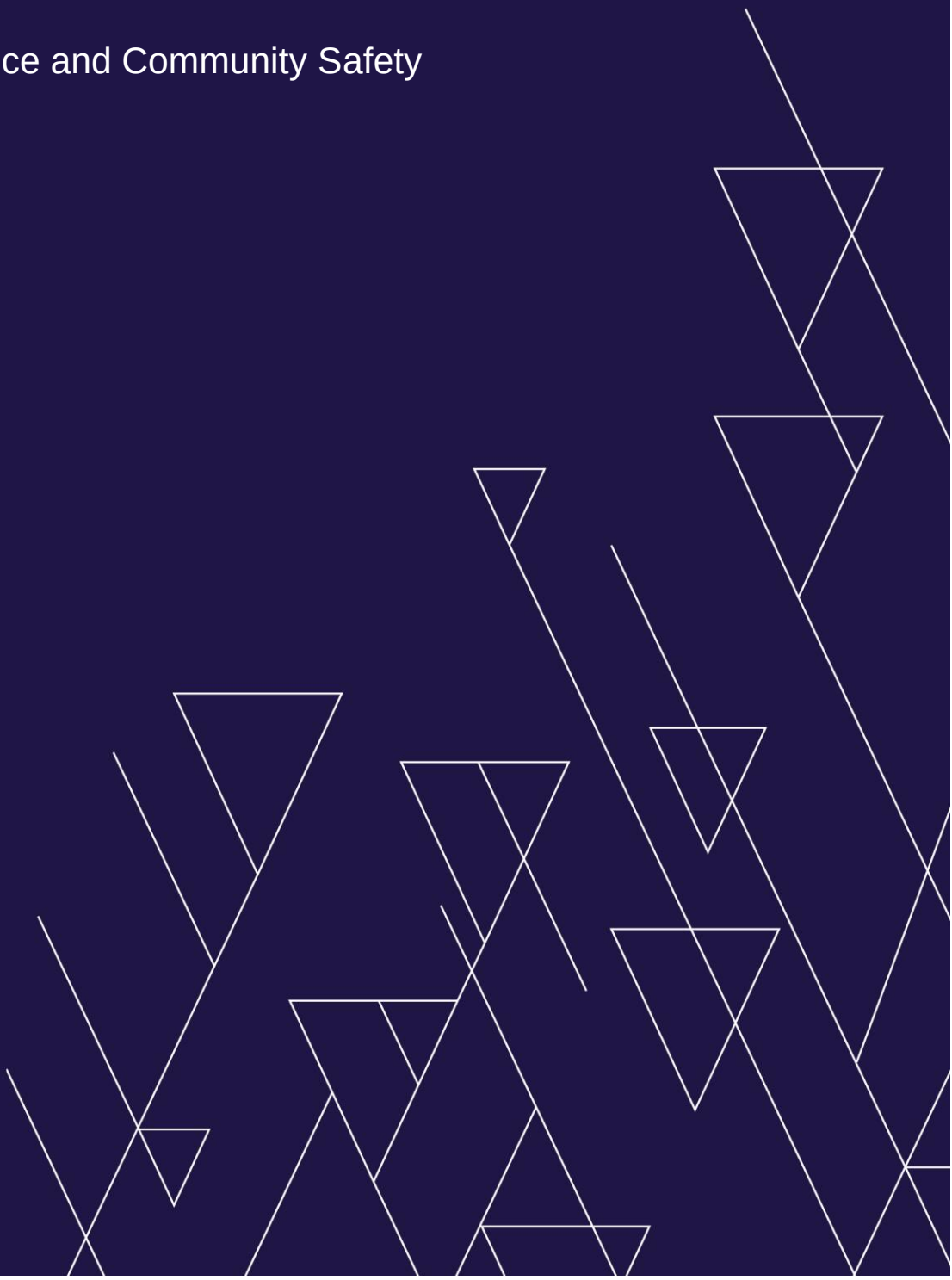
Review of the *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017*

Statutory Review under section 492B of the *Children, Youth and Families Act 2005*.

Department of Justice and Community Safety

May 2022



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Acknowledgements

The Department of Justice and Community Safety (DJCS) acknowledges Aboriginal and Torres Strait Islander people as the First Peoples and Traditional Owners and custodians of the land and waterways upon which our lives depend. We acknowledge and pay our respects to ancestors of this country, Elders, knowledge holders and leaders – past, present and emerging.

We extend that respect to all Aboriginal and Torres Strait Islander peoples. We recognise that Aboriginal and Torres Strait Islander communities are steeped in culture and lore having existed within Australia continuously for some 65,000 years.

We acknowledge the ongoing leadership of Aboriginal communities across Victoria in striving to build on these strengths to address inequalities and improve Aboriginal justice outcomes.

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The review was led by Kerin Leonard, independent consultant, who was supported by a part-time secretariat from DJCS.

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DJCS thanks stakeholders within the justice and community sectors, the many people across government, and especially the young people who engaged with the review for sharing their insights and ideas for positive change.

Preface

This review focuses on the legislative amendments introduced by the *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (YJ Reform Act).

This report outlines the legislative provisions under review and details the review's assessment of their operation. The review's analysis of these specific provisions should be considered in the broader context of the significant positive developments in youth justice in Victoria—reflecting improvements of people's experience in the community and in the system itself.

In the year ending December 2021, Victoria had the lowest number of youth alleged offender incidents (10–17 years) in a decade, and the lowest rate per 100,000 population over the same period.[1] There has been a steady reduction in incidents over the last ten years.

In 2020–21 Victoria also had: the lowest rate of total young people under youth justice supervision in Australia (7.3 per 10,000 young people aged 10–17); the lowest rate of total young people under community supervision in Australia (5.7 per 10,000 young people aged 10–17); and the lowest rate of young people in sentenced detention in Australia (0.3 per 10,000 young people aged 10–17).[2] The sentenced detention rate for young people reduced by 75 per cent over the five years from 0.8 in 2017 to 0.2 in 2021.[3]

Some of the data reported by the review reflects very small numbers of people and cases. For example, on an average day in Victoria in 2020–21 there were 102.1 young people aged 10–17 in detention. Out of the total number of young people in detention on an average day, just 19.1 of those aged 10–17 had been sentenced (convicted of an offence and sentenced to youth justice custody), the remainder being young people on remand, or young adults aged 18–21 serving a 'dual track' sentence in youth justice.[4] Behind these small numbers are victims, accused or sentenced young people, their families and communities.

Experiences of remand remain challenging. In Victoria on an average day in 2020–21, 81 per cent of young people aged 10–17 in detention were unsentenced. The high proportion of unsentenced young people in detention is a national trend, with almost three in four young people aged 10 and over in detention being unsentenced on an average day in 2020–21 nationally.[5]

Extended periods on remand are often unstable periods for a young person, and for any victim who is also waiting for an outcome. This instability can be detrimental to victim recovery and to the young person's rehabilitation. There is further work to do to build a system that drives away from such outcomes. The Government committed to reducing remand numbers and minimising the time spent on remand in the *Youth Justice Strategic Plan 2020-2030.*[6] Where these issues are within the scope of this review, they are discussed further in the body of the report.

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[1] Crime Statistics Agency. 2022, *Alleged Offender Incidents – Tabular Visualisation*, viewed 27 April 2022, <https://www.crimestatistics.vic.gov.au/crime-statistics/latest-victorian-crime-data/alleged-offender-incidents-2>.

[2] Australian Institute of Health and Welfare. 2022, *Youth justice in Australia 2020–21*, p. 8, p. 23.

[3] Victorian Government. 2022, *Diversion: keeping young people out of youth justice to lead successful lives*, p. 5.

[4] Australian Institute of Health and Welfare. 2022, *Youth justice in Australia 2020-21*, viewed 27 April 2022, <Youth justice in Australia 2020–21, Data - Australian Institute of Health and Welfare (aihw.gov.au)>, Table S72b: Young people in detention during the year by age, states and territories, 2020-21; TableS119a: Young people in sentenced detention on an average day by age and Indigenous status, states and territories, 2020-21.

[5] Australian Institute of Health and Welfare. 2022, *Youth justice in Australia 2020-21,* p. 19.

[6] Victorian Government. 2022, *Youth Justice Strategic Plan 2020–2030*, p. 19.

About this report

The Attorney-General and the Minister for Youth Justice asked DJCS to review the YJ Reform Act in accordance with section 492B of the amended *Children, Youth and Families Act 2005* (CYFA).

This report presents the findings and recommendations of the review in relation to:

- the policy objectives of the YJ Reform Act (section 4)
- court-based youth diversion (section 5)
- youth control orders (section 6)
- serious youth offence categorisation (section 7)
- additional provisions (section 8)
- additional opportunities for improvement (section 9).

The report also briefly outlines other issues raised by stakeholders at section 10.

The review has focused on presenting evidence of the operation of the YJ Reform Act and identifying opportunities for improvement. Given the impacts of COVID-19 on the youth justice system and stakeholders, as well as the timing for the review, further engagement with key stakeholders will be critical in shaping the detail of the next steps outlined in this report, particularly where legislative amendments are proposed.

A note on terminology

This report generally refers to 'children and young people' as 'young people' to improve the readability of the report. The review recognises that all people under 18 years of age are children under Victorian law and have the right to protection as children under the *Charter of Human Rights and Responsibilities Act 2006*.

The report specifies when it is talking about young people of a particular age or age range.

In this report, 'Aboriginal' refers to both Aboriginal and Torres Strait Islander people. 'Indigenous' or 'Koori/Koorie' is retained when part of the title of a report, service, program or quotation. This approach is consistent with the language conventions of key Victorian frameworks such as the *Aboriginal Affairs Framework 2018–2023.*

List of recommendations

Court-based youth diversion

Guiding consistent decision-making

Recommendation 1: That the CCYD Steering Committee collectively review the existing frameworks that guide decision-making among partner agencies and develop clearer guidelines to improve consistency across courts and maximise the reach of CCYD.

Monitoring the impact of service delivery

Recommendation 2: That the President of the Children's Court of Victoria and DJCS (with input from the CCYD Steering Committee) continue to monitor the processes and practice directions related to CCYD, including remote engagement with the courts to ensure that:

- all young people are given sufficient opportunities to engage with legal supports during the pre-court stage
- all young people are given sufficient opportunities to engage with CCYD coordinators and other supports
- appropriate mechanisms are identified to support the culturally and linguistically diverse (CALD) community and other disadvantaged groups throughout the pre-court and court processes.

