HIGH COURT OF AUSTRALIA

GLEESON CJ
KIRBY, HAYNE, HEYDON AND CRENNAN JJ

PM APPELLANT

AND

THE QUEEN RESPONDENT

PM v The Queen
[2007] HCA 49
8 November 2007
S217/2007

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation

R F Sutherland SC for the appellant (instructed by Fox O'Brien)

L M B Lamprati SC with N F Noman for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

CATCHWORDS

PM v The Queen

Criminal procedure – Crimes and offences by children – Jurisdiction – A child was charged with a "serious children's indictable offence" as well as lesser offences – The child's committal hearing was in the Children's Court of New South Wales, but the proceedings were remitted to the District Court because the Children's Court did not have jurisdiction to deal with the "serious children's indictable offence" – In the District Court the prosecutor did not proceed with the "serious children's indictable offence" – Whether the District Court was required to remit the proceedings back to the Children's Court for determination – Whether the District Court had jurisdiction to deal with charges against a child not involving a "serious children's indictable offence".

Criminal procedure – Crimes and offences by children – Powers of the New South Wales Director of Public Prosecutions with respect to filing an indictment against a child.

Words and phrases – "serious children's indictable offence".

Criminal Procedure Act 1986 (NSW), s 8.
Children (Criminal Proceedings) Act 1987 (NSW), ss 7, 8, 26, 28, 31, 44.

1 GLEESON CJ, HAYNE, HEYDON AND CRENNAN JJ. The *Children (Criminal Proceedings) Act* 1987 (NSW) ("the CCP Act") makes special provision with respect to the conduct of criminal proceedings against children. The CCP Act differentiates between a "serious children's indictable offence" and other indictable offences.

2 The Children's Court of New South Wales, constituted by the *Children's Court Act* 1987 (NSW), has jurisdiction[1] to hear and determine proceedings in respect of any offence (whether indictable or otherwise) other than a serious children's indictable offence. It has jurisdiction[2] to hear and determine committal proceedings in respect of *any* indictable offence, including a serious children's indictable offence. The CCP Act provides, as the conditions for the exercise of either species of its jurisdiction, that the offence is alleged to have been committed by a person who was a child when the offence was committed and who was under the age of 21 years when charged before the Children's Court with the offence. If a person is charged before the Children's Court with an offence (whether indictable or otherwise) other than a serious children's indictable offence, the proceedings for the offence are to be dealt with summarily[3].

3 If, as in the present matter, a child is charged with a serious children's indictable offence, committed for trial in the District Court of New South Wales, and the prosecutor chooses not to proceed on the charge of a serious children's indictable offence but a lesser, included, indictable offence, must the proceedings for that lesser offence return for hearing and determination by the Children's Court? Does the District Court have jurisdiction to hear and determine that lesser offence?

4 The power given to the District Court to order remitter to the Children's Court of criminal proceedings against a child is contained in s 44 of the CCP Act. That power may be exercised only "[i]f a court before which a person is charged with an offence is satisfied that, because of any provision of [the CCP] Act, it did not or does not have jurisdiction to deal with the charge". There is no provision of the CCP Act which excludes or limits the jurisdiction of the District Court "in

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1 *Children (Criminal Proceedings) Act* 1987 (NSW) ("the CCP Act"), s 28.

2 s 28.

3 CCP Act, s 31(1).

respect of all indictable offences" conferred by s 46(2)[4] of the *Criminal Procedure Act* 1986 (NSW) ("the Criminal Procedure Act") in conjunction with s 166(1) of the *District Court Act* 1973 (NSW)[5].

5 The condition for exercising the power under s 44 of the CCP Act was not satisfied in the present matter. The District Court had jurisdiction to deal with the charges preferred against the appellant. Section 44 of the CCP Act not being validly engaged, no order for remitter should have been made. It was not suggested, either in this Court or in the courts below, that if the District Court had jurisdiction with respect to the charges preferred against the appellant, the further exercise of that jurisdiction should have been stayed.

The proceedings below

6 The appellant was born in December 1987. He was under 18 at the time of the events which gave rise to the present proceedings and was, therefore, a "child" as defined in s 3 of the CCP Act.

7 On 18 September 2004, a court attendance notice was given to the appellant alleging that on 17 September 2004 he had had sexual intercourse with the complainant without her consent, and knowing that she was not consenting to the sexual intercourse, in circumstances of aggravation, namely, that at the time of the offence the complainant was a person aged under 16 years. At that time, s 61J(1) of the *Crimes Act* 1900 (NSW) provided that a person who has sexual intercourse with another person without the consent of that other, and in circumstances of aggravation, and who knows that the other person does not consent to the sexual intercourse, is liable to imprisonment for 20 years. The heading to the section described the offence as "[a]ggravated sexual assault". It is convenient to use that description. Sub-section (2) of s 61J specified seven circumstances of aggravation. One was that the alleged victim was under the age

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4 That sub-section provides:

> "The District Court has jurisdiction in respect of all indictable offences, other than such offences as may be prescribed by the regulations for the purposes of this section."

5 That sub-section provides:

> "The Court has the criminal jurisdiction conferred or imposed on it by or under this Act, the *Criminal Procedure Act 1986* and any other Act."

of 16 years[6]. Another was that "at the time of, or immediately before or after, the commission of the offence, the alleged offender maliciously inflicts actual bodily harm on the alleged victim or any other person who is present or nearby"[7].

8 On 21 October 2004, a little over a month after the first court attendance notice, the appellant was given a further court attendance notice charging him not only with the offence specified in the first notice, but with a second count of aggravated sexual assault against the complainant in which the circumstance of aggravation alleged was that at the time of the offence he occasioned actual bodily harm to the complainant.

9 The first charge laid against the appellant, in which the age of the complainant was alleged to be the aggravating circumstance, was not a serious children's indictable offence. The second charge, alleging the occasioning of actual bodily harm as an aggravating circumstance, was.

10 The charges were brought on for hearing in the Bidura Children's Court at Glebe on 12 April 2005. The hearing was treated as a committal. Only one witness, a forensic biologist, gave oral evidence. Other evidence was tendered in written form. Counsel for the appellant told the magistrate that he had no submissions to make but counsel for the informant told the magistrate that "the DPP is seeking committal for trial" in relation only to the second offence charged (the offence alleging the occasioning of actual bodily harm as the aggravating circumstance). Counsel for the informant indicated that she wished to withdraw the first charge (the offence alleging the age of the complainant as the aggravating circumstance) and this was done. The magistrate, being of opinion "that on the evidence ... there is a reasonable prospect that a reasonable jury properly instructed would convict the [appellant] of an indictable offence", committed the appellant for trial at the District Court in Sydney.

11 On 18 May 2005, as had been foreshadowed at the end of the committal, the Director of Public Prosecutions filed an indictment containing only one charge of aggravated sexual assault by the appellant upon the complainant. The circumstance of aggravation alleged was that at the time of the offence the appellant inflicted actual bodily harm on the complainant. (As noted earlier, this was a serious children's indictable offence.) Subsequently, on 14 March 2006, the Director of Public Prosecutions filed a fresh indictment containing three

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6 *Crimes Act* 1900 (NSW), s 61J(2)(d).

