



**Sentencing/Diversionsary Options
for Children and Young People
Charged with Sexual Offences
in the Children's Court of Victoria**

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Magistrate**

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Table of Contents

An overview	1
1. Voluntary participation in a therapeutic treatment program – s. 354A	3
2. Court’s referral to the Secretary – s. 349	3
3. The impact on criminal charges of a Therapeutic Treatment Order being made	4
4. Diversion for young people charged with sexual offences	6
5. Sentencing for young people charged with sexual offences	6
Attachment A: Therapeutic Treatment Orders – Pathway when the Children’s Court (Criminal Division) makes a referral	8

Sentencing/diversionary options for children and young people charged with sexual offences

An overview

In relation to sexual offences proceeding before the Children's Court, the following 2018 Practice Directions are relevant:

- [No.4](#) – Sexual Offences – Summary Contest Listings (including Forms A and B)
- [No.5](#) – Sexual Offences – Subpoenas relating to confidential communications; and
- [No.6](#) – Intermediary Pilot Program at Melbourne Children's Court – Guidelines for the Intermediary Pilot Program

The Children's Court at Melbourne has a specialist Sexual Offences List (SOL) for children and young people charged with sexual offences. The SOL was established having regard to the recommendations of the 2004 Victorian Law Reform Commission Report [The Sexual Offences: Final Report](#). The SOL commenced sitting in February 2009. It is conducted every three weeks. In order for a matter to be booked into the List from another Court, the Children's Court co-ordinator must be contacted to confirm the next available listing date.

From the outset, an innovative approach was adopted, for example, Victoria Police agreed to provide the police brief to the Children's Court in advance of the hearing. The presiding magistrate would read the briefs prior to conducting the SOL and this resulted in greater case management. The magistrate would not hear any contested proceedings if they had read the brief. A docket system was introduced. The procedures resulted in an appraisal being made as to the strength of the prosecution case, the issues were narrowed, any potential delays could be identified and, as far as possible, contested hearings proceeded when listed. The presiding magistrate could be more interventionist than would normally be the case.

A further innovation which was introduced was that in appropriate cases pre-proof assessments¹ or a 'diversionary approach' was adopted. These matters could include, for example, sibling sexual abuse cases, cases in which the complainant is very young, or cases in which the complainant has an intellectual disability. Such an approach would not be considered unless it was agreed to by the prosecution after consulting with the complainant and the complainant's family. On occasions an initial assessment may be conducted by the Children's Court Clinic. The prosecution agreed not to seek access to the report in order for the young person to fully participate in the assessment. The prosecution relied upon the judicial officer confirming the recommendations made by the clinician, for example, regarding risk assessment, treatment eg counselling, communication strategies.

The diversionary, therapeutic approach would require the accused to attend and participate in a counselling program (for example, 12 months). The court may require the child to attend court during that 12 month period regarding the child's progress and to this end may require a treatment progress report to be provided by the treating clinician.

On the successful completion of the program and compliance with any recommendations made by the suitably qualified clinician, the prosecution would apply to withdraw the charges

¹ The prosecution agreed not to seek access to a pre-proof assessment/counselling report (in order for the young person to fully and frankly participate in the assessment) but to instead rely upon the judicial officer confirming the recommendations of the author of the report etc.

and the child or young person would not incur a criminal record. This diversionary-type approach has some similarities to a Therapeutic Treatment Order (TTO) but it did not require child protection proceedings to be in place. Nor was it necessary for the essential requirements of a TTO to be satisfied which amongst other matters, prior to the commencement of the *Justice Legislation Amendment (Family Violence Protection and Other Matters) Act 2018*, restricted TTOs to children under 15 years of age. If the child did not engage in counselling or reoffended, a determination would be made as to how the matter would further proceed, e.g. whether the diversionary approach would continue or whether the matter would otherwise proceed, for example, to a contested hearing or plea of guilty etc.

