[2013] WACC 3

JURISDICTION	**:**	CHILDREN'S COURT OF WESTERN AUSTRALIA IN CRIMINAL
LOCATION	**:**	PERTH
CITATION	**:**	THE STATE OF WESTERN AUSTRALIA -v- JAB [2013] WACC 3
CORAM	**:**	JUDGE REYNOLDS
HEARD	**:**	25 FEBRUARY 2013
DELIVERED	**:**	7 MARCH 2013
FILE NO/S	**:**	CMI 729 of 2012, CMI 890 of 2012, CC 1904 of 2012 CC 4254 of 2012, CC 63 of 2013, CC 65 of 2013 CC 66 of 2013, CC 68 of 2013, CC 69 of 2013 CC 70 of 2013, CC 71 of 2013, CC 73 of 2013 CC 74 of 2013, CC 76 of 2013, CC 376 of 2013 CC 377 of 2013, CC 379 of 2013, CC 381 of 2013
BETWEEN	**:**	THE STATE OF WESTERN AUSTRALIA Prosecution AND JAB Accused
FILE NO/S	**:**	CKT 35 of 2012, CKT 36 of 2012, CKT 38 of 2012 CKT 39 of 2012, CKT 40 of 2012, CKT 43 of 2012 CKT 45 of 2012, CKT 58 of 2012, CKT 60 of 2012 CKT 108 of 2012, CMI 4985 of 2012, CC 4986 of 2012, CC 91 of 2013, CC 92 of 2013 CC 95 of 2013, CC 96 of 2013, CC 98 of 2013 CC 99 of 2013, CC 100 of 2013, CC 101 of 2013 CC 103 of 2013, CC 104 of 2013, CC 106 of 2013 CC 383 of 2013, CC 385 of 2013, CC 387 of 2013 CC 498 of 2013

BETWEEN	**:**	THE STATE OF WESTERN AUSTRALIA Prosecution AND BAJG Accused
FILE NO/S	**:**	CC 77 of 2013, CC 79 of 2013, CC 80 of 2013 CC 82 of 2013, CC 84 of 2013, CC 85 of 2013 CC 90 of 2013
BETWEEN	**:**	THE STATE OF WESTERN AUSTRALIA Prosecution AND NJG Accused

Catchwords:

Criminal Law - Children - Sentencing principle on taking into account harshness from conditions of detention - Especially severe harshness required - Application of the objectives and general principles of Young Offenders Act 1994

Legislation:

The Sentencing Act 1995 (WA)
The Young Offenders Act 1994 (WA)

Result:

Harshness from conditions of detention impacting on young offender taken into account - The Court requires evidence of conditions of detention in each particular case to find harshness both past and future.

Representation:

CMI 729 of 2012 and others (JAB)

Counsel:

Prosecution	:	Mr S M Stocks
Accused	:	Mr J D Hawkins
Party by Leave	:	Mr G Tannin SC

Solicitors:

Prosecution	:	Director of Public Prosecutions (WA)
Accused	:	JD Hawkins & Associates
Party by Leave	:	State Solicitor for Western Australia

CKT 35 of 2012 and others (BAJG)

Counsel:

Prosecution	:	Mr S M Stocks
Accused	:	Mr C Miocevich
Party by Leave	:	Mr G Tannin SC

Solicitors:

Prosecution	:	Director of Public Prosecutions (WA)
Accused	:	Mr Christian Miocevich, Barrister & Solicitor
Party by Leave	:	State Solicitor for Western Australia

CC 77 of 2013 and others (NJG)

Counsel:

Prosecution	:	Mr S M Stocks
Accused	:	Mr B C Tyers

Party by Leave	:	Mr G Tannin SC

Solicitors:

Prosecution	:	Director of Public Prosecutions (WA)
Accused	:	Mr Ben Tyers, Barrister and Solicitor
Party by Leave	:	State Solicitor for Western Australia

Case(s) referred to in judgment(s):

Astill (No 2) 64 A Crim R 289
Bekink [1999] WASCA 160
Cohen [No 2] [2007] WASCA 279
de la Espriella-Velasco v The Queen [2006] WASCA 31
DPP v Faure [2005] VSCA 91
Eliasen (1991) 53A Crim R 391
Houghton v Western Australia [2006] WASCA 143
O'Brien v Ritchie (unreported, Supreme Court, WA, McKechnie J, Library No 990123, 17 March 1999
R v Bailey (1988) 35 A Crim R 458
R v Bhuiyan [2008] NSWDC 55
R v Liddy (No 2) [2002] SASC 306
R v MacDonnell (2002) 128 A Crim R 44
The Queen v Stevens [2009] VSCA 81
The State of Western Australia v O'Kane CACR 24 of 2010
The State of Western Australia v Richards [2008] WASCA 134
Tognolini v The Queen (No 2) [2012] VSCA 311

JUDGE REYNOLDS:

Background

1 As at 20 January 2013 the only detention centre in Western Australia for children was the Banksia Hill Detention Centre (BHDC) located in Canning Vale, Perth. Previously there were two detention centres. Rangeview Remand Centre (RRC) was essentially used to detain children on remand and sentenced female children. BHDC was essentially used to detain sentenced male children. Sometimes remand and sentenced detainees were moved from one to the other for good reasons including security and capacity.

2 In the second half of 2012, RRC was closed and all of the detainees being held there were transferred to BHDC. As a result, all detainees, both those on remand and those sentenced, and both male and female, were detained at BHDC. The site and buildings of what was RRC, became the Wandoo Prison Facility for 18-24 year olds.

3 On 20 January 2013 an incident occurred at BHDC during which parts of the facility, including 90-100 cells, were extensively damaged by some detainees. It was a very significant incident and the extent of the damage caused to the facility is unprecedented in this State.

4 The cause or contributing causes of the incident and who was directly or indirectly involved in it, are not relevant for the purpose of considering the legal issue to be determined in this judgment.

5 As a consequence of the incident just mentioned, on or about 21 January 2013, 73 male detainees were transferred from BHDC to Unit 5 within Hakea Prison. Hakea Prison is an adult prison facility located in Canning Vale, Perth, and is used to hold mainly adult remandees but also sentenced adult prisoners.

6 Pursuant to s 13(1) of the *Young Offenders Act 1994* (WA)(the YO Act) the Minister may, by order, declare a place to be a detention centre. Pursuant to s 13(2) the Minister may also, by order, vary or revoke an order under s 13(1).

7 By the combination of the *Prisons (Hakea Prison) Order 2013*, the *Young Offenders (Banksia Hill Detention Centre) Order 2013*, and the *Young Offenders (Detention Centre) Order 2013*, all gazetted on 22 January 2013, the site and buildings commonly known as Hakea Prison

other than Units 5 and 12, were declared to be a prison called Hakea Prison, for the purposes of the *Prisons Act 1981* (WA), and Units 5 and 12 of Hakea Prison, but not being parts of a prison under the *Prisons Act 1981,* were declared to be a detention centre.

8 By *Young Offenders (Detention Centre) Order (No.3) 2013 (YO Order No.3), Offenders (Detention Centre) Order (No.3) 2013 (YO Order No.3),* gazetted 5 February 2013, Units 11 and 12 at Hakea Prison were declared to be a detention centre, and not parts of a prison. The preceding order, being the *Young Offenders (Detention Centre) Order (No.2) (YO Order No.2),* which declared Units 5, 11 and 12 to be a detention centre, was revoked.

9 *YO Order No.2* revoked *Young Offenders (Detention Centre) Order (No.1) 2012 (YO Order No.1),* which had declared units 5 and 12 at Hakea to be a detention centre.

10 By the *Prisons (Hakea Prison) Order (No.3) 2013,* gazetted on 5 February 2013, Units 11 and 12 at Hakea Prison were excluded from the prison for the purposes of the *Prisons Act 1981* (WA). Other orders correlating to each of the other *YO orders* were made under the *Prisons Act 1981*(WA)(Prisons Act).

11 *YO Order No.3* came into operation on 5 February 2013, immediately after the *Prisons (Hakea Prison) Order (No.3) 2013* was published in the *Gazette.*

12 By at least early February 2013 a decision was made by the Department of Corrective Services (DCS) that the balance of the male detainees who remained at BHDC would be transferred to the detention centre in Hakea Prison. All of them, or at least all of them other than those less than 14 years of age, were transferred to the detention centre in Hakea Prison on 7 and 8 February 2013. Whether it was all or all other than those less than 14 years of age does not matter for the purpose of this decision. That left at least all of the female detainees and perhaps a relatively small number of other detainees at BHDC.

13 Further to the orders gazetted on 5 February 2013 to which I have referred, the male detainees already in Unit 5 at the detention centre in Hakea Prison were shifted from Unit 5 and together with the balance of the males shifted from BHDC then occupied Units 11 and 12 in the detention centre in Hakea Prison from 8 February 2013.