7 s 61J(2)(a).

counts. The first count alleged the offence of aggravated sexual assault but specified, as the circumstance of aggravation, that the complainant was under the age of 16 years. (As noted earlier, this was not a serious children's indictable offence.) Two alternative counts were also charged: having sexual intercourse with the complainant, a child then aged between 14 and 16 years, contrary to s 66C(3) of the *Crimes Act*, and assaulting the complainant, at the same time committing an act of indecency on her, she being then under the age of 16, contrary to s 61N of the *Crimes Act*. Neither of the alternative counts alleged a serious children's indictable offence.

12 There was no occasion in this appeal to consider what consequences for the first indictment followed from filing the second. The appeal to this Court proceeded on the footing that the Director required no leave[8] to file the second indictment and that filing the second indictment "overtook" the first.

13 On 14 March 2006, after the second indictment had been filed, the appellant was arraigned on that indictment, pleaded not guilty to all three counts, and a jury was empanelled. The complainant was called to give evidence. Just before the court adjourned for the day, the jury sent a note to the judge (McGuire DCJ) asking why the appellant was "being tried as an adult".

14 On the following day, counsel for the appellant submitted that the proceedings should not continue in the District Court, but be remitted to the Children's Court, pursuant to s 44 of the CCP Act[9]. The primary judge held that the indictment was "defective in that it particularises conduct constituting an indictable offence and not a serious children's indictable offence". The primary judge concluded that because the Children's Court had not formed the opinion that the charges brought against the appellant "may not properly be disposed of in a summary manner"[10] the District Court had no jurisdiction to deal with the charges contained in the indictment. Accordingly, the primary judge discharged

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8 *R v Harris (No 2)* [1990] VR 305 at 306-307; *Poole v The Queen* [1961] AC 223; *R v Lewis* [1975] 2 NZLR 490; Starkie, *A Treatise on Criminal Pleading*, 2nd ed (1822), vol 1 at 299-300.

9 Section 44 of the CCP Act provided that: "If a court before which a person is charged with an offence is satisfied that, because of any provision of this Act, it did not or does not have jurisdiction to deal with the charge, it may remit the case to such other court as has jurisdiction to deal with the charge."

10 CCP Act, s 31(3)(b)(ii).

the jury and made an order, under s 44 of the CCP Act, remitting the matter to the Children's Court for its determination.

15 The Director of Public Prosecutions appealed to the Court of Criminal Appeal. By majority, that Court (Whealy and Latham JJ; Basten JA dissenting) allowed[11] the appeal and set aside the order of McGuire DCJ remitting the matter to the Children's Court. By special leave the appellant appeals to this Court.

16 In the Court of Criminal Appeal there was debate about whether the order made at first instance was to be understood as an order quashing the second indictment[12]. There was also some debate about whether the appeal instituted by the Director was properly brought under s 5C or s 5F of the *Criminal Appeal Act* 1912 (NSW). Neither of these issues arises directly in the appeal to this Court. The issues debated in this Court centred upon whether the order for remitter to the Children's Court should have been made.

17 As noted earlier, the essential premise for making that order was, in the words of s 44 of the CCP Act, that the District Court "did not or does not have jurisdiction to deal with" the charges preferred in the indictment. And the ultimate proposition, to which the appellant's arguments both in this Court and in the courts below were directed, was a compound proposition. It was that the District Court had no jurisdiction to hear and determine the charges preferred against the appellant (each of which charged an indictable offence *other than* a serious children's indictable offence) because the appellant had not elected to "take his or her trial according to law"[13] for those offences, and the Children's Court had not first decided that the proceedings on *those* charges may not properly be disposed of in the Children's Court in a summary manner.

18 The reference in s 44 to a court being "satisfied that, because of any provision of [the CCP] Act, it did not or does not have jurisdiction to deal with the charge" must be read in the light of other provisions of the CCP Act. The most obvious circumstances in which s 44 will be engaged hinge about the age of the defendant. But s 44 may also be engaged because s 7 of the CCP Act applies. Section 7 of the CCP Act provides that:

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11 *Director of Public Prosecutions (NSW) v PM* (2006) 67 NSWLR 46.

12 (2006) 67 NSWLR 46 at 61 [58] per Basten JA, 72 [113] per Latham J (Whealy J agreeing).

13 s 31(2)(b).

> "(1) Except as provided by this Act, a Local Court may not hear and determine criminal proceedings that the Children's Court has jurisdiction to hear and determine.
>
> (2) The Drug Court may not hear or determine criminal proceedings that a Children's Court has jurisdiction to hear and determine."

19 Evidently, then, s 44 may be engaged if criminal proceedings over which the Children's Court has jurisdiction are commenced in a Local Court or in the Drug Court. A Local Court or the Drug Court may not have jurisdiction to deal with a charge "because of" a provision of the CCP Act (s 7) and s 44 may thus be engaged. But s 7 of the CCP Act is important not only because it stands as an example of how and when s 44 may be engaged. It is important because neither s 7, nor any other provision of the CCP Act, expressly limits the jurisdiction of the District Court.

20 The argument that the CCP Act should be read as limiting the jurisdiction of the District Court depended upon spelling out such a legislative intention from other provisions of the CCP Act which, in their terms, were directed only to the Children's Court or the conduct of proceedings in that Court. The argument was not made good. There are no cogent reasons[14] to read the provisions of the CCP Act as impliedly and indirectly limiting the otherwise general conferral by the Criminal Procedure Act[15] of jurisdiction on the District Court "in respect of all indictable offences".

The relevant statutory provisions

21 Much emphasis was given in argument, both in this Court and in the courts below, to s 31 of the CCP Act. That section regulates the hearing of charges in the Children's Court. It takes its place in the CCP Act in the context provided by the other provisions of the Act including, in particular, s 8 (concerning the commencement of criminal proceedings against a child), s 26 (concerning the application of Pt 3 of the CCP Act) and s 28 (concerning the jurisdiction of the Children's Court).

22 Sections 26, 28 and 31 are all contained in Pt 3 of the CCP Act. Section 26(1) provides that that Part applies to the Children's Court and any

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14 *Australasian Memory Pty Ltd v Brien* (2000) 200 CLR 270 at 279 [17]; *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421.

15 s 46(2).

criminal proceedings before the Children's Court, "notwithstanding any law or practice to the contrary". And s 26(2) provides that in the event of any inconsistency between Pt 3 and Pt 2 of the Act (ss 4-25) regulating "Criminal proceedings generally", Pt 3 is to prevail to the extent of the inconsistency. Section 28(1) (as noted earlier) prescribes the jurisdiction of the Children's Court. It provides:

> "The Children's Court has jurisdiction to hear and determine:
>
> (a) proceedings in respect of any offence (whether indictable or otherwise) other than a serious children's indictable offence, and
>
> (b) committal proceedings in respect of any indictable offence (including a serious children's indictable offence),
>
> if the offence is alleged to have been committed by a person:
>
> (c) who was a child when the offence was committed, and
>
> (d) who was under the age of 21 years when charged before the Children's Court with the offence."

(Sub-section (2) qualifies the operation of s 28(1) in respect of traffic offences. It may be put aside from further consideration in this matter.)