Recommendation 3: That the Children's Court of Victoria, with assistance from DJCS and Victoria Police as required, consider how to increase the availability of information on the operation of the CCYD, including by considering annual public reporting on:

- the number of matters raised in court requesting CCYD be considered
- the key demographic characteristics of young people considered for CCYD
- offence type/s people considered for CCYD have been charged with
- where prosecution consent has been/has not been given to CCYD [data to be collected by Victoria Police if the prosecution consent provision is retained]
- the number of participants in CCYD
- the key demographic characteristics of CCYD participants
- offence type/s CCYD participants have been charged with, and
- the outcome/s of CCYD (that is, whether diversion has been successfully completed or not).

Aligning court decisions on diversion with standard judicial decision-making processes

Recommendation 4: That the Government standardise judicial decision-making on youth diversion and seek to repeal the requirement in section 356D(3) of the *Children, Youth and Families Act 2005* [or exclude the provision as part of the development of a new Youth Justice principal Act] for the prosecution to consent to diversion before it can be ordered by the Court. The legislation should instead allow for the prosecution to make submissions on whether it considers diversion should be ordered in a particular case.

Enhancing opportunities for young people from groups who are over-represented in the youth justice system to participate in CCYD

Recommendation 5: That the Government consider how to remove barriers to diversion for young people from groups who are over-represented in the youth justice system. Further consultation should explore options including, but not limited to:

(a) reducing the exclusion of certain offences from consideration for diversion, and

(b) repealing the requirement in section 356E(1)(a) of the *Children, Youth and Families Act 2005* [or excluding such provisions from the new Youth Justice Act] for the accused young person to acknowledge responsibility for the offence to be eligible for diversion, and instead considering the New Zealand criteria that the young person 'does not deny' the offence (noting that the 'child should be encouraged to accept responsibility for unlawful behaviour' would remain a purpose of diversion in accordance with section 356C of the CYFA).

Recommendation 6: That the Government consider how to support and strengthen opportunities for young people from groups who are over-represented in the youth justice system to participate in CCYD. Further consultation should explore options including, but not limited to establishing designated Aboriginal and CALD diversion coordinator positions to work with Aboriginal and culturally and linguistically diverse young people and their families, or in the alternative, expanding or exploring capacity within existing identified positions to undertake these roles.

Recommendation 7: That the Government undertake further work with community and justice sector stakeholders, including through the South Sudanese Australian Youth Justice Expert Working Group which will be established in 2022, to address the under-representation of African Australian young people in CCYD.

Youth control orders

Aligning the policy objectives of community-based orders with the framework established by the Armytage and Ogloff Youth Justice Review

Recommendation 8: That the Government remove the purpose to 'penalise the child by imposing restrictions on his or her liberty' from community-based orders and give further consideration through the development of a new Youth Justice principal Act to how the purpose of community-based orders can be aligned with the strategic vision for youth justice in Victoria (as set out in the *Youth Justice Strategic plan 2020–2030*) to reduce offending and improve community safety, and to provide genuine opportunities for young people to turn their lives around.

Building on the positive features associated with youth control orders in the new legislative framework

Recommendation 9: That the Government build on the positive features associated with the youth control order and consider replacing it with a community-based order that:

(a) includes more flexible options for the use of: planning meetings, Risk-Needs-Responsivity (RNR) assessment tools pre-sentence, conditions requiring substantial time/program commitments, intensive case management, and judicial monitoring

(b) only uses restrictive conditions where necessary and achievable in the individual circumstances of the young person and in light of the nature of the offending, and does not use broad-brush restrictive conditions such as a ban on social media

(c) contains no presumption in favour of detention following revocation of an order, and

(d) requires the court to consider victim safety when setting conditions.

Strengthening court advice

Recommendation 10: That the Government strengthen the role of Youth Justice in giving the courts relevant and timely information to support the consideration of each young person's risks and needs by:

(a) recognising the role of Youth Justice in advising the Court in the new Youth Justice principal Act

(b) reviewing the court advice service (as per the commitment in the Youth Justice Strategic Plan 2020-2030) to strengthen the quality of advice provided by Youth Justice to the courts, and

(c) working with the Children's Court of Victoria to further consider the state-wide approach to the relationship between the Court and Youth Justice to ensure effective communication and support for judicial officers in every region.

Improving the communication of orders

Recommendation 11: That the Government consider the specialist advice that could be made available to help justice sector stakeholders explain conditions on community-based orders to young people and their families. Further consultation should specifically explore the needs of people with disabilities, Aboriginal people, people from CALD backgrounds, and people with low English literacy, and should consider options including, but not limited to, the Communications Assistance model in New Zealand where communication specialists can assist the court, and the use of video or other forms of communication to supplement written court orders.

Strengthening cultural considerations of Aboriginal children and young people when making orders

Recommendation 12: That the Government strengthen cultural considerations when sentencing orders are made in relation Aboriginal children and young people by:

(a) establishing sentencing principles for Aboriginal children and young people in the new Youth Justice principal Act that align with the policy set out in *Wirkara Kulpa – Aboriginal Youth Justice Strategy 2022-2032*

(b) seeking advice from the Judicial College of Victoria about the support required for judicial education to support implementation of the new sentencing principles, and

(c) exploring opportunities to expand or further draw on the expertise of Aboriginal practitioner roles within Youth Justice, particularly in the preparation of Youth Justice reports to the Court in relation to Aboriginal young people.

Serious youth offence categorisation

Harnessing the specialist jurisdiction of the Children's Court of Victoria as a core limb of Victoria's modern youth justice system

Recommendation 13: That the Government revise the criteria for uplift of matters from the Children's Court of Victoria to a superior court, to:

(a) remove the application of serious youth offence categorisation to uplift decisions (noting that the Supreme Court of Victoria would retain jurisdiction for all homicide-related offences as was the case prior to the YJ Reform Act)

(b) maximise use of the specialist jurisdiction of the Children's Court of Victoria and address circumstances where the court considers that it does not have the sentencing options available to it to respond to the offences alleged, and

(c) permit the Children's Court of Victoria to transfer related offences so that matters that are founded on the same facts or form part of a related serious of offences of the same or similar character can be heard together in a superior court.

Court procedures that account for the age of children and young people

Recommendation 14: That the Supreme Court of Victoria and the County Court of Victoria consider whether any further steps can be taken to adapt their procedures to the needs and developmental differences of children (compared to adults) when they are hearing matters where the accused person is under 18 years of age.

Aligning dual track sentencing to the approach envisaged by the Armytage and Ogloff Youth Justice Review

Recommendation 15: That the Government revise the legislative criteria for dual track sentencing to remove the application of serious youth offence categorisation. The legislative criteria should allow courts to consider the individual circumstances of the person, or look at the overall circumstances including the seriousness of the offending (as is the case with bail decisions).

If the serious offence categorisation is nevertheless retained, the legislative drafting oversight should be rectified so that the dual track restrictions under the *Sentencing Act 1991* only apply to people aged 18 and over.

Focusing parole conditions on individual needs and community safety risks rather than 'serious offence categorisation'

Recommendation 16: That the Government remove the mandatory parole conditions associated with serious youth offence categorisation. Any updates to the legislative considerations should allow the Youth Parole Board to consider the individual circumstances of the person, or look at the overall circumstances including the seriousness of the offending and any risks to community safety (as is the case with bail decisions).

Other provisions

Further assessment of cumulative and mandatory minimum sentencing is required

Recommendation 17: That DJCS, in consultation with Victoria police and the courts, collect data for the 2022–23 financial year on the:

- number of client to youth justice staff physical assaults and the nature of the incident
- number of young people charged with assaulting a youth justice worker

- sentencing outcomes where a young person is convicted, including extent to which courts apply the sentencing consideration in section 362(h) ('specific deterrence'), and
- key demographic information about the young person involved.

DJCS should then report to the Minister for Youth Justice and the Attorney-General by 30 September 2023 with further advice about the effects of cumulative and mandatory minimum sentencing requirements and specific deterrence consideration introduced by the YJ Reform Act have had on policy objectives (the safety of youth justice workers) and on young people.

Additional opportunities for improvement

Strengthening opportunities for victims of crime to engage in youth justice processes in a supported way

Recommendation 18: That the Government further consider how to strengthen opportunities for victims of crime to engage in youth justice processes, including the support required to do so. Further consultation should explore options including, but not limited to:

(a) a potential legislative requirement that victims (if any) be notified of potential diversion and key court events (what is involved, what are the potential outcomes and what opportunities there are to be involved), with further consideration of:

  (i) who should be responsible for informing victims (e.g. prosecution, Victoria Police, or a victim support worker), and

  (ii) how a victim's interest in further contact would be recorded, who would have access to this information and by what mechanism

(b) opportunities for victim participation, including in restorative justice and court processes, and

(c) further opportunities to support victims of crime who participate in youth justice, including through enhanced services and additional funding for these roles.

A tailored approach to addressing the complex criminogenic needs of children aged 10 to 13 years

Recommendation 19: That the Government develop a tailored youth justice service model for children aged 10 to 13 years. The model should include a focus on early intervention that addresses the criminogenic needs of children, as well as effectively connecting children (and coordinating service responses) with other systems such as health, mental health, community services, Child Protection, and education.

Establishing regular and transparent data reporting

Recommendation 20: That DJCS develop a framework that would assist in the reporting and monitoring of legislative provisions. Initial priorities for monitoring and public reporting should be identified in consultation with stakeholders. Consultation should consider the legislative provisions to prioritise reporting on, and the types of demographic and health characteristics (such as disability status) that would support analysis of the operation of those provisions.

1. Introduction

The YJ Reform Act was enacted in 2017 and came into effect in stages between November 2017 and June 2018. It introduced several youth justice and broader criminal justice system reforms.

The YJ Reform Act was developed in the context of several high profile and critical incidents in the community and at the Parkville and Malmsbury Youth Justice Precincts. It included a range of new sentence options, as well as increased penalties and consequences for committing certain offences. In addition, the YJ Reform Act also introduced a new 'Serious Youth Offence Regime', a statutory Children's Court Youth Diversion scheme, and other technical and miscellaneous amendments.

1.1 Purpose and scope of this review

The requirement for a statutory review was included in the YJ Reform Act.