This innovative approach was subsequently legislatively enacted by the introduction of [s. 354A](#) CYFA.² It provides for the child to be discharged if the statutory requirements are met, including that the child has voluntarily attended and participated in an appropriate therapeutic treatment program to the satisfaction of the treatment provider. The proceeding is adjourned for not less than the period of the therapeutic treatment program and the case may be re-listed at short notice.³

A summary of the pre proof options in sexual offence matters provided for in the CYFA is as follows:

Pre proof options	Criteria	Adjournment	Discharge Y/N?
Voluntary participation in a therapeutic treatment program (s 354A)	s. 354A(1)	s. 354A(2)	s. 354A(3), (4) and (5).
Court referral to the Secretary (DHHS – child protection) if the court considers there is prima facie evidence for the making of an application for a TTO (s 349)	s. 349(2), (3). Note also – s. 245(1)(b) and (4).	ss. 350, 351, 352, 355, refer also to TTO provisions, if a TTO is made.	Refer to TTO provisions, if a TTO is made.
Therapeutic Treatment Order is/has been made (s. 352).	s. 352. Note also - ss. 244, 248, 250, 255 to 258.	ss. 352, 352A, 353, 354	ss. 354(4), (4A), (5).
Diversion	s. 356C, 356D, 356E, 356F, 356G. Note also – a forensic psychological/risk assessment is generally required to be provided to the diversion coordinator in order for the assessment to be conducted.	s. 356D(1), 356H	s. 356I

² *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014*. Section 354A commenced operation on 1 March 2016.

³ s. 354A(2) CYFA

The introduction of these pre proof approaches recognises the immaturity of children and young people and the efficacy of therapeutic counselling in appropriate cases.

*...juvenile sex offenders are still children and remain open to corrective emotional and cognitive experiences that will help reframe their ideas and world views, address their emotional and behavioural difficulties and help them to engage pro socially and in ways that yield greater personal satisfaction and a sense of self efficacy.*⁴

I will now summarise the pre proof and sentencing options.

1. Voluntary participation in a therapeutic treatment program – s. 354A

If a child is an accused in the criminal division and the court is yet to make a finding in relation to the charge/s, the court may consider adjourning the matter if satisfied that the child has exhibited sexually abusive behaviours that would justify a referral to the Secretary under s. 349(2) (refer below) and the court is satisfied that the child has attended and participated, is attending and participating or will attend and participate voluntarily in a therapeutic treatment program.⁵

The court may adjourn the criminal proceeding for not less than the period of the therapeutic treatment program and may re-list the adjourned case at short notice.⁶ Any statement made by a child when participating voluntarily in a therapeutic treatment program, is not admissible in any criminal proceedings in relation to the child.⁷ If the court is satisfied that the child has voluntarily attended and participated in an appropriate therapeutic treatment program, having regard to:

- (a) *the child's attendance record;*
- (b) *the nature and extent of the child's participation;*
- (c) *whether or not the child's participation was to the satisfaction of the therapeutic treatment provider;*
- (d) *the opinion of the therapeutic treatment provider as to the effectiveness of the treatment*⁸

it must discharge the child without any further hearing of the criminal proceeding.⁹

2. Court's referral to the Secretary – s. 349

When a child appears in a criminal proceeding and the Court considers that there is prima facie evidence that grounds exist for the making of an application for a TTO, the court may refer the matter of an application to the Secretary for investigation.¹⁰

The court must consider the following matters when deciding whether to refer the matter to the Secretary:

⁴ Rich P *Understanding, Assessing and Rehabilitating Juvenile Sexual Offenders* page 256.

⁵ s. 354A(1) CYFA

⁶ s. 354A(2) CYFA

⁷ s. 251 CYFA

⁸ s. 354A(4) CYFA

⁹ s. 354A(3) CYFA

¹⁰ s. 349(2) CYFA

- (a) *the seriousness of the child's sexually abusive behaviours; and*
- (b) *any previous history of sexually abusive behaviours of the child and how those behaviours were addressed; and*
- (c) *the particular characteristics and circumstances of the child; and*
- (d) *any other matters the Court considers relevant.*¹¹

If a referral is made pursuant to s. 349, the Secretary is required to provide a report within 21 days to the court (criminal division) confirming whether the Secretary has made a protection application, an application for a TTO or the Secretary is satisfied that no application is required.¹² If an application has been made, the Secretary must report to the criminal division the outcome of the application, that is, that the application was dismissed or that a protection order or a TTO, as the case may be, was made and the terms of the order.¹³ If a TTO is made, the criminal matter is adjourned and proceeds in accordance with the summary below.