14 In addition to the gazettal of units at Hakea Prison being declared a detention centre and the transfer of male detainees from BHDC to the detention centre in Hakea Prison as just mentioned, there were obviously other consequences as a result of the incident on 20 January 2013. Those consequences include lock-downs, the use of restraints, restrictions on visits, the use of strip searches, and a cessation or reduction of programs for some time at least at both the detention centres at Hakea Prison and BHDC. While it is clear and no issue is taken by any of the parties and DCS that those consequences have resulted, without evidence I cannot make any specific findings of fact on the existence and extent of any of them in any particular case.

15 Before I go any further I must say that the gazettal of a declaration that units within an adult prison be a detention centre is unprecedented in this State. The conditions under which both remand and sentenced young detainees have been held and managed since 20 January 2013 are also unprecedented. In short, since 20 January 2013 there has been a very significant change in the detention environment in this State.

16 Historically this Court has not been provided with or sought any information on the character and extent of detention regimes and how they have impacted on particular young offenders before sentence and how they will likely impact on them during any detention in the future. However, given that the detention environment has changed so significantly in recent times, to ensure that justice is done it may now be necessary for the Court to take into account harshness of the conditions of detention when sentencing young offenders.

17 The threshold issue arising from all of that, is whether as a matter of law harshness of the conditions under which an offender has been held on remand and/or would serve a sentence of detention may be taken into account by a sentencing judge or magistrate.

18 It is against all of that by way of background that on 13 February 2013 I wrote to the parties and the Department in the following terms:

> I have become aware that the nature of detention and the programs and recreation offered to children in detention, both on remand and following the imposition of a sentence of detention, has significantly changed in recent times and particularly since 20 January 2013. Further to that, since 8 February 2013 all male detainees, with the exception of those under 14 years of age and a small number of other males, have been and continue to be detained within units gazetted as a detention centre located within the outer boundaries of Hakea Prison. Such units were designed for adult

prisoners and were to be used in conjunction with other parts of Hakea Prison.

I wish to have the benefit of written and oral submissions from the counsel and solicitors for the parties and the Department of Corrective Services, Youth Justice Division, in respect of the relevance for sentencing purposes of the nature and severity of the regimes applied to a child in detention at Banksia Hill and Hakea, whether on remand or following the imposition of a sentence of immediate detention.

There are two particular aspects which apply to that, and I seek the benefit of submissions on each of them. They are:

1. The nature of the detention regimes, e.g. lockdowns, and the nature of restrictions applied to a child when in and moving about within the detention facility, and

2. The availability or lack of availability of programs and recreational activities within the detention facility to advance the rehabilitation of a child.

If information of the kind referred to is ruled to be relevant, then subject to any submissions from the parties and the Department, I would propose that the Department be required to prepare and file a supplementary written pre-sentence report setting out detailed particulars of the relevant information. No evidence on oath or by affidavit would be required from the Department or at all unless any issue was taken with any material fact(s).

The three cases set out above are listed before the Court for sentence on 5 March 2013. It is highly desirable that sentencing proceeds for all three young offenders on that date.

Please note that all three cases are early listed to come back before the Court on Monday 25 February 2013 at 3:00pm in Court 4, 160 Pier Street, Perth. The purpose of this early listing is for the question on relevance as mentioned herein to be heard with all parties and the Department having the opportunity of presenting submissions.

Summaries of the various submissions by the parties and DCS

19 The various submissions of the parties and DCS can be summarised as follows.

20 Counsel for the State has submitted that:

1. In general the conditions of a custodial regime are a matter for the prison authorities, not the Courts;

2. The Court should generally only consider the impact of a custodial regime upon an offender in circumstances where that impact is to be seen as more harsh than would be the case in relation to the average offender;

3. To the extent that the longevity of the particular regime is unknown, any reduction is speculative and should be limited to the impact that is actually known; and

4. The YO Act requires the Court to give consideration to the rehabilitation that would be provided within a custodial setting, but that is by way of a consideration of what is proposed, not a comparison of what may have previously been provided.

21 It has been submitted on behalf of DCS that:

1. The management regime applied to young persons detained under the YO Act is a matter for the executive branch of government and that the YO Act places that function with the Chief Executive Officer of DCS;

2. The Court should only consider the impact of the detention regime upon a young offender in circumstances where the impact is to that particular individual rather than to all persons detained under the YO Act at that particular facility; and

3. Section 7 of the YO Act does not authorise the Court to undertake enquiries into the management of the detention centre where a young offender sentenced to detention is to be held in custody.

22 NJG is 15 years of age. He was refused bail and remanded in custody on 3 January 2013. He was therefore on remand at BHDC when the incident occurred. The submissions made on his behalf mention that he was transferred to Hakea Prison sometime around the beginning of February. He has therefore spent time on remand at both BHDC and the detention centre in Hakea Prison. It is not suggested that he played any part in the incident at BHDC on 20 January 2013. I make no finding at all in relation to that.

23 The submissions also contain details of lock-downs that NJG has been subjected to at both BHDC and the detention centre in Hakea Prison. Material contained in the submissions is not evidence and so I will not set out the particular information provided. Suffice to say, for present purposes, if findings of fact were made consistent with the material

provided then such lock-downs would inevitably be found to be especially severe.

24 In summary, it has been submitted on behalf of NJG that he has been subjected to particularly onerous conditions of detention and overly restricted movement generally within the detention centres. It is also submitted that he has been offered insufficient outdoor recreation and inadequate education. It is submitted that such onerous conditions and inadequate provision of programs ought to be reflected in sentencing. Indeed, it is also submitted that the changes in the detention regime applied to him since 20 January 2013 is arguably in breach of principles contained in the YO Act and articles of the Convention of the Rights of a Child (CROC), General Assembly Resolution 44/25 of 20 November 1989, Articles 37(c) and 40(1).

25 JAB is 16 years of age. Again it is not suggested that JAB played any part in the incident at BHDC on 20 January 2013. Again, I make no finding in relation to that.

26 The same or similar submissions as made on behalf of NJG have also been made on behalf of JAB. It is further submitted on behalf of JAB that:

1. The changes that have occurred since 20 January 2013 to the nature of detention of children have significantly increased the hardship that young offenders face both on remand and following the imposition of a sentence of detention. It is submitted that such hardship can be taken into account by a sentencing judge;

2. The hardship of being detained in a detention centre in Hakea Prison is aggravated by the fact that he is currently being held in a facility not designed for housing juveniles. Although the situation also affects other male juvenile detainees, it is not the case for female juvenile detainees or those under 14 years of age. The fact that other male juveniles are also subject to this hardship does not make the situation the norm for this State and does not take away his hardship;

3. It is submitted that the requirement that the Court disposes of matters in a way that is in proportion to the seriousness of the offence and is consistent with the treatment of other young persons who commit offences brings in to play the need for parity when sentencing children. An extension to that submission is that a term of detention to be served in a detention centre located in

Hakea Prison, is more harsh than a term to be served at BHDC and that this should be taken into account when sentencing.

27 BAJG is 14 years of age. He was remanded in custody on 4 January 2013 and has remained on remand since then. He was initially remanded at BHDC and then transferred to the detention centre in Hakea Prison in early February 2013. The submission made on his behalf refers to an extensive lockdown regime after the incident and being handcuffed when moved about within BHDC. The submission also provides that since BAJG has been at the detention centre in Hakea Prison he has not been on an oval. He is upset that there is not enough getting out or school and feels that he is being punished for an incident which he was not involved in. I make no comment or finding on that last point.

28 It is submitted on behalf of BAJG that the Court should take the hardships that he is experiencing into account. It is submitted that the Court should reduce any sentence by a specific amount for the hardship already suffered. The submission acknowledges that there are obvious problems as to how the reduction should be calculated when it is unknown how long a restricted regime will be in place. As to any reduction for future hardship the Court will need to hear from DCS as to what their plans are for the management of the detainees and then assess what, if any, reduction should be given.

Cases relating to adults on the relevance of the harshness of imprisonment

29 As President of the Court I am very mindful that the law expressly provides for special provision to ensure the fair treatment of young persons. See s 7(a) of the general principles contained in the YO Act. Children should not be regarded and treated as small versions of adults. Therefore what applies in the cases of adults does not necessarily apply to children.

30 That said, the reasons that I will first examine the authorities on the relevance of harshness of imprisonment on adults is because, first, there does not seem to be any specific authority in relation to children. Secondly, it is because if the legal principle in cases relating to adults is that harshness of the conditions of imprisonment may be taken into account when sentencing, then surely and without the need for anything further, that legal principle should also apply to children.

31 In addition to considering the general question of whether harshness of the conditions of detention may be taken into account when sentencing children, I will also consider whether the application of the principle is

limited to cases where the harshness exists because the offender has a particular characteristic or whether it also extends to cases where harshness is a character of the conditions of detention and those conditions impact on the particular offender. I will also consider what amount of harshness needs to exist before it may be taken into account? Finally, I will consider whether the Court by taking harshness of conditions of detention into account is encroaching on a function of the executive to manage custodial facilities or simply but importantly informing itself of evidence of a factor which it must take into account to properly perform its function of sentencing.