23 Section 31 provides:

> "(1) If a person is charged before the Children's Court with an offence (whether indictable or otherwise) other than a serious children's indictable offence, the proceedings for the offence shall be dealt with summarily.
>
> (2) Notwithstanding subsection (1):
>
> (a) if a person is charged before the Children's Court with an indictable offence (other than an offence that is punishable summarily without the consent of the accused), and
>
> (b) if the person informs the Children's Court (at any time during, or at the close of, the case for the prosecution) that the person wishes to take his or her trial according to law,
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> the proceedings for the offence shall not be dealt with summarily but shall be dealt with in accordance with Divisions 2–4 (other than

sections 60 and 61) of Part 2 of Chapter 3 of the *Criminal Procedure Act 1986* in the same way as if a court attendance notice had been issued in accordance with that Act.

(3) Notwithstanding subsection (1):

(a) if a person is charged before the Children's Court with an indictable offence, and

(b) if the Children's Court states that it is of the opinion, after all the evidence for the prosecution has been taken:

(i) that, having regard to all the evidence before the Children's Court, the evidence is capable of satisfying a jury beyond reasonable doubt that the person has committed an indictable offence, and

(ii) that the charge may not properly be disposed of in a summary manner,

the proceedings for the offence shall not be dealt with summarily but shall be dealt with in accordance with Divisions 2–4 (other than sections 60 and 61) of Part 2 of Chapter 3 of the *Criminal Procedure Act 1986* in the same way as if a court attendance notice had been issued in accordance with that Act and as if the Children's Court had formed the opinion referred to in section 62 of that Act.

(4) If, in the circumstances referred to in subsection (3), the Children's Court commits a person for trial, the Children's Court shall forthwith furnish to the person a statement of the reasons for its decision to commit the person for trial instead of dealing with the matter summarily.

(5) Notwithstanding subsection (1):

(a) if a person is charged before the Children's Court with an indictable offence, and

(b) if, at any stage of the proceedings, the person pleads guilty to the charge, and

(c) if the Children's Court states that it is of the opinion that, having regard to all the evidence before it, the charge may not properly be disposed of in a summary manner,

> the proceedings for the offence shall not be dealt with summarily but shall be dealt with in accordance with Division 5 of Part 2 of Chapter 3 of the *Criminal Procedure Act 1986* as if the offence were a serious children's indictable offence in respect of which the person had pleaded guilty as referred to in that section."

24 Ordinarily, then, if a person is charged before the Children's Court with an indictable offence that is not a serious children's indictable offence, and pleads not guilty, the proceedings are to be dealt with summarily in the Children's Court, unless one of two conditions is met. First, the accused person may elect "to take his or her trial according to law"[16]. Secondly, the accused person is to be committed for trial if (a) the Children's Court states that it is of the opinion, at the end of the prosecution case, that the evidence is capable of satisfying a jury beyond reasonable doubt that the person has committed an indictable offence and (b) the Children's Court is of the opinion that "the charge may not properly be disposed of in a summary manner"[17].

25 But as both the words of s 31 and the express provisions of s 26 make plain, the provisions of s 31 apply to the Children's Court and to any criminal proceedings before the Children's Court. In terms, the provisions of s 31 are not directed to any other court or to proceedings in any other court.

26 It may readily be accepted that the CCP Act was intended to make special provision with respect to the conduct of criminal proceedings against children. It may likewise be accepted that the provisions it makes are intended to work for the benefit of those children who face criminal prosecution. But identifying the purposes of the CCP Act in this way does not demonstrate that the Act bears the construction urged by the appellant.

27 While, in oral argument, the appellant placed chief emphasis upon s 31 of the CCP Act, the appellant also supported the reasoning of Basten JA in the Court of Criminal Appeal. It is convenient to examine these arguments by reference to his Honour's reasons.

28 Basten JA concluded[18] that all offences which are not serious children's indictable offences are to be dealt with summarily in the Children's Court unless

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16 s 31(2)(b).

17 s 31(3).

18 (2006) 67 NSWLR 46 at 53 [28].

the steps prescribed by s 31 of the CCP Act are engaged and, in accordance with that section, the accused person is committed for trial in another court. That conclusion depended, in part, upon the construction of s 8 of the CCP Act. Basten JA held[19] that s 8 required the conclusion that proceedings against a child in respect of an offence which is not a serious children's indictable offence "should not be commenced otherwise than by a court attendance notice".

29 It is necessary, then, to have regard to the relevant provisions of Pt 2 of the CCP Act and s 8 in particular. Section 8, at the times relevant to this matter, provided that:

> "(1) Criminal proceedings should not be commenced against a child otherwise than by way of court attendance notice.
>
> (2) Subsection (1) does not apply:
>
> (a) if the offence for which proceedings are being commenced consists of:
>
> (i) a serious children's indictable offence,
>
> (ii) an indictable offence under Division 2 of Part 2 of the *Drug Misuse and Trafficking Act 1985*, or
>
> (iii) an offence (whether indictable or otherwise) prescribed by the regulations for the purposes of this paragraph,
>
> (b) if, in the opinion of the person by whom the proceedings are commenced, there are reasonable grounds for believing that:
>
> (i) the child is unlikely to comply with a court attendance notice, or
>
> (ii) the child is likely to commit further offences,
>
> if the proceedings were to be commenced by court attendance notice, or
>
> (c) if, in the opinion of the person by whom the proceedings are commenced:

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19 (2006) 67 NSWLR 46 at 52 [25].

(i) the violent behaviour of the child, or

(ii) the violent nature of the offence,

indicates that the child should not be allowed to remain at liberty."

30 Three separate points are to be made about s 8 and its application to the circumstances of the present case. First, criminal proceedings that are commenced against a child otherwise than by issuing a court attendance notice are not invalidly commenced if the qualifications to the application of s 8(1) provided in s 8(2) are not satisfied. The jurisdiction of the court in which those proceedings are commenced is not affected by the failure to begin the proceedings in accordance with s 8. Secondly, the criminal proceedings against the appellant that were maintained in the District Court by the filing of the second indictment had been commenced by way of court attendance notice. Thirdly, if, unlike this case, criminal proceedings against a child were instituted by filing an indictment in the District Court alleging indictable offences unrelated to any charges that had been laid in a court attendance notice and had been the subject of examination in prior committal proceedings in the Children's Court, there may be some question whether the prosecution of that indictment should be stayed[20]. But that would be a question about the *exercise* of jurisdiction, not whether the District Court had jurisdiction in respect of the offences. The resolution of any question about staying such proceedings would raise issues different from the issues of jurisdiction that must be considered in this case and it is not necessary to say any more about this third point. It is, however, desirable to amplify the first two points.

31 Is compliance with s 8 "mandatory", in the sense that criminal proceedings commenced against a child otherwise than in accordance with the section are to be treated as not validly commenced[21]?

32 The expression "should not be commenced ... otherwise", used in s 8(1), may be read as expressing only an exhortation, not a command. That is the more natural meaning of the words used. Sub-section (2) provides that s 8(1) "does not apply" if one of the various objective criteria stated in s 8(2)(a) is met, or if the person by whom the proceedings are commenced forms an opinion of a kind described in s 8(2)(b) or (c). These qualifications to the operation of s 8(1) may

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20 *Barton v The Queen* (1980) 147 CLR 75.