3. The impact on criminal charges of a Therapeutic Treatment Order being made

Whilst a Therapeutic Treatment Order (TTO) and a Therapeutic Treatment (Placement) Order (TTPO)¹⁴ may only be made in the Family Division of the Children's Court, the criminal division may refer a matter pursuant to s. 349 CYFA and a TTO has implications in respect of the criminal proceedings. I have attached a TTO flowchart prepared by the Children's Court and available on JOIN.¹⁵

The family division of the court may make a TTO in respect of a child if the court is satisfied that the child has exhibited sexually abusive behaviours and that the order is necessary to ensure the child's access to, or attendance at, an appropriate therapeutic treatment program.¹⁶ The phrase 'sexually abusive behaviours' is not defined in CYFA. In [DoHHS v J](#),¹⁷ Gibson M considered the meaning of 'sexually abusive behaviours'. She referred to the second reading speech and the definition used by the Therapeutic Treatment Board and found that the young person had exhibited sexually abusive behaviours:

*...not because he used any power, authority or status to engage the others in the unit in sexual activity. Nor is it because I view him as an abuser. It is because I consider that the behaviours he engaged in with his co-residents were abusive to himself and to the others, and he would benefit by engaging in therapeutic treatment.*¹⁸

In the context of a TTO and a TTPO, 'child' is defined as 'a person who is of or above the age of 10 years and under the age of 18 years when the order is made.'¹⁹ A TTO remains in force

¹¹ s. 349(3) CYFA

¹² s. 350(1) and (2) CYFA

¹³ s. 351CYFA

¹⁴ Refer to ss. 252 - 254

¹⁵ Attachment A

¹⁶ s. 248 CYFA. Refer to sections 244 – 246 and 248 – 250 CYFA

¹⁷ [2015] VChC 1 per Gibson M

¹⁸ *Ibid.* at [15] – [20]

¹⁹ s. 3(1) CYFA

even if the child attains 18 years after the order is made.²⁰ A TTO remains in force for the period of the order, not exceeding 12 months.²¹

When determining whether to make a TTO, the court must consider:

- (a) *the seriousness of the child's sexually abusive behaviours; and*
- (b) *any previous history of sexually abusive behaviours of the child and how those behaviours were addressed; and*
- (c) *the particular characteristics and circumstances of the child; and*
- (d) *any other matters the court considers relevant.*²²

[Sections 252](#) and [253](#) CYFA prescribe when a TTPO can be made. For the purposes of this Paper, I am concentrating upon TTOs.

If a TTO is made and the child has charges in the criminal division about which the court has not yet made a finding, the court must adjourn the criminal proceedings for a period not less than the TTO.²³ Any statement made by a child when participating in a therapeutic treatment program under a TTO, is not admissible in any criminal proceedings in relation to the child.²⁴ The legislation also provides for judicial oversight during the operation of the order. At the time the court adjourns the criminal proceeding or at any time whilst the TTO is in place, the court may require the Secretary to provide reports to the criminal division (copies to be provided to the child and prosecutor), regarding the child's progress and attendance at the therapeutic treatment program.²⁵ The purpose of the judicial oversight is to monitor the child's engagement and to ensure that if for whatever reason/s counselling is not progressing, that steps could be taken to ensure the effectiveness of the order earlier, rather than waiting for the order to end or for an application to extend to be made due to non-compliance or non availability of a clinician, for example. The practice I have adopted is to adjourn the criminal charges to a date no earlier than when the TTO is to expire and also list special mention/s, for example, if it is a 12 month TTO, list a special mention in approximately 6 months' time, depending upon the circumstances of the case.

The Secretary may apply for one extension of the TTO for a period not exceeding 12 months and the court may grant the extension if satisfied the child is still in need of therapeutic treatment.²⁶ An application to extend a TTO may be made even if the child has turned 18 before the TTO is extended or will reach 18 years during the period of the extension.²⁷ In [Victoria Police v HW](#)²⁸ Grant J considered the meaning of '*attended and participated in the therapeutic treatment program*' and the orders to be made in the criminal jurisdiction when there was an application to extend a TTO. Although this case was decided prior to the introduction of [s. 354\(4A\)](#), Grant J refers to the second reading speech and the rationale for the introduction of therapeutic treatment orders.²⁹

²⁰ s. 250(2). However, a TTPO ceases to be in force once the child reaches 18 years or marries, whichever occurs first - ss. 254(2), 256(4) CYFA.