32 I start my analysis of the various cases by referring to ***York v The Queen [2005] HCA 60, Del 06/10/2005***, because it is clear from that case that the High Court regards harshness resulting from conditions of imprisonment as a relevant matter to be taken into account by a sentencing judge.

33 In that case, the High Court was concerned with an appellant who had pleaded guilty to serious drug offences. Her significant cooperation with the authorities assisted in securing a murder conviction. Evidence was presented to the sentencing judge that the appellant's life would be endangered in prison. She was sentenced to a wholly suspended sentence of imprisonment. That was overturned on appeal. The High Court restored the sentence of the sentencing Judge.

34 At par 38 Hayne J stated:

> That the appellant faced a real risk of serious harm in prison was not a consideration irrelevant to deciding what sentence should be imposed upon her. <u>The effect of serving a term of imprisonment, and the conditions under which an offender would serve that sentence, are relevant matters that may be taken into account by a sentencing judge – at least when that effect and those conditions are shown to be different from, and more onerous than, the effect on and conditions undergone by other prisoners</u> [32].. and in this case, it was well open to the primary judge to conclude that the 'very high' risk of physical harm to the offender in prison would not only affect the conditions under which she would serve a sentence but also be likely to lead to radically different consequences for the appellant from the consequences of imprisonment for other prisoners. The Court of Appeal's inquiries about the risks which the appellant faced served only to reinforce those conclusions, leading the majority of that Court to say that the relevant department of the executive 'was not in a position to demonstrate … that it has the capacity to deal adequately with problems highlighted by this case'.[33]
>
> *(my emphasis)*

35 As noted by Steytler P in ***Houghton v Western Australia [2006] WASCA 143*** at par 24, the cases on factoring into account as a mitigating factor the conditions that an offender will be subjected to during sentence have not been entirely uniform.

36 In ***O'Brien v Ritchie (unreported, Supreme Court, WA, McKechnie J, Library No 990123, 17 March 1999)***, McKechnie J took into account the fact that the appellant had been remanded in maximum security in deciding to suspend the sentence of imprisonment.

37 At 10-11 he stated:

> There is one further factor which points to suspending the sentence. The material before the magistrate indicated that during his period on remand, the appellant was incarcerated in maximum security. While ordinarily the matter of the type of incarceration if left to the Ministry of Justice, it does not seem right, if it is the case, that a person who have never before been imprisoned and who is on remand only, should be so confined. In the mix of factors relevant to sentence, especially having regard to the appellant's particular antecedents … I have concluded that this factor also should be weighed in determining the correct disposition for this case.

38 I note that the harshness taken into account by McKechnie J in that case related to the conditions in prison which had applied to the particular offender rather than to a particular characteristic of the offender. In my respectful view, two further important points can be noted from what his Honour had to say. First, while the type of incarceration was a matter for the relevant department, it was still nevertheless a factor which he needed to take into account to perform his function as the sentencing Judge. Secondly, his Honour was clearly of the view that it was a factor which needed to be taken into account to ensure that a just sentence was imposed.

39 In ***Bekink [1999] WASCA 160***, the appellant was sentenced to three years imprisonment with eligibility for parole for an offence of unlawful wounding. Prior to the appellant being sentenced there had been a riot in Casuarina Prison and the prison authorities responded by imposing a 'restricted management regime' commonly known as a lock-down on half of the prisoners in the prison. There was no particular reason why one half was chosen rather than the other. The lock-down was imposed to offset structural changes to make the prison more secure and not to punish prisoners. There was a shortage of beds in the prison at the time. The appellant was not made the subject of a lock-down because of any misconduct on his part. Indeed the lock-down had already commenced before the appellant was imprisoned. Up until the time of the appeal, the

appellant had been subjected to the lock-down arrangement for about three months.

40 Ipp J noted all of the above in his judgment. He also stated that the appellant was confined to his cell for 21 hours per day, and that he had no recreational or physical activity apart from walking up and down the corridor together with 26 other prisoners. At par 5 he stated that:

> Confinement in a cell for a substantial period is a severe form of punishment.

41 He then went on to add that:

> This is recognised by the *Prisons Act 1981 (WA)* which provides for confinement as a form of punishment for offences committed in prison.

42 The Court allowed fresh evidence to be adduced to establish the harsh conditions applicable to the appellant's imprisonment by applying the case of ***Eliasen (1991) 53A Crim R 391***. After referring to that case, Ipp J stated as follows at par 9-11 inclusive:

> There are several other instances where courts have had regard to factors which render the imprisonment of a particular individual more arduous than the norm. See, for example, *Todd* [1976] Qd R 21; (1976) 6 A Crim R 105 where an offender was blind, *Bailey v DPP (NSW)* (1988) 62 ALJR 319; 34 A Crim R 154 where the prisoner was infected with the AIDS virus, and *Perez-Vargas* (1986) 8 NSWLR 559; 25 A Crim R Malcolm CJ noted (at 37) that:
>
> > 'Account should be taken of the impact of a sentence of imprisonment on an aboriginal person in the light of his social and culture background'.
>
> In *Boon* (unreported, Court of Criminal Appeal, NSW, 17 November 1983), the court said:
>
> > '[W]eight should be given in favour of the respondent in that there is material justifying the conclusion that imprisonment will come particularly hardly upon him. It is not necessary to canvass the circumstances leading to that conclusion. He has thus far been held in custody that has involved some protective overtones during his time in jail. It is likely that this situation will continue into the future, this, I repeat, rendering his imprisonment more distressing and arduous than if he were to be imprisoned in accordance with the ordinary manner of holding prisoners within the State's penal institutions.'
>
> See also *Vachalec* [1981] 1 NSWLR 351 at 353. In this State, WA, McKechnie J in *O'Brien v Ritchie* (unreported, Supreme Court, WA,

McKechnie J, No 1166 of 1998, 17 March 1999), held that the fact that an offender was incarcerated in maximum security when he was on remand was reductive of sentence.

In *Astill (No 2)* (1992) 64 A Crim R 289, Kirby P (in dissent) had regard to whether the fact that a prisoner was to be held in 'strict protection' amounted to 'special circumstances' under s 5 of the *Sentencing Act 1989* (NSW) and remarked (at 293):

> 'It is by no means unusual for courts, in determining the duration of a custodial sentence, to take into account features of the offence or of the offender which will result in imprisonment bearing down more severely upon the offender than upon the average prisoner. In this context, quite outside the scheme of the *Sentencing Act*, it has long been a recognised principle of sentencing that prisoners in strict protection undergo privations which make their period in custody more onerous than is the same period for ordinary prisoners.'

His Honour proceeded (at 294) to observe that it was clear, and really a matter of common sense that:

> 'Ordinary sentencing principles would require consideration to be given to the disparity between arduous sentencing conditions and ordinary sentencing conditions. It is like, if you will, the old distinction between imprisonment and penal servitude with hard labour. The latter was originally reserved for aggravated cases. It was always, and self evidently, reserved for cases where extra punishment was required. The quality of punishment and its intensity was greater. So if the quality and intensity of the punishment of a person in strict protection and a prisoner in this State.'

Also concluded (also at 294):

> 'The existence of strict protection in a prisoner's imprisonment may, in a particular case, enliven a sentencing Judge's discretion to readjust the elements of the minimum and additional terms of the total punishment.'

The principle that can be derived from the aforegoing is that, in sentencing, the court is required to take into account the reductive effect of hardships, not ordinarily experienced by ordinary prisoners, that an offender through circumstances subjective to him, may endure by being in prison. If those hardships are not known at the time of sentencing, evidence may be given of them in the course of an appeal against the sentence imposed and the appellate court is required to have regard thereto in determining whether the sentence imposed was according to law.

43 Importantly, at par 12 Ipp J stated:

> As I have mentioned, the lock down conditions are very close to those imposed on persons who have committed prison offences, yet the prisoners in the lock down category are subjected to those conditions without having committed prison offences and have to endure them for a far longer period than offenders who are sentenced to solitary confinement under the *Prisons Act*. This means that the lock down conditions are significantly more severe than those contemplated by Parliament as the ordinary conditions of imprisonment when it passed the *Prisons Act*.

44 Further a par 14 he stated:

> …the arbitrary nature of the allocation to the lock down regime is inimical to justice. The applicant, in effect, for no reason relating to his conduct, is receiving extra punishment not contemplated by the sentence imposed on him.

45 After referring to various cases and commenting on the lock-downs, Ipp J stated at par 17 that:

> …had the sentencing judge known how the applicant would be imprisoned for the three month period in question, he arguably might have reduced the sentence by one month.