21 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

suggest that s 8(1) is to be read as a command, and not just as legislative encouragement for adopting one means of starting criminal proceedings rather than others.

33 The history of s 8 of the CCP Act supports reading s 8(1) as hortative, not prescriptive. As originally enacted, s 8 provided that "[i]f criminal proceedings are taken against a child in respect of an offence, the proceedings *shall be commenced* by way of summons or citation unless ..." (emphasis added). The *Children (Criminal Proceedings) Amendment Act* 1987 (NSW) amended s 8(1) so that it provided that "[c]riminal proceedings *should not be commenced* against a child otherwise than by way of summons or attendance notice" and the Explanatory Note to the Bill described the amendment as "intended *to encourage* the use of attendance notices and summonses in preference to warrants" (emphasis added).

34 The critical question, however, is what is the consequence of not instituting particular criminal proceedings by way of court attendance notices?

35 Whether s 8(1) expresses a command, or merely an exhortation, no express provision is made by the CCP Act for any consequences that are to be attached to not acting in accordance with the section's provisions. In particular, nothing in the text or context of the CCP Act suggests that proceedings commenced against a child otherwise than by a court attendance notice are to be treated as not having been validly instituted[22], if none of the qualifications provided by s 8(2) applies.

36 Due weight must be given to s 4 of the CCP Act, and its provision that Pt 2 of the Act (which includes s 8) applies to any court that exercises criminal jurisdiction and to any criminal proceedings before any such court "notwithstanding any law or practice to the contrary". But s 4 is engaged in respect of the *exercise* of criminal jurisdiction and in respect of criminal proceedings before a court. In its terms, s 4 is not directed to the logically anterior question of what courts have jurisdiction over particular matters. Section 4 does not detract from the conclusions earlier expressed about the operation of s 8 and the validity of proceedings instituted otherwise than by a court attendance notice.

37 The second point to make about the application of s 8 in this case is that the construction of the section urged by the appellant, and adopted by Basten JA,

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22 *Project Blue Sky Inc* (1998) 194 CLR 355.

treated the filing of the second indictment in the present matter as the commencement of criminal proceedings against the appellant that were separate and distinct from those that were commenced when either the first or the second court attendance notice was given to him. Even if, contrary to the view expressed earlier in these reasons, s 8(1) were to be construed as invalidating any commencement of criminal proceedings against a child otherwise than in the manner described by s 8(1) (as limited in its application by s 8(2)) the relevant criminal proceedings against this appellant were commenced by way of court attendance notice.

38 All of the offences alleged in the second indictment preferred against the appellant were either expressly charged in the second court attendance notice or were lesser, included, offences of which the appellant could have been found guilty if the tribunal of fact was not satisfied of the appellant's guilt of the offence that was charged[23]. Arraigning the appellant in the District Court on the second indictment filed in that Court marked the start of his trial on the charges alleged in the indictment. In that limited sense, those particular criminal proceedings might be said to have been commenced by the filing of the second indictment. For the purposes of s 8(1), however, criminal proceedings against the appellant *were* commenced by way of court attendance notice. Section 8 of the CCP Act does not assist the appellant's argument.

39 A second, and separate strand in the reasoning of Basten JA depended upon the construction of the opening words of s 31(1) of the CCP Act: "If a person is charged before the Children's Court ...". The appellant submitted that, as Basten JA had held[24] in the Court of Criminal Appeal, "[i]f" should be read, in the context provided by the Act as a whole, as meaning "when" in the sense of "whenever". But even accepting that this is the preferable construction of the opening words of s 31(1), the critical point to observe is that the sub-section does not speak to courts other than the Children's Court. Reading s 31(1) as prescribing that, "when" or "whenever" a person is charged before the Children's Court, the charge is to be dealt with summarily does not require the conclusion of exclusivity of jurisdiction to which the appellant's argument was directed. That is, even so understood, s 31(1) does not demonstrate that s 28 of the CCP Act is to be read as conferring jurisdiction on the Children's Court that is exclusive of the jurisdiction of other courts. It does not demonstrate that the District Court has no jurisdiction to hear an indictable offence unless the steps contemplated by

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23 *Crimes Act*, s 61Q.

24 (2006) 67 NSWLR 46 at 52 [24].

s 31(2) have first been taken in the Children's Court in relation to that particular offence.

40 At first instance, and in the Court of Criminal Appeal, much of the argument proceeded by reference to the power of the Director of Public Prosecutions to file an ex officio indictment. Section 8 of the Criminal Procedure Act provides that:

> "(1) All offences shall be punishable by information (to be called an indictment) in the Supreme Court or the District Court, on behalf of the Crown, in the name of the Attorney General or the Director of Public Prosecutions.
>
> (2) Such an indictment may be presented or filed whether or not the person to whom the indictment relates has been committed for trial in respect of an offence specified in the indictment.
>
> (3) This section does not apply to offences that [are] required to be dealt with summarily.
>
> (4) This section does not affect any law or practice that provides for an indictable offence to be dealt with summarily."

Section 8(2), in particular, permits filing an ex officio indictment.

41 In the Court of Criminal Appeal, Basten JA concluded[25] that "by virtue of a combination of s 8 of the *Criminal Procedure Act* and s 8 and s 31 of the [CCP Act], the Director had no power in this case to file an ex officio indictment in relation to an offence other than a serious children's indictable offence".

42 Asking a question about the Director's powers to file an ex officio indictment diverts attention from the statutory question presented by s 44 of the CCP Act. It was s 44 that founded the order made at first instance to remit the matter to the Children's Court and s 44 was engaged only if the District Court "did not or does not have jurisdiction to deal with the charge". Whether the Director had power to file an ex officio indictment may go to the validity of the second indictment that was filed in this matter but it does not, at least directly, identify whether the District Court had jurisdiction to deal with the charges laid in that indictment. Be this as it may, the conclusions reached in the Court of Criminal Appeal about the power to file an ex officio indictment depended

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25 (2006) 67 NSWLR 46 at 53 [28].

entirely upon the resolution of the questions of construction of the CCP Act that have already been considered. No separate question of construction was identified. For the reasons already given, the relevant provisions of the CCP Act do not bear the construction for which the appellant contended. Those provisions do not require or permit some reading down of the otherwise general powers given to the Director by s 8 of the Criminal Procedure Act.

43 It is, nonetheless, desirable to make two further points about the filing of the second indictment in this matter. It is very common, in criminal proceedings against adults, for the Director of Public Prosecutions to file an indictment that lays charges different from those that were before a magistrate considering whether to commit a person for trial. At a committal, the question for a magistrate[26] is whether "having regard to all the evidence ... the evidence is capable of satisfying a reasonable jury, properly instructed, beyond reasonable doubt that the accused person has committed *an* indictable offence" (emphasis added). The question is *not* whether there is evidence capable of demonstrating, to the requisite standard, guilt of the offence that is then charged.

44 Section 31(3) of the CCP Act prescribes when a child is to be committed to stand trial in the District Court or the Supreme Court. For present purposes, the provisions of s 31(3) are in substantially identical form to the provisions of the Criminal Procedure Act governing when an adult should be committed for trial. The question posed by s 31(3) of the CCP Act is whether the evidence is capable of satisfying a jury beyond reasonable doubt that the person has committed *an* indictable offence, not *the* offence that was then charged.