Section 492B of the amended *Children, Youth and Families Act 2005* (CYFA) specifies that the Minister for Youth Justice must review the operation and effectiveness of the 2017 reforms and determine whether the policy objectives of the YJ Reform Act remain valid, and whether the amendments made by the Act remain appropriate to achieve those objectives.[7]

DJCS was responsible for undertaking the review to meet these statutory requirements.

Section 492B of the CYFA sets out topics that the review is required to examine.[8]

1.1.1 Statutory requirements of the review

The statutory requirements for the review are reproduced at Appendix A. In summary, section 492B of the CYFA requires the following areas to be reviewed:

- **The validity of the YJ Reform Act's policy objectives – Section 492B(1)**

  The review must determine whether the policy objectives of the YJ Reform Act remain valid and whether the reforms remain appropriate to achieve those objectives.

- **The operation of the reforms – Section 492B(3)(b)-(e)**

  The review must cover the operation of: youth control orders; youth diversion strategies and programs; and the dual track system (noting that the reforms removed the eligibility of young people (18-21 years of age) to serve their sentence in a youth justice facility in certain circumstances, for example if they are to be sentenced for a category A 'serious youth offence').

- **The effects of the reforms – Section 492B(3)(a)(i)-(iv), 492B(e)**

  Without limiting the matters the review may consider, the review must cover the effects of the reforms on:

  - rates of offending and re-offending
  - incarceration rates of young people (including Aboriginal and Torres Strait Islander young people)
  - community safety
  - the long-term wellbeing of children and young people in contact with the justice system.

[7] *Children, Youth and Families Act 2005,* s 492B(1).

[8] *Children, Youth and Families Act 2005,* s 492B(3).

- the categorisation of serious youth offences (Category A and B) and the effect of this on decisions about bail, non-custodial sentences and the placement of young people in Youth Justice centres.

- **Additional opportunities for improvement – Section 429B(3)(g)**

  The review may also identify any additional legislative, administrative or policy reform that is necessary to improve the operation of Victoria's youth justice system.

1.1.2 Timing of the review

The CYFA requires that the review be completed and a report tabled in both houses of Parliament by 1 June 2022.[9] In recognition of the impact of COVID-19 on the review's timeframes, and given the role of key stakeholders in responding to the pandemic including outbreak responses in late 2021 and early 2022, this report focuses on outlining the available data and evidence and on identifying priority issues and opportunities for improvement. There is a commitment to further consultation on proposed changes arising from the review beyond the tabling of this report.

We are grateful for the stakeholder input provided to the review and look forward to continued engagement on implementation of the review recommendations.

1.1.3 The review is part of a broader statutory reform process

While this review focused on the YJ Reform Act, it took place in the context of broader reform to Victoria's youth justice system following the Armytage and Ogloff *Youth Justice Review and Strategy: Meeting needs and reducing offending* (the Armytage and Ogloff Youth Justice Review), completed in 2017. This review included a recommendation, which Government has accepted, for a standalone Youth Justice Act. For this reason, the review needs to be considered as one part of a broader reform project for youth justice and its governing legislation.

1.2 How the review was conducted

1.2.1 How the review gathered and used data

The review took both a quantitative and qualitative approach to examine the operation and effectiveness of the 2017 reforms. The review looked at the cohort impacted by the reforms (demographic and backgrounds), key data from Youth Justice, the Crime Statistics Agency, the courts and other service delivery bodies, and stakeholder feedback regarding the operation and effectiveness of the reforms. The outcomes of the review are supported by case studies, and engagement with key workers and young people.

As the YJ Reform Act came into effect between November 2017 and June 2018, the review examined data collected between 2016 to 2021 (financial and calendar years depending on the source of the data set).

Data from prior to the commencement of the YJ Reform Act, spanning 2016-2018, was considered in comparison to later data in order to inform an analysis of the reform's impacts. All data sets were validated and collated by the Crime Statistics Agency and DJCS data custodians. Data measures used in the review were agreed in consultation with both the Crime Statistics Agency and the DJCS data custodians to ensure that the measures were appropriate, accurate and reflected the intended scope of section 492B of the CYFA.

[9] *Children, Youth and Families Act 2005,* s 492B(4).

When analysing the data, the review considered the impact of the COVID-19 pandemic and the significant period of reform in youth justice and the broader service system in Victoria. These influences have been accounted for throughout the review.

The review also considered recent analysis undertaken for an evaluation of the CYD service by the DJCS. The evaluation was a priority in the *Youth Justice Strategic Plan 2020–2030.*[10] The review has drawn heavily on the evaluation's data analysis and stakeholder interviews, and this is reflected in section 5 on 'Court-based youth diversion'. A more detailed statistical analysis was possible for diversion compared to other areas under review due to the significantly larger number of diversion participants.

1.2.2 Stakeholder consultation

The review invited stakeholder input through a targeted call for submissions. Individual meetings were held to further explore issues and opportunities.

The review engaged and consulted with key justice sector institutions and services, education and human services areas within government, human rights bodies, and organisations that work with Aboriginal and culturally and linguistically diverse (CALD) young people. Custodial and community-based youth justice staff were consulted across metropolitan and regional areas. In addition, the review met with young people at the Parkville and Malmsbury Youth Justice Precincts, and with youth representatives from the Centre for Multicultural Youth.

The review also met with youth justice representatives from New South Wales and New Zealand.

A list of submissions received and meetings held is at Appendix C.

1.2.3 The Expert Advisory Group

The review was supported by an Expert Advisory Group (EAG) with expertise in the specialist jurisdiction of the Children's Court of Victoria, policing and community safety, the law, and child and adolescent health and development.

The EAG provided expert, independent insight into the 2017 reforms and assisted in the identification of opportunities for improvement in the future. The EAG members were:

- Paul Grant (Chair): Former President, Children's Court of Victoria; Alternate Chair, Youth Parole Board; Former County Court Judge and Magistrate, including Supervising Magistrate for the Koori Court
- Tim Cartwright: Former acting Chief Commissioner, Victoria Police; Former Family Violence Implementation Monitor
- Professor Susan Sawyer AM: Chair, Adolescent Health, Department of Paediatrics, University of Melbourne; Director, Centre for Adolescent Health, Royal Children's Hospital and Murdoch Children's Research Institute
- Timothy Goodwin: Member of the Victorian Bar; Board Member, Victorian Human Rights and Equal Opportunity Commission; Former Junior Counsel Assisting the Royal Commission into the Protection and Detention of Children in the Northern Territory.

[10] Victorian Government. 2022, *Youth Justice Strategic Plan 2020–2030*, p. 19.

2. Overview of the YJ Reform Act

The YJ Reform Act amended various Acts, including the CYFA, to enact reform to the youth justice system.[11] While the YJ Reform Act does not state its policy objectives, the Government outlined the key aims of the reforms in the second reading speech. Those aims were to:

- prevent a child's life of crime before it starts, which it noted was critical to protecting the community
- recognise that suitable young people should be given the opportunity to rehabilitate, and
- address community concerns about crimes committed by children and young people, and to improve safety and security in Youth Justice facilities.[12]

The review understood these aims to be the policy objectives against which the reforms were to be reviewed, noting that not every policy objective will apply to all reforms given the breadth of the topics covered by the YJ Reform Act.

For completeness, the key reforms introduced into the CYFA by the YJ Reform Act are summarised below. These provisions are broader than the statutory requirements for this review. Miscellaneous provisions beyond the review's statutory requirements to consider are outlined in further detail at section 8.

The YJ Reform Act introduced the following reforms to the CYFA in 2017:

- **Sentencing and court proceedings**
    - The creation of Youth Control Orders—a new sentencing option for children that is an alternative to detention and involves intensive supervision and monitoring.
    - Categorising certain offences as serious youth offences, and the effect of this categorisation on decisions about bail, transferring charges to higher courts, the placement of young adults in youth justice centres, and mandatory parole conditions.
    - Increased penalties and new offences in youth justice precincts (including assaults on staff and escapes) to protect youth justice workers.
    - Allowing the courts to impose an aggregate sentence (for two or more convictions).
- **Diversion**
    - Court-based youth diversion provisions—this established a legislative basis for a diversion program in the Criminal Division of the Children's Court of Victoria.
- **Youth justice custodial operations**
    - Amendments relating to justice placement decisions (for example transfers and co-location, remand placements), to increase flexibility in decisions about where children and young people are housed within youth justice facilities.
    - Information sharing and restrictions on publication.

[11] *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017*, s 1.

[12] Legislative Assembly, Parliament of Victoria. 2017, *Parliamentary Debates*, 8 June 2017.