²¹ s. 250(1) CYFA

²² s. 248(2) CYFA

²³ s. 352 CYFA

²⁴ s. 251 CYFA

²⁵ s. 352A CYFA

²⁶ s. 255 and 256

²⁷ s. 256(IA) CYFA

²⁸ [2010] VChC 1

²⁹ At [13] – [15].

Applications may also be made by the Secretary, child or parent of the child to vary the conditions of a TTO³⁰ and applications may be made by the Secretary to revoke a TTO.³¹ Applications to revoke can be made when the child is no longer in need of therapeutic treatment or alternatively in cases in which the child is not attending the therapeutic treatment.

Upon the completion or revocation of the TTO, DHHS (child protection) must report to the criminal division details of the child's participation in and attendance on the TTO.³² If the Court is satisfied having considered submissions made on behalf of the child and the prosecutor and having regard to the criteria detailed in [s. 354\(4A\)](#) (that the child has attended and participated in the therapeutic treatment program to the satisfaction of the treatment provider and also having regard to the opinion of the treatment provider as to the effectiveness of the treatment), it must discharge the child without any further hearing of the criminal proceedings.³³

If the child is not discharged, the Court may determine what (if any) further proceedings in respect of the child are appropriate.³⁴

4. Diversion for young people charged with sexual offences

The usual principles regarding diversion apply in relation to sexual offences,³⁵ save for it is generally the case that a forensic psychological/risk assessment of the young person is required to be obtained. The assessment may be conducted by the Children's Court Clinic. Such an assessment not only assists the diversion coordinator when conducting the assessment for diversion but it may also assist the court in determining initially whether the matter should be referred for an assessment for diversion and/or whether diversion is appropriate in a particular case. One relevant matter when considering the appropriateness of diversion in a particular case, is the maximum timeframes within which a proceeding can be adjourned to complete a diversion plan, e.g. whether there is sufficient time for the therapeutic counselling program to be completed.³⁶

5. Sentencing for young people charged with sexual offences

The pre proof approaches detailed above will naturally not always be appropriate in sexual offence matters. The extensive jurisdiction of the Children's Court means that there are extremely serious sexual offences which are before the court and when regard is had to the criteria of the pre proof options, would not be suitable.

When a child is sentenced for the commission of sexual offences, the sentence imposed by the Court may include a condition requiring the young person to receive counselling and treatment from organisations which provide specialist programs, for example, the MAPPS (Male Adolescent Program for Positive Sexuality) Program. Counselling by MAPPS is only available for male offenders who have been sentenced to a supervisory order or are sentenced to a term of detention. SABTS (Sexually Abusive Behaviours Treatment Service) counsellors provide therapeutic treatment for young people (10 to 18 years of age) on Therapeutic

³⁰ s. 257 CYFA

³¹ s. 258 CYFA

³² s. 353(1) and (2) CYFA

³³ s. 354(3) and (4) CYFA

³⁴ s. 354(5) CYFA

³⁵ Refer to sections 356B to 356K CYFA

³⁶ s. 356D(1) and s. 356H CYFA

Treatment Orders and also those who engage voluntarily in treatment. Family counselling is also provided.

Kids First Australia (formerly the Children's Protection Society) provides counselling for young people (including those engaging in sexually abusive behaviours and complainants and their families) in the north eastern suburbs of Melbourne. Kids First also provides counselling for complainants and their families. For a young person over the age of 12 with an intellectual disability, and at risk of committing or having committed a sexual offence, a specialist service is provided by the Australian Community Support Organisation (ACSO) Problematic Sexualised Behaviour Service.

