Mills v Hawley **[2013] WASC 261 (3 July 2013) – Supreme Court of Western Australia**

'Breach of violence restraining order' – 'Following, harassing, monitoring' – 'Sentencing'

Charge/s: Breach of violence restraining order.

Appeal Type: Appeal against sentence.

Facts: The appellant had previously been in a relationship with the protected person and they had a 2-year-old child. He sent about 49 text messages and made 31 phone calls on a daily basis in breach of a violence restraining order (VRO). He claimed he was attempting to make arrangements to see his child. He had one prior conviction for breaching the same VRO. The prosecution accepted that the text messages were not threatening and the phone calls were not answered. However, the seriousness of the offence was increased because it occurred immediately after he had been dealt with by the Court for the previous breach. The appellant pleaded guilty to a charge of breaching a VRO. He was sentenced to 7 months' imprisonment, suspended for 12 months.

Issue/s: Whether the Magistrate erred in imposing a sentence of imprisonment and failing to reduce the sentence to take account of the appellant's early plea of guilty.

Decision and Reasoning: The appeal was upheld.

Under s 61A of the *Restraining Orders Act 1997* (WA), 'if a person has committed and been convicted of at least two offences within the period of two years before the conviction of the offence for which he or she is to be sentenced, the person is to be sentenced for a 'repeated breach'' (see at [12]). This did not apply to the appellant. As such, under s 6(4) of the *Sentencing Act 1995* (WA) the Court cannot impose a sentence of imprisonment unless it concludes that it is justified by the seriousness of the offence or the protection of the community. This offence was serious (see at [4]). However, Allanson J concluded that a sentence of imprisonment was not the only appropriate penalty. His Honour noted (at [19]) various mitigating factors including the appellant's youth ([19]) and the fact that no violence nor threats of violence were involved in the offending. Therefore, it could not be said that the protection of the community or the protected person required a sentence of imprisonment. The Magistrate also did not refer to the plea of guilty as a mitigating factor. The sentence was set aside and sent back to the Magistrates' Court for re-sentencing and his Honour stated at [23] that a community based order may be appropriate.