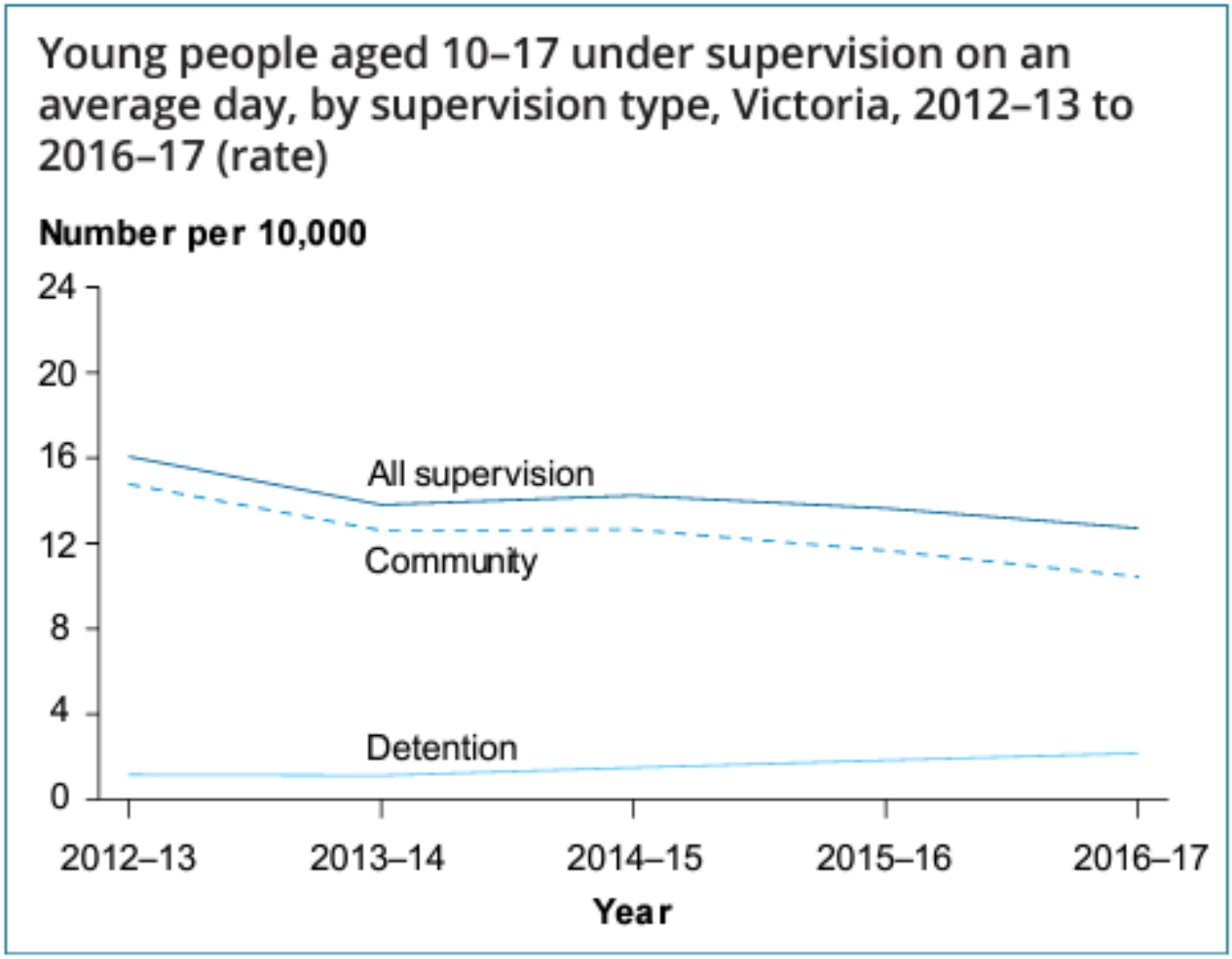
3. Context

The YJ Reform Act was introduced during a period of rapid change within Victoria's youth justice system. The sections below outline: the practical context and the youth justice trends in the lead-up to and following 2016–17; the system-wide reforms that took place shortly after the introduction of the YJ Reform Act; and the policy context for this review which includes a new youth justice strategic plan and the redevelopment of the youth justice legislative framework.

3.1 Youth justice trends

Over the five years to 2016–17, the number of young people under supervision on an average day fell by 22 per cent, while the rate for those aged 10–17 fell from 16 to 13 per 10,000.[13]

Figure 1: Young people aged 10–17 under supervision on an average day, by supervision type, Victoria 2012–13 to 2016–17 (rate)

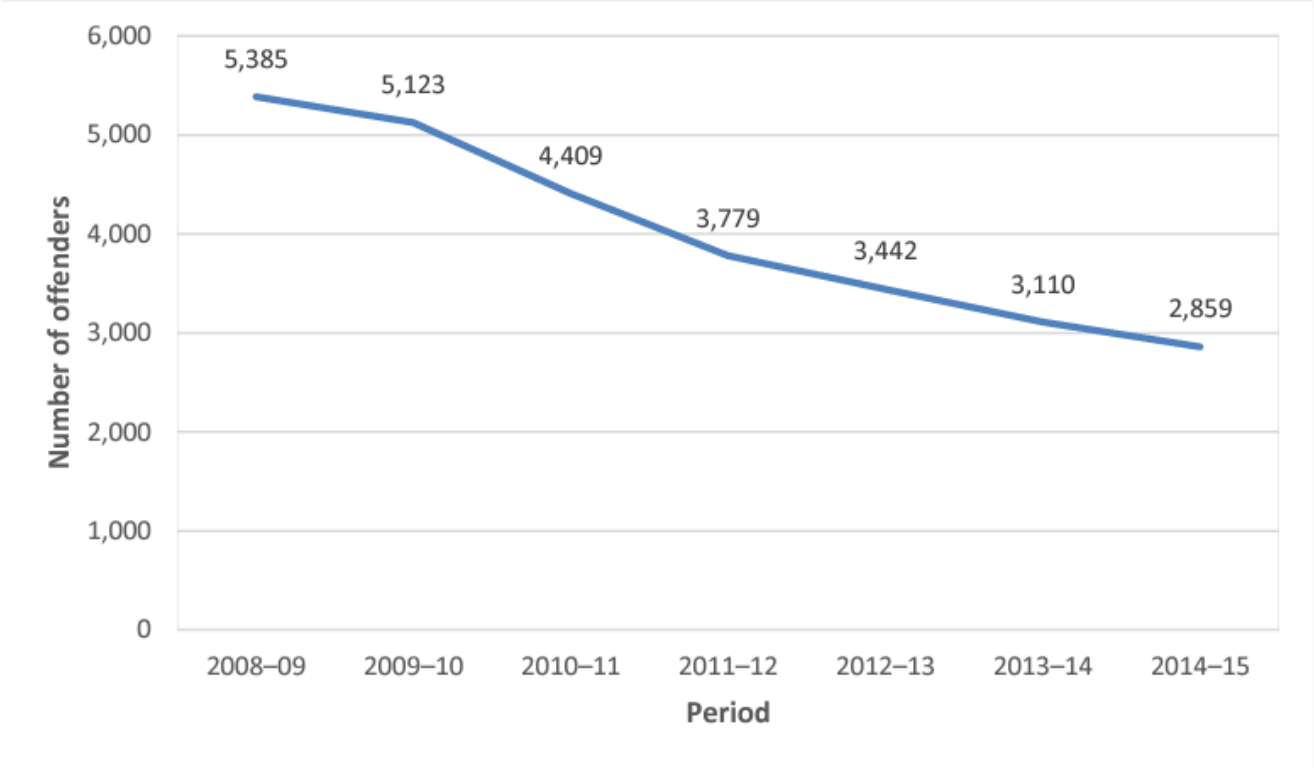


Source: Reproduced from the Australian Institute of Health and Welfare, *Youth justice in Victoria 2016–17*, 2018, p 2.

[13] Australian Institute of Health and Welfare. 2018, *Youth Justice in Victoria 2016–17*, p. 1.

The Sentencing Advisory Council's *Data Update Report* for 2016 noted that between 2010 and 2015, the number of young people sentenced in the Children's Court of Victoria decreased by approximately 43 per cent.[14]

Figure 2: Number of sentenced young offenders between 2008–09 and 2014–15



Source: Sentencing Advisory Council, *Reoffending by children and young people in Victoria*, 2016, p 16.

At the same time, there was an increase in the number of convicted young people aged 10–17 years who were responsible for a disproportionate number of incidents of offending in the community, with increases in the number of individual young people who were responsible for multiple incidents of offending.[15]

In 2016 and 2017 there were a number of high-profile incidents in the community and in youth justice facilities which increased community concerns about youth crime. In July 2017, the Armytage and Ogloff Youth Justice Review reported that Victoria had the highest recorded rates of assaults in custody compared with other Australian jurisdictions.[16]

In the general community, there was also a sense of growing concern about youth crime. The Armytage and Ogloff Youth Justice Review in 2017 noted 'the constant and high volume of media attention on violent crime'.[17]

Since 2017, there has been a steady reduction in the rate of offending by children and young people in Victoria.

[14] Sentencing Advisory Council. 2016, *Sentencing Children in Victoria Data Update Report*, p. 12.

[15] Crime Statistics Agency. 2016, *Downward Trend in the Number of Young Offenders, 2006 to 2015*, p. 1.

[16] Penny Armytage and James Ogloff. 2017, *Youth Justice Review and Strategy: Meeting needs and reducing offending, Executive summary*, p. 7.

[17] Penny Armytage and James Ogloff. 2017, *Youth Justice Review and Strategy: Meeting needs and reducing offending, Executive summary*, p. 10.

Figure 3: Youth offending 2016–21 (10–17 year olds): Crimes against the person and property and deception offences

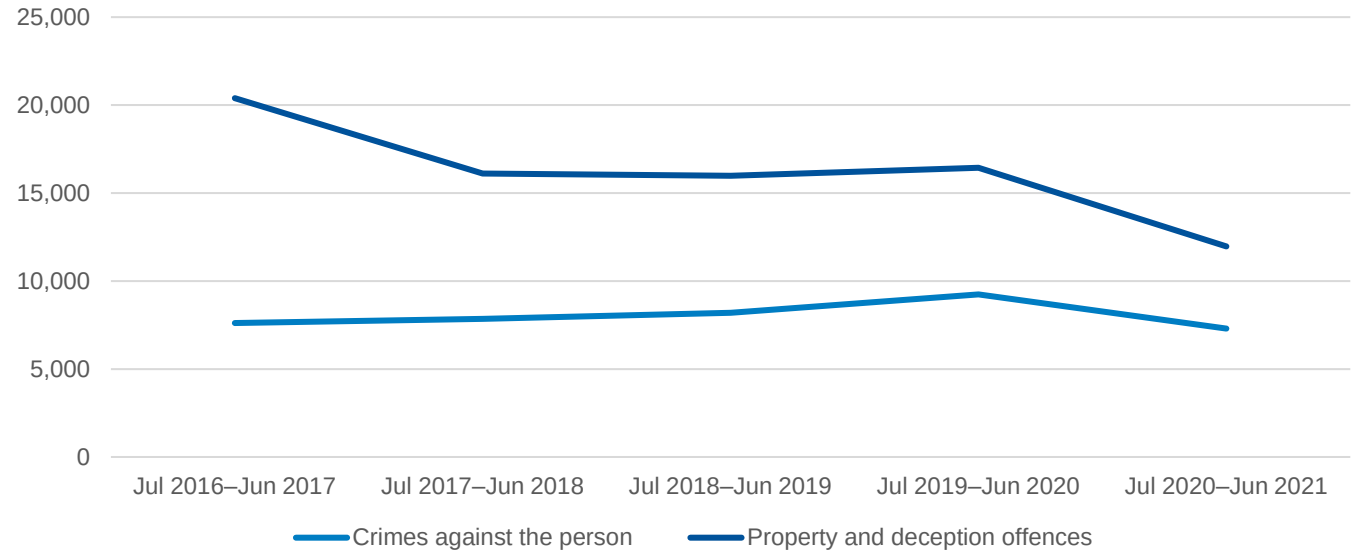
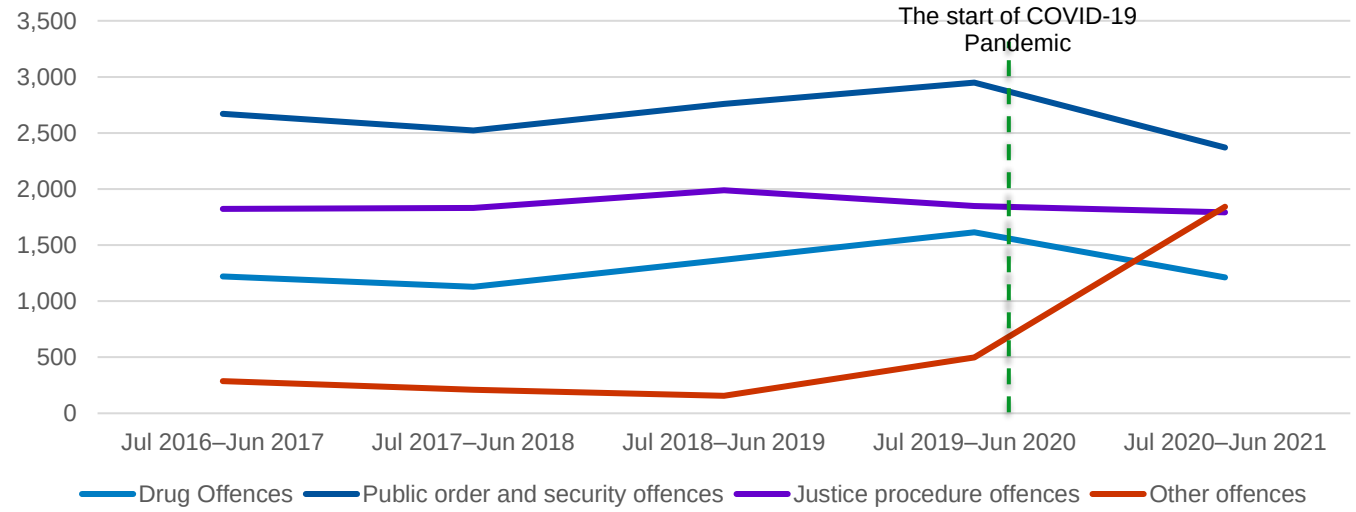