46 At par 27 Heenan J set out details of the regime that the appellant was subjected to. Included in those details were some to the effect that the appellant had very limited opportunity for recreation and access to reading material. At par 29 Heenan J stated:

> When a court decides to sentence an offender to imprisonment it goes on to fix the length of term. In doing so usually, as in this case, it will have no information before it as to the prison to which the offender will be sent or as to what regime will apply to him. They are matters for the prison authorities into whose custody he is entrusted. But sometimes the court will be given information showing that imprisonment by its very nature will impose hardship upon a particular individual which is much greater than upon the average person – for example, in the case of a tribal Aborigine, a blind person or a woman with a newborn baby. In other cases – for example that of an informer or a person with the AIDS virus – the information will demonstrate a necessity for the prisoner to be kept in protective custody or in some other form of comparative isolation. In any of those cases the sentencing court might impose a term shorter than usual. The same approach might be adopted if, for example, the sentencing court were informed that a large minimum or medium security prison were destroyed by earthquake or flood, so that all prisoners, or even a particular group of prisoners, would be subject to unduly onerous conditions for a substantial period. Thus, had Williams J been aware that the applicant would be subject to the particular regime in question throughout his time in prison, his Honour might well have imposed a sentence of less than

> three years imprisonment. Of course, one cannot say now precisely how much less it would have been.

47 Heenan J gave an indication of what reduction he might have given if he was the sentencing judge when at par 31 he stated:

> …if the court were to reduce his sentence by one month or six weeks, - for what it might regard as the undue hardship which he has endured already – would it be faced with a similar application 12 weeks further on if the situation had not changed?

48 It is very clear from the judgments of both Ipp J and Heenan J that if the appellant had appeared before a sentencing judge in the same position that he was in when he appeared before them, that the sentencing judge would have been required to take the hardship of the conditions of imprisonment into account as a mitigatory factor when deciding the sentence.

49 Ipp J and Heenan J did not interfere with the sentence imposed by the sentencing judge, not because they thought that the hardship was not relevant, but rather because they were part of an appeal court and in the overall scheme of things, the short duration of the hardship relative to the lengthy term of three years, and there being no evidence of what regime the appellant would be subjected to in the future, they thought that any interference with the sentence imposed at first instance would amount to tinkering.

50 Anderson J took a different approach to that of Ipp J and Heenan J. At par 22 he stated:

> Of course the courts assume that prison conditions will not be inhuman or cruel, but I am not aware of any principle of sentencing that makes the sentence conditional on the prison regime being of a particular quality or which requires the sentencing court to appraise or evaluate the actual conditions in the various prisons to which the prisoner is likely to be sent, before handing down sentence. Therefore, I think it is impossible to take the next step called for by the argument. That is, that if it should turn out that the conditions are harsher than those that were assumed at the time of sentence, the sentence should be shortened on appeal.
>
> In my opinion, there is no basis in law for this approach.

51 I wish to return to the judgment of Ipp J and respectfully give my interpretation of what he meant by the words 'an offender through circumstances subjective to him' when he stated the principle he derived from the cases to be that 'the court is required to take into account the

reductive effect of hardships, not ordinarily experienced by ordinary prisoners, that an offender through circumstances subjective to him, may endure by being in prison.'

52 While Ipp J expressed the principle in those terms, he also proceeded on the basis that the hardship of the conditions of imprisonment including the lock-downs fell within the operation of the principle. Particular parts of his judgment should be interpreted by reference to the whole of his judgment. The word 'subjective' can have different meanings depending on how and the context in which it is used. It could be used to mean a characteristic of the particular individual. It could also be used to mean that an individual was subjected to something.

53 The case examples given by Ipp J included not only cases where the harshness of the conditions was because of a characteristic of the particular offender but also cases where harshness was a characteristic of the conditions which impacted on the particular offender. As mentioned, the facts in ***Bekink*** fell within the second of these two categories. Therefore in my respectful view, when Ipp J used those particular words 'an offender through circumstances subjective to him' when stating the principle as he did, in my view he was not intending to limit the principle to only those cases where the harshness of the conditions resulted from a characteristic of the particular offender. In my view when Ipp J used the word 'subjective' in the context of 'circumstances subjective to him' he meant it to mean 'subjected to'. Accordingly when he used the words 'circumstances subjective to him' he meant 'circumstances subjected to him'.

54 In my respectful view, the same interpretation can be concluded from the approach taken by Heenan J. In par 29 of his judgment as set out above, he first referred to examples where harshness arose because of a characteristic of the particular offender e.g. tribal aboriginal, a blind person, a mother with a newborn baby, or a person with an AIDS virus. He then referred to the example of a prison being destroyed by earthquake or flood resulting in the need for unduly onerous conditions to be applied to all or a particular group of prisoners. The combination of Heenan J's reference to that example, his view that the hardship which had impacted on the appellant because of the conditions, including the lock-downs and the restrictions of his recreation and reading material, would be a relevant consideration for a sentencing judge, and his quantification of a reduction for it, supports the conclusion that he did not limit the operation of the principle to only those cases where the harshness resulted from a characteristic of the particular offender. Clearly he was also of the view

that harshness could be taken into account if it was a characteristic of the prison conditions which impacted on the particular offender.

55 I also wish to make comment on the reference by Ipp J to the judgment of Kirby P, as he then was, in the case of ***Astill (No 2)***. Ipp J noted that Kirby P was in dissent. That is of course true but it in no way detracted from what Kirby P had to say on the point and to which Ipp J referred.

56 For the moment I will shift to refer to parts of the report of ***Astill (No 2) 64 A Crim R 289***. The outcome in ***Astill (No 2)*** fell to be determined on whether hardship resulting from a regime of strict protection should have been treated as a special circumstance within the meaning of 'special circumstances' as provided in s 5 of the *Sentencing Act 1989* (NSW) for the purpose of sentence. The majority were of the view that the sentencing judge had properly taken such hardship into account in arriving at the sentence imposed without treating it as a special circumstance as such and were not prepared to interfere with the sentence. Indeed the judgments of the majority actually lend support to the statements made by Kirby P and to which Ipp J referred. In particular, at p 303 Sully J stated:

> I have had the benefit of seeing in draft the judgment of his Honour the President, and there is much of what his Honour says with which I respectfully agree in principle.

57 What essentially separated Kirby P from the majority, was that he elevated the hardship resulting from the appellant's prison regime to a 'special circumstance' which in turn then required some specific reduction to be expressly identified and made to the minimum term to be served before early release. The majority did not agree on that particular point.

58 Having said all of that, I also wish to add that Kirby P set out in his judgment some of the contents of an affidavit of the applicant filed in support of his appeal which set out details on the issue of hardship. The affidavit included references to a reduced exercise program by reason of time and area, a reduced educational program, and reduced visiting entitlements. I also note that one of the points made by the applicant in his affidavit was that after having been in mainstream custody for a short period of time, he then found that the time in strict protection seemed to pass very slowly. I think that point would be particularly relevant in the case of a child.

59 After setting out the evidence contained in the applicant's affidavit on the issue of hardship, Kirby P then stated at p 298:

> This evidence warrants the same comment as was given by Lord Lane CJ in *Davies and Gorman* (at 322). It is perfectly good sense that time spent in strict protection will be equivalent to a much longer time "in a happier atmosphere", as his Lordship described ordinary imprisonment, surely with tongue in judicial cheek.

60 Can I just go back to the case of ***Bekink***. I wish to make two further comments on it. First, Ipp J and Heenan J obviously did not think that by taking harshness of conditions in prison into account that they were in any way encroaching on the role of the executive to manage prisons. Secondly, they clearly did not think that the operation of the *Sentencing Act 1995* (WA) in any way prevented a sentencing judge from taking harshness of conditions in a prison into account. Generally, if something bears upon the impact which a sentence of imprisonment will have upon an offender then it should be taken into account when sentencing. See ***The State of Western Australia v Richards [2008] WASCA 134 Martin CJ at par 7***.

61 The case of ***R v Liddy (No 2) [2002] SASC 306*** concerned an ex magistrate who was sentenced at first instance to a period of 25 years imprisonment with a non parole period of 18 years for a multiple number of serious sex offences committed when he was a serving magistrate. The issue of a reduction of the sentence arose by reason that the offender was being kept in solitary confinement. The majority were not prepared to interfere with the sentence at first instance. One of the majority, Mulligan J, recognised the harshness but concluded that in the circumstances it did not entitle the appellant to any reduction in penalty. The other, Gray J, also recognised the harshness but concluded that its mitigatory effect in the appellant's case was much less than for say an offender who was an informer or personally disabled. Williams J, in dissent, was of the view that a small reduction was warranted for the appellant's solitary confinement because it arose from a justifiable fear of reprisals unconnected with his crimes.

62 This case is important to refer to because of the statements made in it by Gray J in relation to the doctrine of the separation of powers and the administration of prisons being a role of the executive arm of government.

