonathon whether or not he is on a TTO.

24. Jonathon was referred to that program by DoHHS for an assessment, however it did not occur. His grandmother had been reluctant to engage him in it. She had refused to believe that he had engaged in "sexual abuse".

25. In fairness to Jonathon's grandmother, she had not been provided with the details of what had occurred in the Unit until these current proceedings.

She understood he had been charged with sexual offences and believed that he was being accused of being a “sexual offender”, and the sexual offender in the Unit.

26. Having had the benefit of hearing the evidence presented to this Court, she now has an understanding of her grandson’s experience in the Unit. Her evidence to me was that she had no idea of the seriousness of what occurred, or its’ context, but she now accepts that Jonathon needs counselling to assist him to deal with his experiences, put the behaviours in the past, and learn how to move beyond them. She acknowledged there was a condition on his CTSO requiring him to engage in counselling as directed by DoHHS, and stated that she intends to assist him to comply with any such direction in that regard.

27. I have no hesitation in accepting that Jonathon’s grandmother was genuine in her evidence to me. She has done everything else in her power to advocate for Jonathon’s best interests. She has almost moved mountains with respect to his education and recreational needs, including dealing with institutional resistance to allow him full participation at school, to attend school camp, and to join a football club because of the allegations of sexual abuse against him. Jonathon now attends school full time, I understand is able to play football with the local club, and he has recently returned from school camp, all largely thanks to the efforts of his grandmother. He appears to have settled in her care and his relationship with her is a close one, where Jonathon is able to trust and confide in her, and take on board her views.

Jonathon's grandmother was described as cooperative, reasonable and willing to work with DoHHS and Berry Street. I was not surprised to hear that the current Child Protection case plan for Jonathon was one of working towards permanent care with her.

28. In all the circumstances, I do not consider that a TTO is necessary to ensure Jonathon's access to, or attendance at, an appropriate therapeutic program. The evidence leads me to conclude that his grandmother now understands the imperative of such a program and will voluntarily work with DoHHS to ensure Jonathon's attendance. It is most unfortunate that it took these proceedings for all the information to be provided to Jonathon's grandmother. It resulted in intervention for Jonathon being delayed.

29. In conclusion, I note Detective Senior Constable S's evidence to me that he did not consider the criminal charges against Jonathon would be proceeded with, and that his ultimate aim was always for Jonathon (and the other children) to receive treatment.

30. The Application for a TTO will be dismissed as I am not satisfied that the precondition set out in s.248(b) is satisfied.

Magistrate J. Gibson

6 March 2015