45 If the charges laid in the indictment differ from those that were before a committing magistrate, a question may arise about whether the accused person should stand trial on those charges without there having been some further preliminary inquiry. Considerations of the kind dealt with in *Barton v The Queen*[27] will bear upon the resolution of that question. But the fact that an indictment lays charges that differ from those that had been made in the court that committed an accused person for trial does not bear upon the jurisdiction of the court in which the indictment is filed. That question of jurisdiction, in the present case, turns upon whether, on its true construction, the CCP Act gives the Children's Court exclusive jurisdiction. It does not turn upon identifying the charges laid in the Children's Court or upon the course of events in the Children's

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26 *Criminal Procedure Act* 1986 (NSW), s 63(1).

27 (1980) 147 CLR 75.

Court. The CCP Act does not give the Children's Court exclusive jurisdiction over indictable offences that are not serious children's indictable offences.

46 After the conclusion of oral argument the parties, by leave, filed submissions about the history of New South Wales legislation governing criminal proceedings against children. Nothing in that history casts light directly on the immediate question of construction that must be decided. The history demonstrates no more than that special provision has long been made to regulate criminal proceedings against children. The question that must be decided is what is the extent of that "special provision". The answer to that question depends upon the construction of the relevant provisions.

47 For these reasons, s 44 of the CCP Act was not engaged. The District Court of New South Wales had jurisdiction to deal with the charges laid in the second indictment.

48 Before disposing of the appeal, however, it is necessary to notice one other point which arose in the course of oral argument but which was not the subject of any ground of appeal in this Court. As noted earlier, counsel for the informant sought leave of the Children's Court to withdraw the charge which had been laid in both the first and the second court attendance notices given to the appellant, of aggravated sexual assault in which the circumstance of aggravation alleged was the age of the complainant. It is to be recalled that this offence was the principal count alleged in the second indictment heard in the District Court.

49 In the Court of Criminal Appeal, Basten JA expressed[28] the view that s 206 of the Criminal Procedure Act could properly have been engaged in the present matter with the consequence that further proceedings could not be brought for the offence alleged as the principal charge on the second indictment. The correctness of this view was not put in issue in the appeal to this Court. It is neither necessary nor desirable to express any conclusion about it.

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28 (2006) 67 NSWLR 46 at 54 [30].

Order

50 The appeal should be dismissed.

51 KIRBY J. This appeal arises from a divided decision of the Court of Criminal Appeal of New South Wales concerning the unusual circumstances of the trial of the appellant, PM[29]. That trial commenced in the District Court of New South Wales, before McGuire DCJ and a jury.

52 As appears from the joint reasons in this case[30], the appeal concerns the jurisdiction of the District Court of New South Wales and of the Children's Court of New South Wales. It also concerns the powers of the New South Wales Director of Public Prosecutions ("the DPP") (and his or her delegates) to find indictments and to take proceedings in such courts in respect of criminal offences committed by children.

The facts

53 *Initiation of the proceedings*: The trial of the appellant arose out of criminal conduct alleged to have occurred in September 2004. At the time of the alleged offence, the appellant was aged 16 years and 9 months. He was therefore a "child" within the meaning of that term in the *Children (Criminal Proceedings) Act* 1987 (NSW) ("the CCP Act")[31]. The complainant was then a girl aged 14 years. The offence alleged was non-consensual sexual intercourse said to have occurred at a school that the two children attended. By the time the proceedings reached the District Court and the Court of Criminal Appeal, the appellant was 18 years of age[32].

54 Following a complaint to police, two separate charges were brought in the Children's Court. Each was initiated by the issuance of a court attendance notice[33]. The first charge, dated 18 September 2004, alleged an offence comprising a form of aggravated sexual assault under s 61J of the *Crimes Act* 1900 (NSW). The aggravating feature specified was that the alleged victim was under the age of 16 years[34]. For the purposes of the CCP Act, the offence

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29 *Director of Public Prosecutions (NSW) v PM* (2006) 67 NSWLR 46.

30 See joint reasons at [6]-[29] setting out the relevant facts and applicable legislation.

31 See the CCP Act, s 3 (defining "child").

32 (2006) 67 NSWLR 46 at 48 [3].

33 See the CCP Act, s 3 (defining "court attendance notice").

34 See *Crimes Act* 1900 (NSW), s 61J(2)(d).

charged was not a "serious children's indictable offence"[35]. If it had been, a trial otherwise than in the Children's Court would have been required[36].

55 On 21 October 2004, a second court attendance notice was issued to the appellant in respect of a differently particularised offence under s 61J. It specified a serious circumstance of aggravation, namely, the malicious infliction of actual bodily harm on the alleged victim[37]. This offence fell within the definition of a "serious children's indictable offence".

56 On 12 April 2005, a committal hearing commenced before the Children's Court. There, the DPP sought to withdraw the first charge. This course was permitted, and the Magistrate discharged the appellant with respect to that charge. So far as the second charge was concerned, the Magistrate committed the appellant to stand trial in the District Court.

57 On 18 May 2005, the DPP filed a notice of readiness to proceed to trial in the District Court. Annexed to that notice was a draft indictment stating the offence intended to be tried. In effect, it was the same as the offence in respect of which the Magistrate had committed the appellant for trial.

58 On 14 March 2006, the DPP presented an indictment in the District Court containing different charges. The first was in all relevant respects identical to the original charge laid in the Children's Court. Two additional charges, pleaded in the alternative, alleged offences which were not "serious children's indictable offences".

59 *The jury's question*: Upon his arraignment in the District Court, the appellant pleaded not guilty to all charges. A jury were empanelled. The trial commenced in the normal way. However, at the end of the first day, McGuire DCJ notified counsel that he had:

> "received a note from the jury which is in the following terms. 'The accused committed the crime at age sixteen/seventeen, why is he being tried as an adult?'"

60 McGuire DCJ called for submissions from counsel as to how he should answer the jury's question.

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35 See the CCP Act, s 3.

36 See the CCP Act, s 28.

37 See *Crimes Act* 1900 (NSW), s 61J(2)(a). A defect in the drafting of the actual notice is not relevant for present purposes: see (2006) 67 NSWLR 46 at 49 [10], 63-65 [71]-[77].

61 The question resulted in overnight research by counsel for both parties. For the first time, the appellant's counsel saw what he regarded as the significance of the fact that the first charge now being preferred in the indictment was distinct from the "serious children's indictable offence" in respect of which the appellant had been committed for trial in the District Court. In the result, he applied for an order remitting the matter to the Children's Court to be dealt with as a trial of a "child" in accordance with s 31 of the CCP Act.