63 At p 288 Gray J stated:

> There has been considerable judicial debate over the relevance of harsh prison conditions and their effect on the sentencing process. The principle

> of proportionality, the separation of powers and the proper approach to sentencing needs to be considered.

and,

> Making an allowance for an unduly harsh prison regime creates considerable difficulty. Such an approach may lead to a court participating in both law enforcement and the administration of prisons. The latter is traditionally a matter for a different arm of government. A consideration of the doctrine of the separation of power suggests that involvement of this kind by the courts is inappropriate.
>
> The interaction between a defendant and the prison environment produces a unique situation. There are authorities which suggest that if a particular defendant has certain characteristics that may be aggravated by a term of imprisonment there may be a reduction in sentence. A court may consider that the prison experience would be more onerous for a particular defendant than for other prisoners if relevant and admissible evidence is provided.

64 The point I wish to make is that despite those references to the doctrine of the separation of powers and the administration of prisons being a matter for the executive arm of government, Gray J, and indeed the other members of the Court, still thought it appropriate to consider the issue of harshness arising from the solitary confinement of the appellant. Clearly their Honours by proceeding and considering the issue of harshness were of the view that they were not in any way encroaching on the role of the executive arm of government administering prisons, but were rather taking into account information on how the appellant was being managed in the prison to in turn enable them to properly carry out the function of the appeal court in relation to the sentence imposed by the sentencing judge.

65 Gray J referred to a variety of cases in his judgment in order to distil the principle to be applied in cases concerning hardship because of prison conditions. He noted different circumstances in the cases he referred to. I note that he adopted the remarks of Kirby P in ***Astill (No 2)*** which were also adopted by Ipp J in ***Bekink*** and to which I have previously referred. At p 289 Gray J also adopted the following remarks of Kirby P:

> In *Inge v The Queen* Kirby J observed:
>
> > 'However the considerations that are relevant to the decision address the mind of the decision-maker not only to the "circumstances of the offence" but also to the "justice" of the case … Consideration must also be given to circumstances which may increase the impact of the sentence imposed upon the prisoner.

> Thus, it is relevant to consider the age of the offender, whether the offender may have to be kept in protection and whether the offender suffers from an illness or other condition which may render the punishment especially severe in his or her case."

66 The case of ***DPP v Faure [2005] VSCA 91*** concerned an offender sentenced for a serious firearms offence to 18 months imprisonment with a non parole term of nine months. The appellant suffered from ill health and had been subjected to 23 hour lock-down conditions during 66 days of pre-sentenced detention which made his time in custody particularly onerous.

67 The Court unanimously held that the sentence was wholly disproportionate to the gravity of the crime and manifestly inadequate. The sentence was increased to a period of imprisonment of three years with a non parole period of two years. The Court also unanimously stated that the increase in the sentence would have been higher but for the significant likelihood that the offender would spend a substantial part of his sentence in 23 hour lock-down.

68 This case is apposite to the cases before me because it concerns lock-downs and all of the members of the Court took the harshness resulting from the lock-down into account. I also note that the harshness to the appellant in that case was exacerbated because of his ill health. It should also be noted that the Court took the likely conditions of imprisonment in the future into account.

69 The case of ***de la Espriella-Velasco v The Queen [2006] WASCA 31*** involved an appeal against conviction and sentence in relation to an offender convicted of a serious drug offence. He was sentenced to life imprisonment with a non parole period of 26 years. That was not disturbed on appeal.

70 The main purpose for referring to this case is that it highlighted the difficulty for a court predicting what weight, if any, should be given to harshness in the prison system in the future. Evidence needs to be given to enable a court to make such a prediction and determine the weight, if any, to be taken into account for any hardship resulting from the conditions in prison. In that case no evidence was given on the issue of future hardship and so the Court was not able to interfere with the sentence at first instance.

71 The case of ***Houghton v Western Australia [2006] WASCA 143*** involved an offender convicted of an offence of doing unlawful grievous

bodily harm. He was sentenced to four years and eight months imprisonment. The appellant appealed the sentence. In addition to the ground of appeal that the sentence was manifestly excessive, the appellant also submitted that he would suffer hardship in the course of serving his sentence because the possibility of deportation had rendered him ineligible for a minimum security rating, home leave or work release. He submitted that such hardship should be taken into account.

72 At par 24 Steytler P stated:

> The cases in this respect have not been entirely uniform. While there appears to be general acceptance of the principle that, in cases where hardship and deprivation would be particularly aggravated by matters subjective to a prisoner, this is a proper consideration to be taken into account by a sentencing judge (see *R v Vachalec* [1981] NSWLR 351 at 353 per Street CJ), the application of that principle has been variable.

73 Steytler P referred to various case examples of the approaches taken by various Courts in various circumstances. In the case examples he referred to, some concerned hardship arising from a characteristic of the particular individual. His Honour also referred to the case of ***Bekink***, in which the harshness was a characteristic of the conditions in prison, including lock-downs, which impacted on the particular individual.

74 Steytler P stated that in ***Bekink***, their Honours Ipp J and Heenan J appeared to have adopted a similar approach and one which was different to that taken by Anderson J. It should be noted that Murray J agreed with the reasons given by Steytler P.

75 Steytler P's comments on the approaches taken by their Honours in ***Bekink*** can be compared and contrasted with what Roberts-Smith J had to say about their respective approaches in ***de la Espriella-Velasco v The Queen*** at p 328. Roberts-Smith J stated that he did not take Anderson J to be expressing any different view to the principle that Ipp J derived from his consideration of the authorities. Therefore what Steytler P and Murray J had to say about that must be preferred to what Roberts-Smith J had to say about it. Ipp J and Heenan J took the same approach and clearly that was that the hardship from the conditions in prison, including the lock-downs, should be taken into account by a sentencing judge. Anderson J did not share that view and was thereby the minority on the point.

76 I note that in ***Houghton v Western Australia***, Roberts-Smith J at p 275 added that the relevant authorities referred to in the judgment of

Steytler P 'are concerned with some feature, unique to the prisoner, which renders imprisonment significantly more severe, or a significantly greater hardship than it would be for other prisoners'. That addition is not a statement with which Steytler P and Murray J expressly or impliedly joined with.

77 It seems that Roberts-Smith J was limiting the cases in which hardship from prison conditions could be taken into account, to those cases where the hardship was the result of a characteristic of the particular offender. That was not the view of Ipp J and Heenan J in ***Bekink***. It was also not a view expressed by Steytler P and Murray J in ***Houghton***.

78 For reasons which I do not feel that I need to go into for the purpose of reaching a decision in these cases before me, the Court in ***Houghton v Western Australia*** unanimously dismissed the appeal.

79 In the case of ***The Queen v Stevens [2009] VSCA 81***, their Honours Maxwell P, Vincent JA and Hargrave AJA in their joint judgment at par 20 stated that:

> It is, of course, well accepted that the conditions under which a sentence of imprisonment is likely to be served – and the personal, physical and social situation of the individual concerned – are to be taken into account when considering the severity and impact of the penalty imposed in the particular circumstances. This aspect of the matter can be significant in situations where it appears that, by reason of the presence of some feature personal to the offender, the serving of a term of imprisonment can be seen to be more onerous than would ordinarily be anticipated for a person who could reasonably be described as a 'mainstream' prisoner.

80 In ***Stevens***, the conditions under which the appellant was being held were described in par 17 of the joint judgment as follows:

(a) Single person cell, with television, shower, toilet and hand basin;

(b) Minimum of 6 hours out of cell each day;

(c) Mixing with 2 other prisoners in exercise;

(d) Up to 12 family contact visits per year;

(e) Up to 32 personal telephone calls per week, with unlimited legal professional calls;

(f) Fortnightly cooking program; and

(g) PlayStation2 in his cell.

81 At par 21 their Honours commented on those conditions as follows:

> There would seem to be no real doubt that the conditions under which the appellant has been required to serve his sentence are more restrictive than those applicable to the bulk of the prison population. As noted earlier, however, it is also acknowledged by him that this situation has arisen as a consequence of his behaviour during his periods of incarceration. Moreover, it appears that, for his own reasons, possibly related to his personal security concerns, he prefers to remain in his current placement.

82 Despite the conclusion by the Court that the conditions were more restrictive, it did not attach any weight to them even though they impacted on the appellant because they were imposed as a result of the appellant's own behaviour in prison and also because the appellant, for his own reasons, preferred to remain in his current placement.