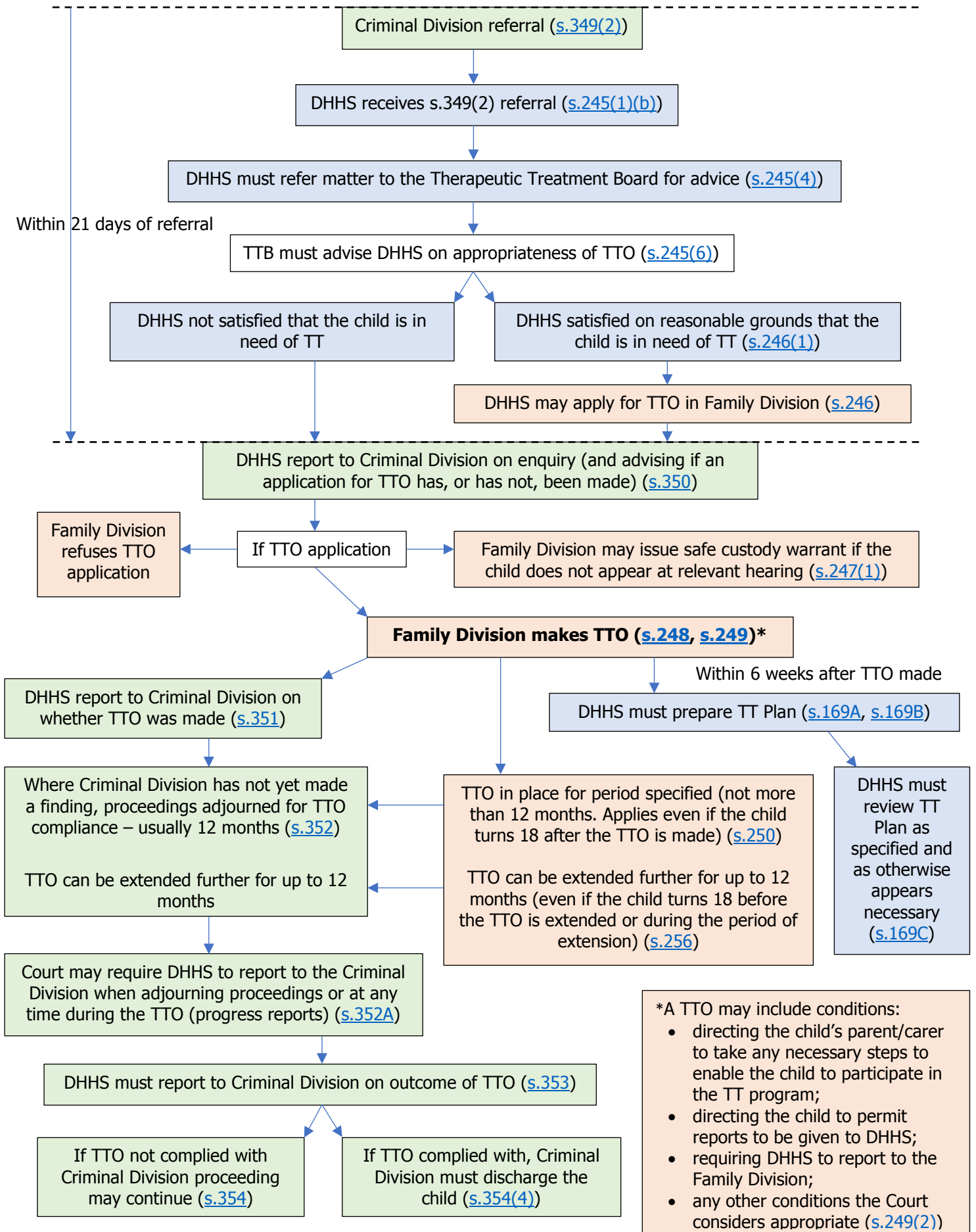
[*Victoria Police v MA*](#)³⁷ is a decision in relation to an application by the prosecution pursuant to the [*Sex Offenders Registration Act 2004*](#). Whilst this Paper is in respect of sentencing and the decision to place someone on the SOR is not a sentence, if an application is to be made, the prosecutor generally makes reference to the application either after any priors have been alleged or at some stage prior to sentence. Due to the high threshold which must be met, it is rare for these applications to be granted in the Children's Court.³⁸

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³⁷ [2011] VChC 7 per Bowles M

³⁸ Refer to s. 11 SORA

Attachment A: Therapeutic Treatment Orders - Pathway when the Children's Court (Criminal Division) makes a referral



***A TTO may include conditions:**

- directing the child's parent/carer to take any necessary steps to enable the child to participate in the TT program;
- directing the child to permit reports to be given to DHHS;
- requiring DHHS to report to the Family Division;
- any other conditions the Court considers appropriate (s.249(2))