62 *The judge's ruling*: Following argument on the issue, McGuire DCJ acceded (over the opposition of the prosecutor) to the appellant's request. He said:

> "… [A] bill was found for a serious children's indictable offence … and an indictment was filed in the District Court. That gave the District Court jurisdiction in relation to the proceedings relating to this accused.
>
> Subsequently, the charge on the indictment filed in this Court was changed to a lesser charge, as is contained in the present indictment before the Court … which is not a serious children's indictable offence. It was submitted that as the matter is in the District Court, jurisdiction is not taken away by reason of the change in the charge which was reduced from the serious children's indictable offence to an indictable offence. Accordingly, the matter can and should proceed on the indictment currently before the Court. The learned Crown Prosecutor conceded that benefits which may have been available in the Children's Court have in effect been 'blocked off', to use his words. As the matter is now before this Court, this is where it should remain and where it should be determined.
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> It appears to me that the indictment before this Court is defective in that it particularises conduct constituting an indictable offence and not a serious children's indictable offence. The indictable offence charged on the indictment could only have come to this Court pursuant to the procedures outlined in s 31 of the [CCP] Act. Accordingly, it appears to me that this Court has no jurisdiction to deal with the charges contained in the indictment.
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> … I was informed that the DPP has given his sanction to the issue of an ex officio indictment. In effect, the DPP is apparently seeking to cure the current defective indictment by issuing an ex officio indictment.
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> I can see no warrant for this course. If the DPP wishes to issue an ex officio indictment, that would involve a fresh proceeding and not merely an attempt to retrospectively cure the current defective indictment. I gravely doubt whether the DPP has the power to issue an ex officio indictment in relation to an indictable offence not being a serious

children's indictable offence. This would involve circumventing procedures provided for in s 31 of the [CCP] Act."

63 In consequence, McGuire DCJ discharged the jury. Pursuant to s 44 of the CCP Act, he remitted the matter to the Children's Court for determination of the charges now in issue. The DPP mounted a successful challenge to this ruling in the Court of Criminal Appeal, whereupon the appellant appealed to this Court.

64 I have set out the above extract of the reasons of the experienced trial judge because it well encapsulates the problem with which he was confronted. It represents his immediate response to the problem that now falls to be resolved here.

65 *The appellant's submissions*: In the Court of Criminal Appeal and in this Court, the appellant defended the approach of McGuire DCJ. In the court below, his submissions attracted the support of Basten JA. The case presented to us is by no means open and shut. For that reason, and out of respect for the differing opinions expressed below, I write separately, despite the fact that I reach the same conclusion as that expressed in the joint reasons.

66 The appellant urges that McGuire DCJ's solution to the problem of jurisdiction is consonant with fulfilment of the purposes of the New South Wales Parliament in enacting the CCP Act. He submits that the opposite conclusion would permit the DPP to circumvent the CCP Act by the simple expedient of finding a new indictment, once before the District Court, for an offence other than a "serious children's indictable offence". This would procure the hearing of the offence in the District Court before a judge and jury. It would avoid the Children's Court and the significant substantive and procedural advantages that Court affords an accused "child". Obviously, this was the consideration that motivated the question from the jury who, by inference, were anxious about the fact that an offence relating to the conduct of schoolchildren would ordinarily (and more appropriately) be dealt with in the Children's Court rather than tried before judge and jury in the District Court as if the accused were already an adult.

67 The appellant's basic submission was that it was the intention of Parliament that all offences alleged against a "child" (other than those defined as "serious children's indictable offences") would be dealt with summarily in the Children's Court, provided that that Court retained jurisdiction over the accused in the sense that he or she had not reached the age of 21. It is not disputed that the Children's Court retained jurisdiction over the appellant in that sense.

Factors supporting remitter to the Children's Court

68 A number of factors support the approach of McGuire DCJ. Most of them are set out in his ruling, which was admirably brief and to the point.

69 *Separate trial of children*: The trial of children (even those accused of quite serious crimes) in a separate court under special conditions is not something novel. It represents a long established feature of criminal justice in New South Wales[38], as in other Australian jurisdictions.

70 The separate treatment of children has long had a dual purpose. First, it recognises the inappropriateness, except in the gravest of cases, of invoking the full range of adult criminal trial procedures and punishments where the offender is young, and typically inexperienced and immature. Secondly, it operates so as to prevent youthful offenders becoming associated with adults having extensive criminal histories, acknowledging that affording such offenders a second chance may divert them away from future criminal behaviour. The removal of accused children to a court such as the Children's Court is, therefore, both the mark of a civilised community and a reflection of that community's perception of its own self-interest in the treatment of young offenders.

71 These are not trivial purposes. They reflect extremely important social policies. In interpreting the CCP Act, it is the duty of courts, including this Court, not to brush such objectives aside but to attempt to fulfil them so far as this is possible, given the legislative provisions.

72 *Diversion of a child accused*: Introducing the Bill that became the CCP Act, the Minister called attention to a number of relevant "major proposals and legislative initiatives around Australia and overseas"[39]. He made mention of the "comprehensive child welfare report" of the Australian Law Reform Commission[40] and special inquiries and reports in other Australian States and

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38 See *Juvenile Offenders Act* 1850 (NSW). The 1850 Act was repealed under Sched 1 to the *Criminal Law Amendment Act* 1883 (NSW), which contained specific offences in respect of boys and youths (s 446). Part III of the *Neglected Children and Juvenile Offenders Act* 1905 (NSW) created a Children's Court with special powers and procedures. See also *Child Welfare Act* 1923 (NSW), Pt XI; *Child Welfare Act* 1939 (NSW), Pt III; *Community Welfare Act* 1982 (NSW), Pt IX. The last-mentioned Act was repealed under s 4 of the *Miscellaneous Acts (Community Welfare) Repeal and Amendment Act* 1987 (NSW) consequent upon the enactment of the *Children's Court Act* 1987 (NSW). At the same time the New South Wales Parliament enacted the Act under consideration in this appeal.

39 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 April 1987 at 10353.

40 Australian Law Reform Commission, *Child Welfare*, Report No 18, (1981). See in particular Ch 4 ("Young Offenders: Current Law and Practice") and Ch 5 ("Young Offenders: The Childrens Court").

Territories and in New Zealand. He described the CCP Act as introducing "significant modifications … reflect[ing] recent developments in the juvenile justice area"[41]. In particular, he said:

> "[T]he Government has decided that … police will be left with the function of deciding who will be prosecuted. Under the bill criminal proceedings will now be able to be commenced, where appropriate, by summons or citation. This reform has been welcomed by the police and the courts, as it provides an option to charge and bail.
>
> Another reform requires that the courts take steps to ensure that children brought before the court understand the proceedings, the allegations made against them, and the legal implications of those allegations."

73 The Minister went on to describe special provisions in the CCP Act for moderated sentences and the destruction of records both of cases where the child is found not guilty and in other cases. He also referred to the purpose of the CCP Act to provide "greater protection against the undue prejudicial effect of the existence of such records and to actively promote rehabilitation"[42]. Self-evidently, the provisions of the CCP Act embody important legislative objectives. They ought not to be interpreted as subject to easy circumvention by public office-holders (such as the DPP).

74 *Upholding distinctive procedures*: In earlier decisions, the Court of Criminal Appeal has itself recognised that the foregoing considerations support an approach that gives full force and effect to the provisions of the CCP Act protective of young accused offenders. In *Stanton*[43], Gleeson CJ, with the concurrence of Wood and Grove JJ, observed[44]:

> "[T]he High Court emphasised in *Jago*[45] [that] the community has a right to expect that persons charged for criminal offences are brought to trial. Equally, however, the [CCP] Act is important legislation which

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41 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 April 1987 at 10357.