83 In ***Tognolini v The Queen (No 2) [2012] VSCA 311***, the Court in the joint judgment of Maxwell P, Buchanan and Redlich JJA reduced the non parole period of a sentence under appeal and stated at par 31 and 32 as follows:

> With respect, such a long non-parole period could not have taken proper account of the onerous conditions in which the applicant had been held, throughout the two years and seven months of his incarceration under the first sentence. In our view, that consideration necessitated a material reduction in the non-parole period below what would otherwise have been appropriate had the applicant been held in more conventional prison conditions.
>
> That consideration is all the more powerful now. The conditions in which the applicant has now been held for five years – and seems likely to remain – are extremely onerous. The decision to keep the applicant in a management unit was expressly made for his protection. But the very great deprivations associated with being so held inevitably make the experience of imprisonment substantially more burdensome than it would otherwise be. That is a matter which must necessarily affect the sentencing decision.

84 In ***Tognolini***, the conditions of the appellant's imprisonment included spending a minimum of 20-22 hours per day in his cell. The appellant was sentenced for two different sets of unrelated offences. The first set consisted of one offence of committing an indecent act with a child less than 16 years of age, one count of perverting the course of justice and 18 counts of supplying a drug of dependence to a child. The second set consisted of charges including blackmail, arson, indecent assault, threatening to damage, assault, intentionally causing serious injury and stalking.

85 I note that in this case the harshness did not result from a characteristic of the particular offender. Rather, the harshness was a characteristic of the regime which impacted on him. I also note that this case concerned an offender who spent long hours each day alone in his cell.

86 Many of the cases, but not all of them, use different words or phrases to describe what level of hardship will be taken into account when sentencing. For the moment I will put that point to one side and return to it later. I do so because in my view, the extent of the hardship is a separate and distinct point from whether or not a particular individual should qualify for his or her hardship to be considered and then if thought to be significant enough to be taken into account.

87 Having for the moment refined the issue in that way I think that the question to be asked is as follows. Is the operation of the legal principle on taking into account harshness of conditions in prison limited to those cases where the harshness is a characteristic of the particular offender, or in addition to that, can harshness also be taken into account if it is a characteristic of the conditions in prison and those conditions impact on the particular offender to be sentenced?

88 On my reading of the cases I conclude that harshness of conditions in prison may be taken into account when sentencing an offender. I also conclude that harshness may fall within one or other or both of the two categories just mentioned.

89 I now return to consider the point concerning what level of harshness needs to exist before it may be taken into account as a relevant factor when considering sentence. I have deliberately stated the question in those terms and not in terms of what harshness needs to exist before it may be given any weight in the sentence because in some cases harshness may exist and be a relevant factor but for some good reason(s) not warrant any or much weight in the overall consideration.

90 To indicate what level of harshness will be taken into account, the Courts have used various phrases such as 'not ordinarily experienced by ordinary prisoners' (***Bekink***), 'more burdensome upon him than would otherwise be the case of the ordinary jail inmate' (***R v Bailey (1988) 35 A Crim R 458***), 'harsher or more severe punishment for a particular offender than for other prisoners' (***R v MacDonnell (2002) 128 A Crim R 44***), 'greater than that experienced by many prisoners' (***R v Bhuiyan [2008] NSWDC 55 Finnane QC DCJ at par 23***), 'than would ordinarily be

anticipated for a person who could reasonably be described as a "mainstream" prisoner' and 'more restrictive than those applicable to the bulk of the prison population' (***Stevens at par 20 and 21*****),** 'more onerous than, the affect on and conditions undergone by other prisoners' (***York at par 38***), 'bearing down more severely upon the offender than upon the average prisoner' (***Richards, Steytler P at par 44***), and 'subject to prison conditions which were more arduous than those of the average prisoner' (***The State of Western Australia v O'Kane CACR 24 of 2010 par 68***).

91 The reference by Ipp J in ***Bekink*** to 'not ordinarily experienced by ordinary prisoners' reflected the particular circumstances of the case. An arbitrary lock-down of half of the prison population was simply not ordinary and the appellant was impacted by it. Those lucky enough to be in the other half were not. In my view those words of Ipp J are apposite to the current situation in relation to detention centres for children in this State. Whatever the precise factual position may be, the current situation at both the detention centre in Hakea Prison and BHDC could not be properly regarded as ordinary.

92 The test of an average prisoner could not really be applied literally in practice because prison populations are not homogenous. It is not a case of one regime fits all. Indeed, in the adult prison system there are a multiple number of prison facilities located throughout the State and each no doubt has its own range of prisoner management regimes.

93 All of that is reason why predicting what prison conditions will likely be for a particular offender in the future in the adult jurisdiction is so difficult.

94 A literal application of the average prisoner test and also the test that the harshness should be the result of more onerous conditions than those undergone by other prisoners, would not do justice in a situation where harshness was a characteristic of the conditions which impacted on all prisoners. Examples of that would include where there was a total lock-down or rotating lock-downs across all of the units in the prison, or where there was a policy to apply restraints to all prisoners when they were moved about within the prison without any consideration of their individual circumstances.

95 If harshness is a characteristic of the conditions which impact on every prisoner then each prisoner should not miss out on it being taken into account simply because no differentiation can be made amongst them.

96 Given all of that, I think that cases where the conditions of imprisonment are in a general sense out of the ordinary, as in ***Bekink*** and indeed as is the case at the moment at the detention centre in Hakea Prison and BHDC, then they really fall within a category of their own. Clearly in those cases the Court will take harshness into account if the justice of the case requires it.

97 Otherwise where a prison is operating functionally, i.e. as would be expected in the ordinary course, I think that the test on the level of harshness which needs to exist for it to be taken into account when sentencing, is that as stated by Hayne J in ***York v The Queen***. The test is whether the conditions under which the offender would serve the sentence of imprisonment are more onerous than, the affect on and conditions undergone by other prisoners.

98 I now wish to comment further on the submissions by the State and DCS that the Court should not concern itself with the conditions of a custodial regime because they are matters for the prison authorities. That was expressed as a general rule in the State's submissions and as an absolute rule in the submissions on behalf of DCS.

99 Paragraph 28 of the submissions of DCS provides as follows:

> In Cohen, the above passage from *R v Liddy (No. 2)* was cited with approval by His Honour Steytler P (at 29):
>
> > 'In this case concerns of the kind discussed by Gray J, Anderson J and Roberts-Smith JA are particularly apposite…The possibility that privileges that are granted only at the discretion of the executive (and, hence, would not ordinarily have been taken into account when sentencing an offender) might be denied seems to me to be an insufficient basis for interfering with the sentences imposed.'

100 I repeat my earlier comments when I referred to ***R v Liddy (No 2)***. There are two further points that I wish to make on this particular issue. First, the comments by Steytler P in ***Cohen [No 2] [2007] WASCA 279*** are not apposite to the factual circumstances of the three cases before me. These cases are not concerned with privileges. Not being subjected to frequent and lengthy lock-downs is not a privilege. Further, not being subjected to a general policy of the application of restraints is not a privilege. Further again, being offered appropriate education and recreation programs is also not a privilege.

101 Secondly, no Court has adopted the approach as urged on me by DCS on this issue concerning the inter relationship between the Courts and the executive. Importantly, that includes the High Court as can be seen from the judgments and the final orders made in ***York v The Queen***.

102 In summary, I am of the view that:

1. Where harshness is a characteristic of conditions in prison which impact on a particular individual, it may be taken into account on sentence, and

2. Harshness resulting from conditions in prison where the prison is functioning as it ordinarily should will be taken into account if the conditions under which the offender is to serve the sentence of imprisonment are more onerous than, the affect on and the conditions undergone by other prisoners. In those cases where a prison is not functioning as it ordinarily should then harshness should be taken into account when the justice of the case requires it.

3. By taking the harshness of conditions in prison into account when sentencing, a Court is not encroaching on the role of the executive to manage prisons. Rather the Court is simply but importantly taking into account and considering information, sometimes obtained from the relevant government department in charge of prisons, to enable it to carry out its function of sentencing.

4. Harshness resulting from conditions of imprisonment has long been a recognised principle of sentencing. Although harshness is not expressly referred to in the *Sentencing Act* it is nevertheless proper to take it into account when sentencing an offender under the *Sentencing Act* because it is a factor which bears upon the impact which a sentence of imprisonment will have upon an offender.

5. Courts require evidence to make findings on prison conditions and harshness in a particular case. Past conditions are matters of fact and should not be too difficult to decide. However, findings on future conditions, being prognostications, are particularly difficult. Nevertheless Courts must do the best they can having regard to evidence.

6. All of that necessarily applies to cases involving children with necessary modifications applying the provisions of the YO Act.

103 I will now weigh the objectives and general principles in the YO Act relating to children with the findings that I have just made.

104 When one reads the general principles of juvenile justice in s 7 of the YO Act it is clear that they are based on principles contained in International covenants including the United Nations Standard Minimum Rules for the Administration of Justice, commonly known as the Beijing Rules, adopted by the United Nations General Assembly on 29 November 1985, and also the Convention on the Rights of a Child (CROC), adopted by the United Nations General Assembly on 20 November 1989 by resolution 44/25 and ratified by the Commonwealth on 17 December 1990. That said, I do not propose to set out any particular provisions from those two covenants. Rather I will go directly to the objectives and general principles provided in the YO Act.