Figure 4: Youth offending 2016–21 (10–17 year olds): Drug offences, public order offences, justice procedures offences and other offences (including public health order-related offences)

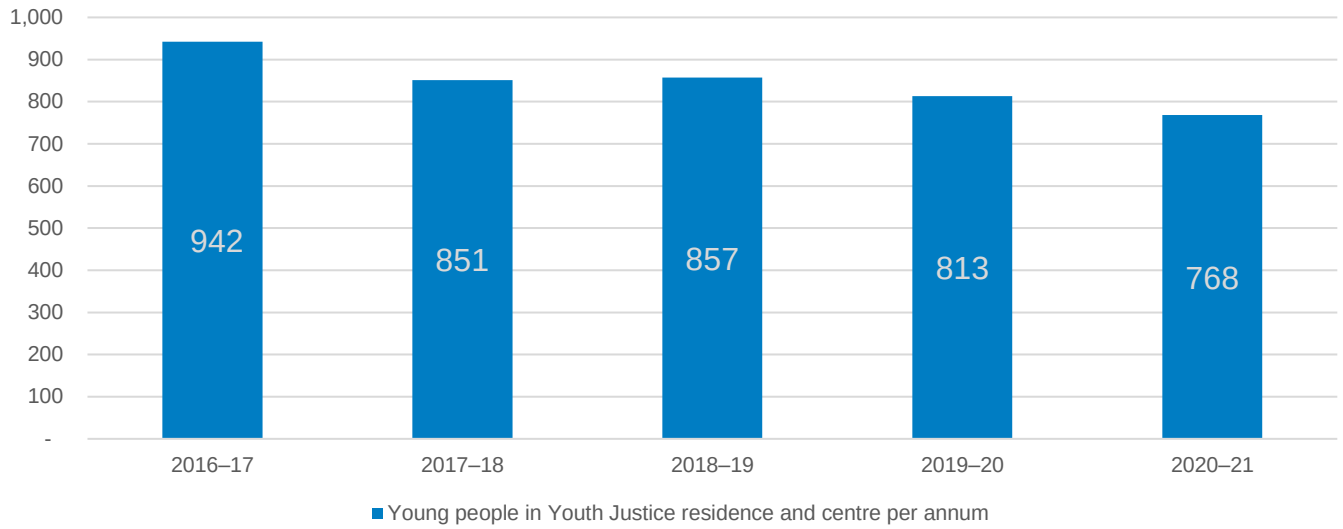


Note: Other offences include breach of public health order offences introduced in 2020 in response to the COVID-19 pandemic.

Data from the Crime Statistics Agency indicates that the rate of alleged youth offender incidents in Victoria (year ending March 2021) was 17 per cent lower than the year ending March 2012 and 12.3 per cent lower than the year ending March 2017.

In addition, in 2019–20 the average number of young people in youth justice custody decreased by 8 per cent compared with 2017–18 and 3 per cent compared with 2018–19. The average number of young people under youth justice supervision in the community also decreased by 11 per cent compared with 2017–18 and 3 per cent compared with 2018–19.

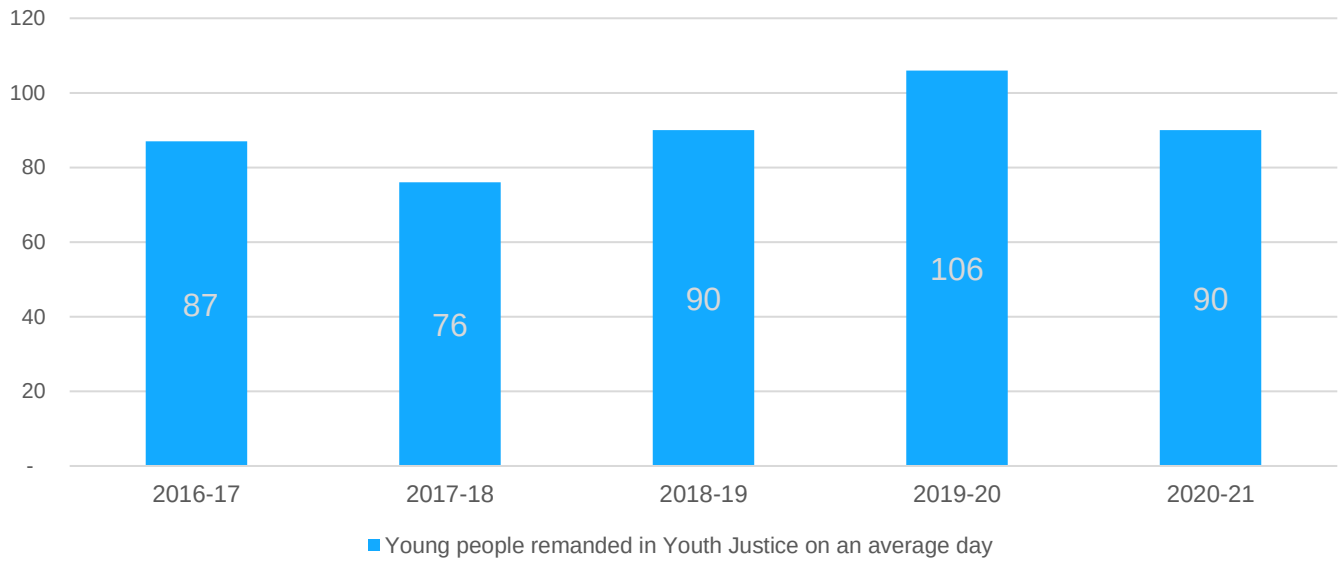
Figure 5: Total unique number of children and young people in a youth justice centre and residence per year (population per year)



Since June 2018, there has been a gradual increase in the number of young people on remand in youth justice each year, until 2020–21 when these numbers decreased. Prior to the enactment of the YJ Reform Act, there had been a decreasing trend in the annual number of children and young people on remand. Compared with the pre-reform period of 2017–18, the number in 2018–19 increased by 12 per cent. In 2019–20, the numbers reached a peak of 612 children and young people, jumping by 20 per cent compared with pre-reform period of 2017–18.

In Victoria in 2020–21, when only young people aged 10–17 are considered, about 81 per cent of those in detention on an average day were unsentenced.[18]

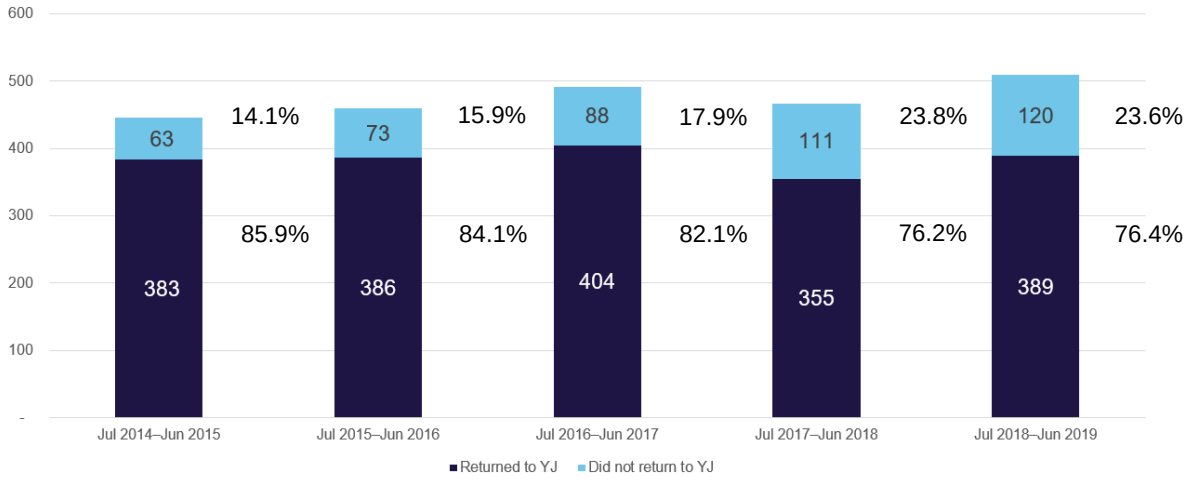
Figure 6: Number of children and young people on remand in youth justice on an average day



[18] Australian Institute of Health and Welfare. 2022, *Youth justice in Australia 2020–21,* p. 19.