42 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 8 April 1987 at 10357.

43 (1991) 52 A Crim R 164.

44 (1991) 52 A Crim R 164 at 168.

45 *Jago v District Court (NSW)* (1989) 168 CLR 23.

establishes distinctive procedures and principles relevant to criminal proceedings against persons whose conduct falls within its purview, and it confers protections and benefits upon such persons which the court should safeguard. In the present case the procedures of that Act have been bypassed."

75 It was pointed out in *Stanton* that the facts of the case were somewhat peculiar and that, in the circumstances, there had been no "deliberate attempt on the part of the prosecuting authorities to circumvent the relevant statutory provisions"[46]. Mr Stanton had been under the age of 18 at the time he was alleged to have committed seven offences which, although indictable, were not "serious children's indictable offences" for the purposes of the CCP Act. However, an eighth and more serious offence was alleged to have occurred in respect of the same complainant at a time when Mr Stanton was over 18 years of age, and hence outside the jurisdiction of the Children's Court. The various offences were said to have comprised a related course of conduct. Committal proceedings in respect of all counts had taken place together. In these circumstances, it was held to be appropriate for all of the charges to be tried together and necessarily elsewhere than in the Children's Court.

76 The facts in *Stanton* may be contrasted with those of the present case. Here, initial proceedings in the Children's Court resulted in the committal of the appellant to stand trial in the District Court charged with a "serious children's indictable offence". The DPP then jettisoned the relevant charge. Instead, he presented an indictment for an offence which, *prima facie*, was one that the CCP Act contemplated would be dealt with in the Children's Court. It is arguable that this amounted to a "deliberate attempt on [his] part … to circumvent the relevant … provisions [of the CCP Act]" such as to distinguish this case from *Stanton*. At the least, it was said, the DPP's actions contravened the spirit of the legislation and the apparent purpose of Parliament in enacting s 31(1) of the CCP Act[47].

77 *Harmonious reading of the DPP's powers*: These considerations aside, the appellant submitted that the power of the DPP to present an *ex officio* indictment in the District Court must be construed harmoniously with the CCP Act. The appellant argued that the DPP's powers, expressed in broad and general language, should be read down so as to be subject to the intention of Parliament that, in the usual case, criminal allegations against children (other than in respect of "serious children's indictable offences") would be dealt with in the Children's Court. He submitted that that Court's jurisdiction ought not to be bypassed

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46 (1991) 52 A Crim R 164 at 167.

47 Section 31(1) of the CCP Act is set out in the joint reasons at [23].

through the exercise of the broad discretion of the DPP to proceed on an *ex officio* indictment in the District Court or Supreme Court of New South Wales.

78 Because the DPP is a public office-holder, it might be expected that he would act in accordance with the policies of Parliament, including that expressed in the less than absolutely mandatory terms of s 8(1) of the CCP Act. That sub-section provides that "[c]riminal proceedings *should not* be commenced against a child otherwise than by way of court attendance notice" (emphasis added). In adopting the course that he did, it was submitted, the DPP contradicted an important, and expressly stated, policy objective of Parliament. Because the result was to deprive the appellant of significant protections that would have been available to him in the Children's Court (but were not applicable in higher courts), it was argued that the better view was that the District Court lacked jurisdiction. This would mean that McGuire DCJ was correct to so conclude. Under s 44 of the CCP Act, the District Court could remit the case to the Children's Court where it should have continued in the first place.

79 I have outlined what seem to be the main arguments supporting the appellant's position because I regard them as far from meritless. In the result, however, I have come to a conclusion adverse to the appellant's submissions. I have done so because of textual considerations and also countervailing reasons of legal principle and policy.

The District Court had jurisdiction

80 *A non-mandatory obligation*: Basten JA concluded that s 8(1) of the CCP Act precluded the filing of an *ex officio* indictment against a child (other than in respect of a "serious children's indictable offence") because that course would prevent criminal proceedings being commenced by court attendance notice[48]. However, this finding does not reflect the language and purpose of that sub-section.

81 The sub-section is expressed, curiously, in terms of what "should" be done. It provides that "[c]riminal proceedings *should not* be commenced against a child otherwise than by way of court attendance notice" (emphasis added).

82 The choice of this term does not appear to represent an accidental slip. Several verbs are used in the CCP Act, reflecting an apparently deliberate hierarchy of obligations.

83 Thus, where a mandatory obligation is envisaged, the CCP Act uses the conventional verb "shall". For instance, s 6, which concerns "[p]rinciples

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48 (2006) 67 NSWLR 46 at 52-53 [25].

relating to the exercise of criminal jurisdiction", dictates that a court, in exercising criminal jurisdiction with respect to children "*shall* have regard to [specified] principles" (emphasis added). Likewise, the verb "shall" is used in s 9(1), a provision requiring expedition of the hearing where a child is held in custody and has not been released on bail. In such a case, "the child *shall* be brought before the Children's Court as soon as practicable"[49] (emphasis added).

84 Where a significant obligation (but not one as strict as that which "shall" indicates) is intended, the CCP Act, in a number of places, uses the phrase "is to be". Thus, s 10(1)(a) provides that any person (other than a person specified) who is not directly interested in the proceeding "is to be" excluded from the place where the proceedings are being heard, unless the court otherwise directs[50].

85 A more imperative provision is s 11(4C), which provides that a court "is not to make an order" as specified unless satisfied of certain conditions. Section 11(4E) stipulates that where a court sentencing a person in respect of a "serious children's indictable offence" authorises the publication or broadcasting of the name of that person, it "must" indicate the making of the order to the person and make a record of its reasons for doing so.

86 Where a discretion or evaluating power is conferred, the CCP Act quite frequently uses the verb "may"[51] although, in particular contexts, when used in the negative ("may not"), it appears obvious that this verb also has a compulsory sense[52].

87 The point of this discussion of the language in the CCP Act is that the use of the verb "should" is distinctive, and hortatory rather than mandatory[53]. That interpretation is the only one that can be adopted when the CCP Act is read as a whole and when the contrast is observed between the use of the verb "should" in s 8(1) and the use elsewhere of other verbs of more imperative obligation.

88 *Addressing commencement of proceedings*: Reading the CCP Act in this way confirms that the issue of a court attendance notice is not a mandatory or exclusive mode of commencing criminal proceedings against a child. It is,

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49 See also the CCP Act, ss 12(3), 17, 18(1), 24; cf ss 11(4A), 12(2), 13(1), 14(1), 15(1), 25(2) ("shall not").

50 The CCP Act, s 10(1)(a); cf s 15(3).

51 The CCP Act, ss 10(2), 19(1), 20(1) and 20(3).

52 The CCP Act, s 7(1) and 7(2).

53 See also joint reasons at [32]-[33].

rather, the recommended mode of commencement. Such an interpretation conforms to the explanatory note issued with a Bill that amended s 8(1) of the CCP Act soon after its commencement. That note stated[54]:

> "The proposed section is intended to encourage the use of attendance notices and summonses in preference to warrants."

"Encourage" is a verb that falls short of giving rise to a legal requirement.