105 It is important at the outset to decide whether or not the general principles provided in s 7 of the YO Act apply to children in detention centres on remand or sentenced.

106 Section 6 of the YO Act sets out the objectives of the YO Act. It provides as follows:

> 6. Objectives
>
> The main objectives of this Act are —
>
> (a) to provide for the administration of juvenile justice; and
>
> (b) to set out provisions, embodying the general principles of juvenile justice, for dealing with young persons who have, or are alleged to have, committed offences; and
>
> (c) to ensure that the legal rights of young persons involved with the criminal justice system are observed; and
>
> (d) to enhance and reinforce the roles of responsible adults, families, and communities in —
>
> (i) minimising the incidence of juvenile crime; and
>
> (ii) punishing and managing young persons who have committed offences; and
>
> (iii) rehabilitating young persons who have committed offences towards the goal of their becoming responsible citizens;
>
> and

> (e) to integrate young persons who have committed offences into the community; and
>
> (f) to ensure that young persons are dealt with in a manner that is culturally appropriate and which recognises and enhances their cultural identity.

107 Section 46 of the YO Act sets out principles and considerations to be applied to young offenders by the Court. Section 46(1) provides as follows:

> (1) When dealing with a young person who has been found guilty of an offence, the court, in disposing of the matter, is to apply —
>
> (a) the principles applying generally for disposing of charges of offences, except as those principles are modified by this Act; and
>
> (b) the general principles of juvenile justice.

108 It can be noted that s 46(1) specifically applies to those cases where a young person has been found guilty. Section 46(1)(b) specifically requires the general principles of juvenile justice to be taken into account in those cases. Sections 46(2)-(6) contain additional specific considerations and principles which the Court must apply when dealing with young offenders in all cases.

109 Section 7 of the YO Act is headed 'General Principles of Juvenile Justice' and is prefaced with the words:

> The general principles that are to be observed in performing functions under this Act are that –

110 Given those specific provisions for the Court in s 46, the words prefacing s 7, and the provisions of s 7 in the context of the YO Act as a whole, in my view the general principles in s 7 of the YO Act apply to all decisions made under the YO Act.

111 Section 9 of the YO Act provides:

> 9. Chief executive officer, functions of
>
> It is the duty of the chief executive officer, under the direction of the Minister, to carry into operation the provisions of this Act so far as the duty is not expressly committed to any other person.

112 Section 12(4) of the YO Act provides:

> The chief executive officer may, with the approval of the Minister, make rules for the management and control of Departmental facilities and subsidised facilities generally, or any such facility specified, and for the management and control of young persons in them and the management of officers of the Department.

113 Sections 11A-D of the YO Act make provision for duties of all officers and employees, powers and duties of custodial staff, use of force, and use of restraints, respectively.

114 In my view the general principles in s 7 apply to all of the persons occupying all of those positions and also to all of the functions carried out by all of those persons under the YO Act. Accordingly, all of the general principles in s 7 apply to all decisions made in relation to the creation and maintenance of a detention centre and to the management of children in a detention centre. Further to all of that, all such decisions should be made for the purpose of satisfying the objectives provided in s 6 of the YO Act.

115 Having reached that conclusion I will now set out the general principles in s 7 and then make some specific comments on how some of them apply to the issue of harshness for children resulting from conditions in detention.

116 Section 7 of the YO Act provides as follows:

> 7. General principles of juvenile justice
>
> The general principles that are to be observed in performing functions under this Act are that —
>
> (a) there should be special provision to ensure the fair treatment of young persons who have, or are alleged to have, committed offences; and
>
> (b) a young person who commits an offence is to be dealt with, either formally or informally, in a way that encourages the young person to accept responsibility for his or her conduct; and
>
> (c) a young person who commits an offence is not to be treated more severely because of the offence than the person would have been treated if an adult; and
>
> (d) the community must be protected from illegal behaviour; and
>
> (e) victims of offences committed by young persons should be given the opportunity to participate in the process of dealing with the offenders to the extent that the law provides for them to do so; and

(f) responsible adults should be encouraged to fulfil their responsibility for the care and supervision of young persons, and supported in their efforts to do so; and

(g) consideration should be given, when dealing with a young person for an offence, to the possibility of taking measures other than judicial proceedings for the offence if the circumstances of the case and the background of the alleged offender make it appropriate to dispose of the matter in that way and it would not jeopardise the protection of the community to do so; and

(h) detaining a young person in custody for an offence, whether before or after the person is found to have committed the offence, should only be used as a last resort and, if required, is only to be for as short a time as is necessary; and

(i) detention of a young person in custody, if required, is to be in a facility that is suitable for a young person and at which the young person is not exposed to contact with any adult detained in the facility, although a young person who has reached the age of 16 years may be held in a prison for adults but is not to share living quarters with an adult prisoner; and

(j) punishment of a young person for an offence should be designed so as to give the offender an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways; and

(k) a young person who is dealt with for an offence should be dealt with in a time frame that is appropriate to the young person's sense of time; and

(l) in dealing with a young person for an offence, the age, maturity, and cultural background of the offender are to be considered; and

(m) a young person who commits an offence is to be dealt with in a way that —

(i) strengthens the family and family group of the young person; and

(ii) fosters the ability of families and family groups to develop their own means of dealing with offending by their young persons; and

(iii) recognises the right of the young person to belong to a family.

117 I first wish to comment on the fact that all or most of the male detainees are currently being held at the detention centre in Hakea Prison.

It is important to note that s 7(i) provides that detention 'is to be in a facility that is suitable for a young person'. In my view a declaration and gazettal that a place is a detention centre does not necessarily make the place a facility that is suitable for a young person as required by s 7(i).

118 I will focus my comments on Units 11 and 12 because the material filed on behalf of DCS refers to them and also management issues arising from them being located in Hakea Prison. The essence of my comments would also apply to Unit 5 but as I understand it that unit is no longer being used.

119 However Units 11 and 12 are described for legal purposes, the factual reality is that they were constructed to house adult prisoners and not young detainees. The cells were obviously designed for adults. The units were not constructed with the objectives and general principles in the YO Act in mind. They are located within the outer walls of an adult prison. To get to the units from outside the prison you need to enter through the main entrance of the prison and then move through the prison grounds. To exit the units and the prison, again requires movement through the prison grounds. Visitors for detainees at the detention centre in Hakea Prison need to attend an adult prison and not a juvenile detention centre and visits are conducted in a building in Hakea Prison.

120 Young detainees will inevitably be moved about within Hakea Prison. It will also be necessary for them or some of them to leave the units and go to buildings located in Hakea Prison to engage in visits, to receive urgent medical attention in the Hakea Prison medical centre, and to access the Crisis Care Unit as an interim measure before being transferred to BHDC if considered to be a high risk of self harm.

121 Given all of that, I do not think that Units 11 and 12 could be properly said to be a facility that is suitable for young persons as required by s 7(i) of the YO Act.

122 The culture within the walls of Hakea Prison is no doubt a prison culture and however that may be properly described it is no doubt different to what the culture should be in a detention centre for children. The prison culture would no doubt impact on the young detainees in Units 11 and 12 despite the best will of management and preventative measures being implemented by them.

123 On the point of culture, I do not think that the culture of rehabilitation intended for juvenile detention centres by the statutory framework in the YO Act would have much chance of thriving in a

situation where children are detained in units constructed for adults and located in an adult prison. I should add that culture is not just a factor of physical infrastructure and bricks and mortar. It is very much about regimes and staff numbers and the interaction between staff and detainees. Therefore, even if BHDC is physically restored then of course those other factors would need to be right for its culture to reflect the objectives and general principles of the statutory framework in the YO Act.

124 For all of those reasons, in my view the fact that young detainees are being held in units constructed for adults and located in an adult prison, Hakea Prison, is enough by itself to constitute harshness which can be taken into account. In the case of both the detention centre in Hakea Prison and BHDC, harshness can also result from the conditions of regimes which, consistent with what I have just mentioned, are affected by physical infrastructure, staff numbers and the interaction between staff and detainees.

125 I now turn to consider other conditions of detention. If the lock-downs are of the frequency and duration as indicated by the young offenders in these cases then in my view they are especially severe. I note that the material filed by DCS includes mention that in the two weeks since the incident at BHDC, the detainees who were not involved in the disorder have shown constraint with long periods of lock-downs and restrained movement.

126 The cases on adults show that the Courts have taken into account lock-downs of 18 hours or more per day, and in ***Bekink***'s case, 21 hours per day. Those times cannot be simply transferred over and be applied to children. I say that because the principle in s 7(k) requires a young person's sense of time to be factored in. Indeed that principle applies generally.

127 For young aboriginal detainees, lock-downs would be particularly harsh given their cultural connection to country. The principle in s 7(l) requires culture to be factored into management decisions in detention centres. If young aboriginal children are being frequently locked down and for long hours, then unless there was some acceptable explanation, it would be in breach of s 7(l).