In terms of reoffending, the number of youth recidivists has been declining since 2014, and the rate of non-recidivism increased from 14 per cent in 2014–15 to 24 per cent in 2018–19.

Figure 7: The proportion of young people released from youth justice during a given year who returned to youth justice within two years (10–17 year olds)



Aboriginal and Torres Strait Islander young people—youth justice trends since 2017

The review is required under section 492B(3)(f) of the CYFA to consider 'whether the incarceration of Aboriginal or Torres Strait Islander children and young people has increased or decreased as a proportion of the total incarcerated population of young people in Victoria' since the YJ Reform Act received Royal Assent on 26 September 2017.

The number and rate of Aboriginal young people aged 10–17 under youth justice supervision in Victoria has decreased in recent years.

In 2016–17 Aboriginal young people accounted for 16.9 per cent of all young people in youth detention. The non-Aboriginal detention rate was 1.8 per 10,000 young people (10–17 years) in Victoria, while the Aboriginal youth detention rate was 23.2 per 10,000, 12.7 times the non-Aboriginal rate.[19]

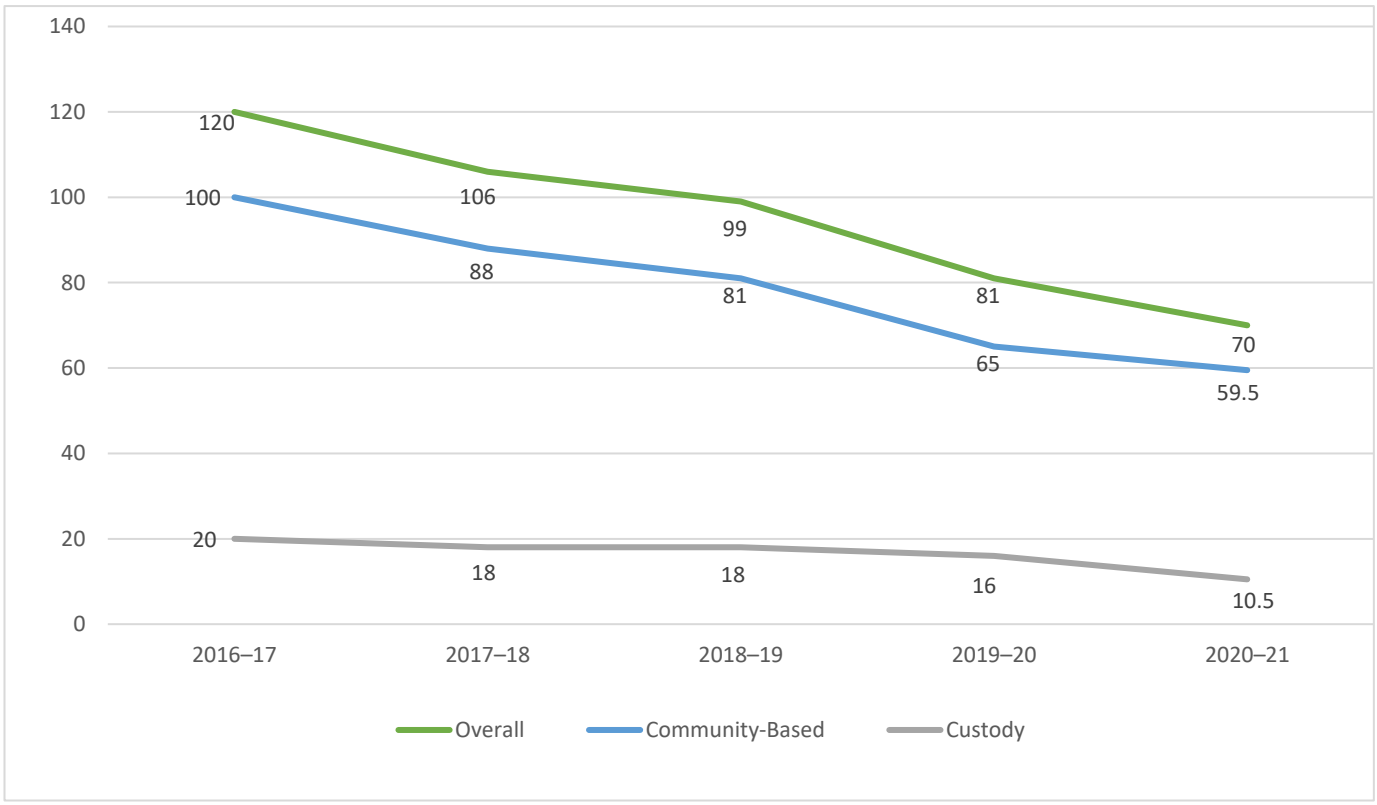
In 2020–21, Aboriginal young people accounted for 16 per cent of all young people in youth detention. The non-Aboriginal detention rate was 1.5 per 10,000 (10–17 years) in Victoria, while the Aboriginal youth detention rate was 9.6 per 10,000, 6.4 times the non-Aboriginal rate.[20]

Figure 8 below shows the number of Aboriginal children and young people aged 10 to 17 under youth justice supervision on an average day from 2016–17 to 2020–21.

[19] Australian Institute of Health and Welfare. 2018, *Youth Justice in Australia 2016-17* p.1.

[20] Australian Institute of Health and Welfare. 2022, *Youth justice in Australia 2020-21*, viewed 27 April 2022, < Youth justice in Australia 2020–21, Data - Australian Institute of Health and Welfare (aihw.gov.au)>, Table S129c: Young people aged 10-17 in detention on an average day by Indigenous status and age, Victoria, 2020-21 (rate).

Figure 8: The number of Aboriginal children and young people aged 10 to 17 under youth justice supervision on an average day



Source: (Historical tables 2016-17 to 2019-20): AIHW, (2021), Youth Justice in Australia 2019-20
* 2020-21 data has been sourced from the Youth Justice Client Relationship Information System (CRIS). This data is not published and may be subject to change.

From 2016–17 to 2019–20 the rate of Aboriginal young people aged 10–17 under youth justice supervision on an average day compared to non-Aboriginal young people (rate of over-representation) reduced by 28 per cent. The rate per 10,000 population of Aboriginal children and young people aged 10–17 under youth justice supervision on an average day reduced by 36 per cent.[21]

Nevertheless, the over-representation of Aboriginal children and young people in youth justice remains concerning. On an average day in 2019–20, Aboriginal children and young people aged 10–17 were:

- 10 times more likely than their non-Aboriginal counterparts to be under youth justice supervision
- nine times more likely than their non-Aboriginal counterparts to be in youth justice detention
- 10 times more likely than they non-Aboriginal counterparts to be under youth justice community-based supervision.[22]

[21] Australian Institute of Health and Welfare. 2022, *Youth justice in Australia 2020-21*, viewed 27 April 2022, < Youth justice in Australia 2020–21, Data - Australian Institute of Health and Welfare (aihw.gov.au)>, Table S12a: Young people aged 10-17 under supervision on an average day by Indigenous status, states and territories, 2010–11 to 2019–20 (rate).

[22] Victorian Government. 2022, *Wirkara Kulpa – Aboriginal Youth Justice Strategy 2022–2032*, p. 17.

3.2 A rapidly changing landscape

Due to a confluence of factors, the review has found it difficult to attribute changes in offending and reoffending rates to the YJ Reform Act. Victoria's youth justice system underwent significant reforms during the review period, many of which are likely to have also impacted on rates of offending and re-offending.

3.2.1 A new approach to youth justice in Victoria

On 3 April 2017, responsibility for youth justice was transferred from the Department of Health and Human Services to the Department of Justice and Regulation.

Shortly after this, in July 2017, Penny Armytage AM and Professor James Ogloff AM delivered the *Youth Justice Review and Strategy* to the Government. The review was the first systematic examination of youth justice services in Victoria since 2000.

The objectives of the review were to:

- create an overarching policy framework for the development of a contemporary youth justice system and accompanying service delivery model
- aim to understand the needs of cohorts of young people, and segments of young offenders, that are particularly vulnerable to exploitation and at high risk of involvement with the youth justice system
- deliver a strategy to enhance and position the department's youth support, youth diversion and youth justice services to respond to the needs of vulnerable cohorts into the future.[23]

The review found that there were significant challenges and issues affecting the Victorian youth justice system, as well as issues and shortcomings within the underpinning legislative framework, governance and administration.

The review recognised the need for a different approach to youth justice, achieved through a differential response to working with young people. It recommended focusing on age-appropriate responses and remaining conscious of the evidence on youth offending.

The review made 126 recommendations, including:

- development of single, modern and responsive legislative framework for youth justice
- restoring the dual track system to its original form and maintaining a low-security response to vulnerable 18–24 year olds
- provision for an interim/temporary assessment order to allow for timely comprehensive assessment to inform decisions regarding bail, remand and sentence
- as part of multi-agency case planning, establish a priority objective that links young offenders to education/skills training and employment
- enshrining the principle of 'detention as an option of last resort' in the new Youth Justice Act
- ensuring provisions in the new Youth Justice Act evenly and effectively balance community safety and offender rehabilitation
- design, build and operate a humane and therapeutic intensive intervention unit.[24]

[23] Penny Armytage and James Ogloff. 2017, *Youth Justice Review and Strategy: Meeting needs and reducing offending, Executive summary*, p. 5.

[24] Penny Armytage and James Ogloff. 2017, *Youth Justice Review and Strategy: Meeting needs and reducing offending, Executive summary*, p. 29–54.

The Government accepted all recommendations from the review, either in full or in principle, and announced an investment of $50 million for youth justice reform. This included:

- $12.9 million to continue the CCYD Service to keep offending behaviour from escalating and to support rehabilitation.
- $11.5 million to develop a new integrated case management framework across youth justice community services as well as youth justice custodial centres.
- $3.8 million for the creation of a new Custodial Classification and Placement Service to review the security risk of all young people in custody to ensure that they are appropriately and safely placed.
- $18.7 million to provide additional health and mental health services to young people in custody.
- $14 million to fund youth mental health initiatives for young people in youth justice, including a specialist mental health service for young people in custody, a forensic youth mental health service for young people in the community, and a dedicated secure forensic mental health unit.
- $1.3 million or a strategy to reduce the overrepresentation of Aboriginal young people in youth justice.
- $2.5 million to reinstate and expand structured day programs.
- $8.8 million towards new programs that directly address young people's offending behaviour.
- $9.9 million to boost training and skills for youth justice staff and to employ new Safety and Emergency Response Team staff.
- $15 million for a whole of government approach to target youth offending, including to provide culturally responsive programs and additional Multicultural Liaison Officers.
- $14.3 million for increased security within custodial centres.