89 Likewise, the Minister's Second Reading Speech in support of the amending Bill said[55]:

> "Section 8 of the [CCP] Act is to be amended to clarify the exercise of police discretion as to whether or not to commence proceedings by way of charge summons or use of attendance notices under the Justices Act 1902. Attendance notices will replace the use of citations, an informal system that at present leads to some confusion."

90 For these and other reasons related to the structure of the CCP Act and the terms of the exceptions provided for in s 8(2), it is clear that the purpose of s 8(1) is to encourage the commencement of proceedings against children through court attendance notices and to avoid arrest wherever possible and appropriate. However, that aside, to give the CCP Act the operation urged on behalf of the appellant would be to divert attention from what it is that Parliament has said "should not" be done. The admonition in s 8(1) is addressed to the *commencement* of proceedings. Its terms do not render it applicable to proceedings that have already been commenced. Here, the proceedings were originally "commenced" against the appellant by way of court attendance notice in the Children's Court[56]. What subsequently happened when the proceedings were before the District Court was not therefore something which, on its face, engaged s 8(1) at all.

91 *Prosecutor's amendment powers*: The reference to an *ex officio* indictment on the part of the DPP appears misleading[57]. The indictment found

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54 Explanatory Note to the Children (Criminal Proceedings) Amendment Bill 1987 (NSW) at 2.

55 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 23 November 1987 at 17012.

56 See also joint reasons at [37]-[38].

57 The power of Crown Prosecutors to find (on behalf of the DPP) a bill of indictment, whether or not there has been a committal in respect of the offence there stated, is contained in s 5(1)(b) of the *Crown Prosecutors Act* 1986 (NSW).

against the appellant in the proceedings in the District Court was not an *ex officio* indictment in the sense that the proceedings were initiated *ex officio*. Rather, as noted above, the proceedings were initiated in the Children's Court by a court attendance notice. The appellant was committed by that Court for trial in the District Court after consideration of the prosecution evidence. The indictment filed in the District Court was then amended. Such amendment to the original indictment was made in the exercise of the broad powers afforded to the DPP to find a bill. Those powers exist whether or not there has been a committal in respect of a charge. Thus, s 7(2) of the *Director of Public Prosecutions Act* 1986 (NSW) provides that:

> "The Director has the same functions as the Attorney General in relation to:
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> …
>
> (c) finding a bill of indictment in respect of an indictable offence, in circumstances where the person concerned has not been committed for trial."

92 In the District Court, the prosecutor found the new bill by exercising the power granted under the Consolidated Instrument of Delegation signed by the DPP. Provided proper procedures are observed, there are strong reasons of legal principle and policy to uphold broad powers on the part of the DPP to find the indictment upon which a trial in respect of criminal charges will proceed, as is considered appropriate, lawful and just. Clear statutory language would be needed to restrict or diminish the necessarily broad powers afforded to the DPP in this respect. Such powers are expressed in wide terms not just for the benefit of prosecutors but also for the protection of accused persons, who should only be tried upon offences judged proper to the facts and circumstances as known to the prosecution at the time of the trial.

93 In the context of the CCP Act as a whole, the "soft" obligation embodied in s 8(1) (addressed in any event to the commencement of proceedings) does not amount to an implied control or limitation on the wide discretion of the DPP to find the counts of the indictment appropriate to proceedings before a court with relevant jurisdiction.

94 *Upholding the jurisdiction of courts*: The appellant's case also conflicts with another important legal principle governing the jurisdiction of a court such as the District Court. As Basten JA acknowledged (for another purpose), "[a]lthough not a superior court, the District Court is a court of record"[58]. No narrow view should be taken of the jurisdiction of the District Court in respect of

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58 (2006) 67 NSWLR 46 at 62 [62] referring to *District Court Act* 1973 (NSW), s 8.

proceedings commenced in a lawful manner before it. Here, the proceedings were lawfully before the District Court because of the earlier order of the Children's Court committing the appellant for trial in the District Court.

95 The section of the CCP Act that McGuire DCJ relied upon to remit the case to the Children's Court (s 44) is conditioned on the requirement that the District Court "did not or does not have jurisdiction to deal with the charge". However, if the foregoing analysis is correct, the District Court *did* have such jurisdiction when the appellant was committed for trial in that Court. No provision of the CCP Act or any other law is expressed in the clear language that would be required to deprive the District Court of such jurisdiction, once engaged.

96 It is a serious matter to conclude that a court is deprived of jurisdiction. At least potentially, that conclusion can have significant consequences for the validity of the orders made by that court without jurisdiction, resulting in great inconvenience in terms of the administration of justice. Want of jurisdiction, especially in a court of record, is not a conclusion to be arrived at lightly[59]. It cannot be derived on the basis of the equivocal, ambiguous and arguably inapplicable provisions invoked by the appellant here.

97 *Limited exclusive jurisdiction*: The only exclusive jurisdiction that the CCP Act confers on the Children's Court relates to the exclusion of the jurisdiction of the Local Court and of the Drug Court. Under s 7, those courts are precluded from hearing proceedings over which the Children's Court has jurisdiction.

98 In effect, the appellant's argument was that, although unexpressed, the same exclusion applies to the District Court and the Supreme Court. He contends that an indictable offence which the Children's Court has jurisdiction to hear and determine cannot as a matter of law be heard by the District Court or Supreme Court, unless the trial *of that offence* is referred into that other court by the Children's Court.

99 Had it been the purpose of Parliament to provide such an exclusion (and in particular one addressed to the Supreme Court as the constitutional court of the State) it would have been expected that such exclusion would have been made explicit (in, for instance, s 7 of the CCP Act). Yet no such exclusion is stated[60]. In this context, the exclusion of the Local Court and the Drug Court can be

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59 See *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 451-452 [50]-[51], 483-484 [143]-[145].

60 See also joint reasons at [19].

explained on the basis that their powers and status are in general equivalent to those of the Children's Court, whereas the District Court and the Supreme Court are courts of larger jurisdiction and powers.

Conclusions and remedy

100 The conclusions of McGuire DCJ and of Basten JA are not without a certain attractiveness. Their Honours were endeavouring to give effect to the principle that, save in respect of "serious children's indictable offences", children charged with criminal offences in New South Wales should be tried in the Children's Court.

101 It is possible that this is what Parliament had in mind when it enacted the CCP Act. It is arguable that its general policy in this regard should be observed. It may be suggested that the policy should have been respected by the DPP in circumstances such as the present, even if not strictly obligatory. There would have been ways whereby the DPP could have upheld that policy and avoided depriving the appellant of the significant benefits and protections of a trial in the Children's Court in accordance with the CCP Act.

102 However, in the circumstances of this case, the questions as to whether the District Court lacked jurisdiction and whether the DPP lacked the power to reformulate the charge must be answered in the negative. It would not be difficult for Parliament to provide the District Court with a more ample power to remit proceedings to another court for reasons of convenience and justice to a child offender if it wished to do so. For example, s 44 of the CCP Act could be amended to afford a power of remitter in more general terms, and to address attention to such considerations. But while that section is expressed in terms of a criterion of lack of jurisdiction, it is not engaged in a case such as the present.

Orders

103 I therefore agree that the appeal should be dismissed.