128 I note that Kirby P in ***Inge*** referred to age as a factor when assessing hardship in the case of adults. Section 7(l) makes special provision for age and maturity to be taken into account in cases involving children. If

lock-downs are happening with no regard to age and maturity then that would also be in breach of the principle in s 7(l).

129 In addition to all of that, lock-downs in a juvenile detention centre need to be considered broadly against the statutory framework created by the objectives and general principles in the YO Act which make rehabilitation a purpose of detention. Lock-downs are obviously inconsistent with rehabilitation. Lock-downs could also give rise to or exacerbate mental health problems for children.

130 The material provided by DCS includes a directive given to staff at BHDC on 1 February 2013 that 'the escorting of detainees within the centre will continue with restraints except in the circumstances listed above'. One of the circumstances listed above in that directive is that 'detainees within a secure room during interview (psych, legal etc) are not to be restrained unless requested to do so by the interviewer'.

131 I have already referred to the fact that after the incident at BHDC restraints were used on detainees who were not involved in the incident on 20 January 2013.

132 Section 11D(1) of the YO Act provides as follows:

> 11D. Use of restraints
>
> (1) The chief executive officer, or a superintendent, may authorise and direct the restraint of a young offender where in his or her opinion such restraint is necessary —
>
> (a) to prevent the young offender injuring himself or herself, or any other person; or
>
> (b) upon considering advice from a medical practitioner, on medical grounds; or
>
> (c) to prevent the escape of a young offender during his or her movement to or from a facility or detention centre, or during his or her temporary absence from a facility or detention centre.

133 Section 11D(1) clearly requires the chief executive officer or a superintendant to be satisfied that restraint is necessary in the case of the particular individual restrained. A separate consideration is required for each particular individual. In my view the direction to which I have just referred is not authorised by s 11D(1) of the YO Act. The particular circumstance referred to is also unlawful because it purports to give

authority to someone who does not have any under the YO Act to decide whether or not a young detainee is restrained. I do not think that a psychologist would want to interview a detainee when the detainee was restrained but interviews would not necessarily be limited to psychologists.

134 The principles set out in s 7(f) and s 7(m) concern strengthening a young offender's family, connecting the young offender with his family, and encouraging the young offender's family to care for and supervise the young offender. Any unreasonable limits on visits by family could constitute a breach of those particular principles. The issue of visits is not limited to visiting times. In the case of detainees in the detention centre at Hakea Prison, it may be that some prospective visitors would be dissuaded from visiting because they did not want to go to an adult prison. Any restrictions on visits could give rise to harshness. Whether there was any harshness in a particular case would of course depend on the evidence.

135 Counsel for JAB has submitted that frequent strip searches since the incident at BHDC have resulted in harshness to JAB. I note that in the material provided by DCS there is a copy of an order made on 21 February 2013 which provides for all detainees of the detention centre at Hakea Prison to be strip searched both before and after visits.

136 I appreciate that in a custodial facility there may be occasions when there is good reason(s) for strip searching. That said, to be strip searched would be very embarrassing and particularly when done by a stranger.

137 Whether a strip search should be taken into account to consider harshness would depend on the particular circumstances. For example, if a detainee had behaved in a way that warranted a strip search then I do not think that it should be taken into account. If the strip search was simply arbitrary then I think that it should be taken into account. In relation to visits, I do not think that the consideration comes down to whether there should be one strip search or two or even any. Visits are very important for children in detention and they should be encouraged. If a detainee is strip searched in relation to visits and for no good reason attributable to his or her behaviour, then I think that the strip search should be taken into account to assess harshness.

138 For the moment, all I need to say is that strip searching could be harsh and be taken into account. Whether or not it should be taken into account will depend on the evidence in the particular case.

139 If evidence called for shows that the picture painted by the young offenders in these cases on lock-downs, the use of restraints, the use of strip searches, and the absence or lack of programs is true, then that would mean that children in detention in this State are being treated more severely than adults. That would constitute a breach of the principle in s 7(c) of the YO Act.

140 I now wish to comment on the availability or non-availability of programs. While I need to wait and see what the evidence is on this particular aspect of the current situation, it seems clear that since 20 January 2013 there has at least been considerable disruption to program delivery including education and recreation programs.

141 Material provided on behalf of DCS shows that education and recreation are now being timetabled into daily schedules. Whether and the extent to which that is actually happening will need to be the subject of evidence before any findings can be made. Further, in relation to recreation it would be necessary to know what form that takes. If my reading of the material provided by DCS, which includes daily schedules, is right, then indoor recreation would happen inside a unit and when it was locked down. Even if there was a table tennis table or something(s) of that sort inside the unit, given the confined space and the numbers of detainees, to describe that time as indoor recreation would not really be accurate.

142 One of the young offenders has also raised lack of outdoor recreation on an oval. I note that outdoor recreation is included in the daily schedules in the material provided by DCS. I would need to receive evidence on what outdoor recreation actually involves. Is there access to an oval or some wide open space? That is particularly important for young children. Are activities actually organised or is it simply a case of allowing the young detainees to go outside the units?

143 During the course of oral submissions it was submitted on behalf of the State that no education program needed to be or could reasonably be expected to have been delivered in January because that fell within the school holiday period. I find no merit in that submission. The objectives and general principles in the YO Act, including s 6(d)(iii) which provides for the rehabilitation of young persons as an objective and s 7(j) which provides that punishment of a young person should be designed to give the offender an opportunity to develop in beneficial ways, apply at all times and to all children in detention.

144 I have already noted that some of the cases on adults referred to programs in prison when considering harshness from conditions in prison. Even so, I should set out why I think that providing programs to children in detention is relevant on this issue of harshness. Pursuant to s 7(h) detention should only be used as the last resort and if required should only be for the shortest necessary time. One of the purposes of detention is punishment.

145 In my view the objectives and general principles in the YO Act create a statutory framework within which detention serves the purpose of punishment. Further and within that statutory framework, punishment by way of detention also serves the purpose of rehabilitation. In order to rehabilitate young offenders in detention it is essential for programs to be made available to them to assist them to develop in beneficial and socially acceptable ways, integrate into the community, and to become responsible citizens.

146 In my view detention is a more severe form of punishment if programs are not made available to children because it does not serve that further purpose of rehabilitation as provided in the statutory framework of the YO Act.

147 Another important aspect of providing essential rehabilitation programs to children in detention is that they provide the children with the opportunity of engaging in them and thereby satisfying the Supervised Release Board that it is entitled to have the necessary level of confidence to release them back into the community when they are eligible for release. If essential programs are not made available to children in detention then the Supervised Release Board could not perform its statutory function. The principle in s 7(h) would be breached if children could not be properly considered for supervised release and as a result were kept in custody for longer than necessary.

148 All of that may well be a reason why a custodial facility for children is called a detention centre rather than a prison.

149 Having commented on the unsuitability of the detention centre in Hakea Prison, the proper culture which should exist in a detention centre, including BHDC and factors relevant to that, and on a variety of conditions which can cause harshness, I should add that when deciding the extent of harshness in a particular case the combined affect of all of them needs to be considered.

150 I should also add that in cases concerning children the consideration of whether or not the harshness should be taken into account must be made by applying all of the objectives and general principles in the YO Act to the evidence in the particular case. Harshness should be taken into account if the conditions of detention are different from and more onerous than those in regimes which would fall within the contemplation of the statutory framework of the YO Act.

Conclusion

151 For all these reasons I find that:

1. Where harshness is a characteristic of the conditions of detention which impact on an individual, then it may be taken into account when sentencing that individual. It does not matter whether the conditions apply to all or any particular number of individuals in the detention centre, and

2. Harshness can arise from the characteristics of the detention centre itself and also from the conditions of the detention regime including but not limited to lock-downs, use of restraints, limits on visits, strip searches, and the unavailability of programs, and

3. In cases concerning children the consideration of whether or not the harshness of detention conditions should be taken into account must be made by applying all of the objectives and general principles in the YO Act to the evidence in the particular case. Harshness should be taken into account if the conditions of detention are different from and more onerous than those in regimes which would fall within the contemplation of the statutory framework of the YO Act.

4. When a Court takes harshness of conditions of detention into account on sentence it is not encroaching on the role of the executive to manage the detention centre.

152 Given these findings it is now necessary for the Court to obtain evidence to enable it to make findings on harshness for both the past and the future.

153 Pursuant to s 47 of the YO Act the Court may request the chief executive officer to cause a report to be prepared to provide the Court with information it needs to dispose of the matter. I will now seek information in that way to enable the Court to assess harshness for each of

the offenders. In doing that I am in no way wishing to prevent the respective offenders from presenting their own evidence if they wish.

154 I propose to make programming orders on obtaining evidence after hearing further from counsel.