3.2.2 Other inquiries and reports

Since 2017 a number of other significant reviews, inquiries and reviews relating to or affecting youth justice have been completed, including:

- 2017: Review of the Parkville Youth Justice Precinct: An independent review by Neil Comrie AO APM.[25]
- 2017: Review of escapes from the Malmsbury Youth Justice Precinct on 8 November 2016 and 25 January 2017 (Neil Comrie AO APM and Brian Hine).[26]
- 2018: Victorian Equal Opportunity and Human Rights Commission and Commission for Children and Young People report into Aboriginal cultural rights in youth justice centres.[27]
- 2018: The Legal and Social Issues Committee of Parliament held an inquiry into Youth Justice Centres in Victoria. The Committee's report made 39 recommendations.[28]

[25] Neil Comrie. 2017, *Review of the Parkville Youth Justice Precinct (Stage One)*.

[26] Neil Comrie and Brian Hine. 2017, *Review of escapes from the Malmsbury Youth Justice Precinct*.

[27] Victorian Equal Opportunity and Human Rights Commission and Commission for Children and Young People. 2018, *Aboriginal cultural rights in youth justice centres*.

[28] Victorian Auditor-General's Office. 2018, *Managing Rehabilitation Services in Youth Detention*, p. 14–15.

- 2018: The Victorian Auditor-General's Office released its report on *Managing Rehabilitation Services in Youth Detention.* The report made nine recommendations.[29]
- 2021: The Royal Commission into Victoria's Mental Health System recommended the expansion of the specialist youth forensic mental health programs to a state-wide level(recommendation 37(4)).[30]
- 2021: The Koori Youth Justice Taskforce and the parallel inquiry conducted by the Commission for Children and Young People culminating in its report, *Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system*. The report made 75 recommendations.[31]

Significant developments in the Government's policy frameworks for youth justice are described further below at section 3.3.

3.2.3 An increased focus on early intervention and diversion

The Armytage and Ogloff Youth Justice Review made several recommendations in relation to early intervention and diversion for children and young people interacting with Youth Justice.

Subsequently, the Government has invested significantly in early intervention and diversionary initiatives. In 2020–21, 25.7 per cent of Youth Justice's community output budget was allocated towards early intervention and diversion programs, including the CCYD service which was given a legislative basis under the YJ Reform Act (refer to section 5 for further detail).

In addition, early intervention initiatives across the youth justice system such as the Multisystemic Therapy (MST) and Functional Family Therapy (FFT) programs were introduced. These are intensive, evidence-based programs that work with the whole family unit to support the young person to change their behaviour and reduce offending.

The Youth Support Service (YSS), working in partnership with Victoria Police also supports young people to stop offending, by connecting them to education and supports. Aboriginal Youth Justice Programs also assist Aboriginal children and young people at risk of entering, or involved with, the criminal justice system in Victoria.

The recent 2022–23 State Budget includes investment to continue the reform of the youth justice system, with a particular focus on diversion. In particular, $11 million was invested for funding to go to a range of programs to support more young people entering the system – and ensuring those who do have the best chance at rehabilitation. This includes funding more Aboriginal Youth Justice Hubs to help prevent children coming into contact with the justice system as part of the implementation of *Wirkara Kulpa*. This also included the expansion of the Central After-hours Assessment and Bail Service and investment in the Children's Court and Victoria Legal Aid to ensure children and young people are not remanded unnecessarily because there is no available court to hear their bail applications. In addition to this, funding of $4.5 million in 2022–23 was also invested to prevent youth crime before it occurs by continuing critical programs aimed at engaging young people in the community and addressing the key drivers of crime.

[29] Victorian Auditor-General's Office. 2018, *Managing Rehabilitation Services in Youth Detention*, Independent assurance report to Parliament 2018–2019: 4, p. 14–15.

[30] Royal Commission into Victoria's Mental Health System. 2021, *Final Report, Volume 3: Promoting inclusion and addressing inequities*, p. 347.

[31] Commission for Children and Young People. 2021, *Our Youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system*, p. 40.

3.2.4 Bail reforms

Following a review of the *Bail Act 1977* (Bail Act) by Justice Paul Coghlan, staged amendments to the Act were made in May, July and October 2018. These amendments introduced significant changes to the Bail Act, including amendments impacting young people such as: tests for granting bail, the availability of conditions and the roles of different bail decision makers.

Of the various amendments, the 'tests for granting bail' were revised within the Bail Act to clarify that where there are two tests involved, they are to be applied in a two-stage process: first the 'reverse onus' test and then the 'unacceptable risk' test.[32] If the court considers there is an 'unacceptable risk' that a person who is applying for bail would endanger the safety of others, commit further criminal offences, interfere with witnesses, obstruct justice or fail to comply with conditions, then they must be refused bail.

The amendments also expanded the circumstances in which people charged with certain offences must satisfy a court that there are either compelling reasons or exceptional circumstances to justify their release on bail (known commonly as the 'presumption against bail').

These reforms have increased the likelihood that people are held on remand, pending the outcome of their matter. In Victoria in 2020–21, when only young people aged 10–17 are considered, about 81 per cent of those in detention on an average day were unsentenced.[34]

3.2.5 Custodial reforms

Since 2017, the Government has also invested in a range of custodial and workforce reforms to support broader youth justice objectives including the safety and stability of youth justice centres. These custodial and workforce reforms are additional factors that are likely to have contributed to greater stability in youth justice centres during the review period.

Infrastructure

Significant investments have been made in custodial infrastructure for youth justice to meet demand, keep the custodial workforce safe, and to support the rehabilitation of young people and reduce their risk of reoffending.

Reflecting the recommendations made by Neil Comrie AO APM in his reports into the Youth Justice precincts, works have included an assessment of fences, walls, doors and other climbing points that could create a security and safety risk. In particular, significant work has been undertaken to improve the safety and security of Parkville Youth Justice Precinct for staff and children and young people.

Custody management

Further initiatives to support the safe operation of youth justice centres have also been introduced, including:

- Establishing a Classification and Placement Unit, so young people are placed in custody following a rigorous assessment of their risks and needs. This has been backed by new beds in the system to best support children.
- Implementation of dynamic risk assessment in custody, enabling custodial staff to make informed staffing and placement decisions based on the prevailing security environment.
- Introducing youth offending programs, such as the Adolescent Violence Intervention Program. These programs are led by trained clinicians to change the behaviours of young people.

[32] *Bail Act 1977*, s 4.

- Enhancing the Security and Emergency Response Team model, including increasing the capacity of the team, and withdrawal of the Corrections Victoria Security and Emergency Services Group.
- Establishing an Intensive Intervention Unit, a dedicated unit at the Parkville Youth Justice Precinct to intervene with high-risk young people who cause harm in custody to reduce their risk of violent offending. The unit provides a new option for addressing problematic behaviour and improving a young person's self-regulation and pro-social behaviours.
- Funding behaviour support specialist positions in custody to support custodial staff to address challenging behaviours among young people.
- Establishing a High-Risk Panel to monitor certain young people in the system to mitigate their risks of further offending. The Commissioner for Youth Justice chairs this panel which dynamically evaluates the effectiveness of the interventions for each young person.
- Increasing the focus on staff safety and wellbeing through occupation safety training and staff supports, including through the Health Safety and Wellbeing Action Plan.

Workforce

In January 2021, the Minister for Youth Justice released the Youth Justice Custodial Workforce Plan. The plan includes practical initiatives across four key pillars, backed by over $7 million of investment in the 2020–21 State Budget. Funding is supporting attraction and retention initiatives and helping the workforce to build the skills they need to undertake complex work with young people.

The Plan also supports the roll-out of a new vocational qualification for Youth Justice custodial staff.

This Plan is complemented by the Youth Justice community workforce plan which sets out how Youth Justice will educate, train and support its community staff to deliver on the reform directions.

DJCS ended the use of agency staff in youth justice centres on 30 June 2021.

Ongoing investment

A significant investment of over $390 million was provided through the 2022-23 Budget to continue to improve Youth Justice custodial services. This included funding for the opening of the Cherry Creek Youth Justice facility, behaviour support specialists, remand beds, and workforce initiatives to ensure safety and stability in custodial settings.

Cherry Creek will be a purpose-built facility to focus on rehabilitation. For example, at Cherry Creek young people will be supported in groups of four, rather than in units of around 15 young people. This will mean staff can provide more targeted, individual support in a safer environment. International practice and expert reviews of the Victorian Youth Justice system have indicated that custodial settings are more settled, safe and effective when young people are placed in smaller facilities that focus on rehabilitation, as opposed to large adult prison-type facilities. The new Cherry Creek facility will be a key part of ensuring better outcomes for young people and the community. Key design features of Cherry Creek include -

- additional outdoor space for all units
- new security and safety features
- an intensive intervention unit, preventative detention unit and a specialised health care and mental health unit, as well as an education and vocational skills centre, recreation, faith and spiritual facilities and alcohol and drug treatment support capability.

The facility is expected to begin accommodating young people in the first half of 2023, following practical completion expected in 2022.

3.2.6 Koori Youth Justice Taskforce and related initiatives to reduce Aboriginal overrepresentation in custody

Over the review period, various initiatives such as the Koori Youth Justice Taskforce have been focused on reducing the overrepresentation of Aboriginal children and young people in Victoria's youth justice system. The *Burra Lotjpa Dunguludja* (Aboriginal Justice Agreement 4) Milestone 2 sets a goal to reduce the number of Aboriginal young people (10–17 years) on an average day to 89 by 2023, to be on track to close the gap by 2031. To achieve this goal, a number of initiatives are underway.

The Koori Youth Justice Taskforce was a joint project between the Commission for Children and Young People and DJCS. The Taskforce conducted a review of 296 Aboriginal children and young people who were in contact with the youth justice system over a six-month period (1 October 2018 – 31 March 2019) including in depth individual case reviews (private hearing) of 69 Aboriginal children and young people. Following the Taskforce, the Commission for Children and Young People established its own inquiry to investigate the overrepresentation of Aboriginal children and young people in the justice system. *Our youth, Our way*, the combined report on the Taskforce and Inquiry, was tabled in the Victorian Parliament on 9 June 2021.

The Taskforce and Inquiry resulted in concrete actions designed to improve youth justice service responses for young people and provide transition pathways out of the youth justice system. Sixty-seven individual case planning sessions were held for young people with complex needs between June and October 2019 resulting in action plans for each young person. The case planning sessions and plans sought to identify supports for the young person and actions that should be taken to address causal factors contributing to offending behaviour and overcome any barriers to success.

In addition, DJCS has been allocated $11.8 million over four years in the 2020–21 State Budget to fund the following initiatives:

- An Aboriginal Youth Justice Hub to provide Aboriginal led services to children and young people from early intervention and diversion through to responses that address the complex needs of Aboriginal young people.
- A program to amplify the voices of Aboriginal young people and engage the voices of Aboriginal children and young people in the design and delivery of youth justice services.
- Expansion of the community-based Koori Youth Justice Worker program (including gender-specific responses for young women and afterhours support).
- A specialist holistic legal service for Aboriginal young people to access high quality, integrated and culturally appropriate legal assistance.
- Aboriginal community led intensive case management for young people with complex needs and conduct case management review panels to support and monitor case planning.

The Government continues to expand and develop the Aboriginal workforce within all levels of youth justice. A team of Aboriginal Liaison Officers, led by a Team Leader and a Manager Aboriginal Custodial Operations respond to the cultural needs of young people, support the development of cultural support plans, ensure connection to family and community are maintained, and work alongside Youth Through Care workers to support young people to transition from custody to community.

Aboriginal young people in custody are offered a suite of culturally specific supports and programs to build new, and reinforce existing, cultural connections. For example, Aboriginal community organisations and Elders are engaged to provide culturally appropriate mentoring to Aboriginal young people in custody.

The development and release of Victoria's first Aboriginal youth justice strategy in 2022 is discussed below.

3.2.7 The COVID-19 pandemic

The review has recognised that the final two years of the review period, including the operation of the youth justice system and the lives of the Victorian community, have been significantly impacted by the COVID-19 pandemic.

Since the COVID-19 pandemic arrived in Victoria in February 2020, the Victorian community has spent significant periods (over 250 days) under 'stay at home' restrictions. While for some young people this provided an opportunity to reconnect with family, for some young people this period increased their exposure to family violence, abuse or conflict. Most young people had less contact with those outside their immediate household, including schools and other services, extended family, friends and their wider communities.[33]

The COVID-19 pandemic also impacted custodial and community operations within youth justice. In custody, restrictions on movements, visitors and programs were implemented, as well as quarantine requirements. Critical service delivery in custody continues via a mix of face-to-face and virtual delivery. Face-to-face education continued under a COVID-19 management plan, except for those in isolation. In the community, supervision and programs were often delivered remotely. Other impacts relevant to the review included policing efforts having been focused on the pandemic response, court backlogs, and the introduction of virtual court appearances. These factors have influenced the data the review has considered since early 2020.

3.3 The current policy context

Since the YJ Reform Act was introduced in 2017, the policy settings for the youth justice system have been holistically reviewed in Victoria.

3.3.1 Youth Justice Strategic Plan 2020–2030

Building on the roadmap for reform laid out in the Armytage Ogloff Youth Justice Review, the *Youth Justice Strategic Plan 2020–2030* was released in May 2020 and reflects Victoria's 10-year vision for how it will deliver a leading youth justice system. The plan sets out the strategic vision for youth justice in Victoria:

> Our vision for Youth Justice in Victoria is for a leading youth justice system that:
>
> → reduces offending by children and young people and improves community safety
>
> → works with others to provide genuine opportunities for children and young people to turn their lives around.[34]

The 10 principles that underpin youth justice and the four reform directions prioritised in the Strategic Plan are set out in Box 1 below.

[33] Commission for Children and Young People. 2020, *Impact of COVID-19 on children and young people: safety*, viewed 12 April 2022, <https://ccyp.vic.gov.au/assets/COVID-Engagement/CCYP-Safety-Snapshot-web.pdf>.

[34] Victorian Government. 2020, *Youth Justice Strategic Plan 2020–2030,* p. 15.

Box 1: Principles and reform directions

Ten principles that underpin Youth Justice

Youth Justice:

1 / Recognises that children and young people must be treated differently to adults and delivers developmentally distinct and appropriate services

2 / Understands that prevention, diversion and early intervention are the most effective and fiscally responsible ways of reducing youth crime in the long term

3 / Builds community confidence in the system and enhances community safety by delivering evidence-based programs that reduce young people's offending

4 / Understands that Aboriginal self-determination and Aboriginal communities must be at the centre of efforts to address the overrepresentation of Aboriginal children and young people in Youth Justice

5 / Recognises that young people should be subject to the least restrictive intervention appropriate in the circumstances, with custody an option of last resort, cognisant of the need to keep the community safe in both the immediate and longer term

6 / Partners with families, services, police and the wider community to address the underlying causes of offending

7 / Builds on the strengths of children and young people to support their positive growth and development

8 / Supports young people to take responsibility for their actions and acknowledge the impacts of their offending on the victim and the community

9 / Delivers individualised services that are cognisant of young people's age, gender, Aboriginal status, cultural background, family circumstances, health, mental health, disability and social needs, and sexuality and gender identity

10 / Recognises that our people are our strength and provides a safe and supported workplace, safe systems of work, as well as equipping staff with the skills and resources required to work effectively.[35]

Reform directions

The four reform directions prioritised in the Plan are:

1. Improving diversion and supporting early intervention and crime prevention.

2. Reducing reoffending and promoting community safety by supporting children and young people to turn their lives around.

3. Strengthening partnerships with children and young people, families and all services and professionals who support their rehabilitation and positive development.

4. Investing in a skilled, safe and stable Youth Justice system and safe systems of work.[36]

[35] Victorian Government. 2020, *Youth Justice Strategic Plan 2020–2030*, p. 16.

[36] Victorian Government. 2020, *Youth Justice Strategic Plan 2020–2030*, p. 17.

3.3.2 *Wirkara Kulpa – Aboriginal Youth Justice Strategy 2022–2032*

Wirkara Kulpa – Aboriginal Youth Justice Strategy 2022–2032 is the first Aboriginal youth justice strategy in Victoria. Its development was led by the Aboriginal Justice Caucus, under the umbrella of the Aboriginal Justice Agreement.

Wirkara Kulpa identifies the actions and efforts required to close the gap by 2031. It continues the progress made to date through the Aboriginal Justice Forum by building on culturally strengthening programs, initiatives, and system improvements that are demonstrating impact. Its vision is that Aboriginal children and young people are not in the youth justice system. This is because they are strong in their culture, connected to families and communities, and living healthy, safe, resilient, thriving and culturally rich lives. It is accompanied by a set of guiding principles that has informed its development and will help to achieve our vision. *Wirkara Kulpa* states that:

> Our vision is that Aboriginal children and young people are not in the youth justice system. This is because they are strong in their culture, connected to families and communities, and living healthy, safe, resilient, thriving and culturally rich lives.[37]

The five domains in the Strategy are outlined in Box 2 below.

Box 2: Five Domains in the Aboriginal Youth Justice Strategy

- Empowering Aboriginal young people and families to uphold change – creating a child-centred system, supporting youth participation, and opportunities for education and earning.
- Protecting cultural rights and increasing connection to family, community and culture – strengthening connections to family, community and culture, strengthening families, creating a caring and stable home for the young person, and creating and culturally safe experience for the young person.
- Diverting young people and addressing over-representation – creating an age-appropriate system, building pathways out of the youth justice system, and supporting them to transition into the community.
- Working towards Aboriginal-led justice responses – supporting Aboriginal organisations to care for Aboriginal children and young people and their families in contact with the justice system, including workforce development, capacity building and sector development.
- A fair and equitable system for Aboriginal children and young people – ensuring better experiences and the social and emotional well-being for young people when entering the youth justice system, and creating a safe custody experience for them.[38]

3.3.3 Youth Justice Diversion Statement

In April 2022, the Government released a Youth Justice Diversion Statement, *Diversion: keeping young people out of youth justice to lead successful lives*. The Statement recognises that 'prevention, diversion and early intervention are the most effective and fiscally responsible ways of reducing youth crime'.[39] It sets out how the diversionary approach is embedded within the youth justice system at pre-chare/pre-court, pre-sentence, and sentenced stages and it highlights priorities for the next four years.

[37] Victorian Government. 2022, *Wirkara Kulpa: Aboriginal Youth Justice Strategy 2022–2032*, p. 26.

[38] Victorian Government. 2022, *Wirkara Kulpa: Aboriginal Youth Justice Strategy 2022–2032*, p. 34.

[39] Victorian Government. 2022, *Diversion: keeping young people out of youth justice to lead successful lives*, p. 5.

3.3.4 Development of a new legislative framework

Finally, the review notes that the Government is developing a new legislative framework for youth justice in Victoria. The new framework will aim to clearly define the fundamental principles and foundations for youth justice—a reform that is more far-reaching than the legislative provisions under consideration in this review.

The new legislative framework will assist with reducing reoffending and ensuring community safety through an emphasis on diversion and early intervention, the rehabilitation and positive development of children and young people, supporting restoration of harm done to victims by offending, and promoting system-wide collaboration and cooperation.

3.4 The legal context

The legal context for youth justice includes the CYFA which currently provides the legislative framework for the system, the broader legislative framework of Victoria's criminal justice system, and the human rights framework set out in state and international law. Relevant laws are briefly outlined below.

3.4.1 Youth justice and broader criminal justice legislation

The CYFA is the principal legislation for Victoria's youth justice service. Chapter 7 of the Act provides for the constitution of the Children's Court of Victoria and Part 5.1 provides for the criminal responsibility of children.

The Children's Court has jurisdiction to hear and determine charges against children and young people aged 10 years or over but under 18 years at the time of the alleged offence and aged under 19 years when court proceedings begin.

Other legislation relating to youth justice includes the:

- *Sentencing Act 1991*
- *Crimes Act 1958*
- *Summary Offences Act 1966*
- *Bail Act 1977*
- *Sex Offenders Registration Act 2004*
- *Family Violence Protection Act 2008.*

3.4.2 The Charter of Human Rights and Responsibilities

The human rights of children and young people in the criminal justice system in Victoria are protected under the *Charter of Human Rights and Responsibilities Act 2006* (the Charter). The Charter protects the following rights (amongst others):

- the right to equality, including the right to equal and effective protection against discrimination[40]
- the freedom from forced work, which has an exception for court-ordered work or service[41]
- freedom of movement[42]

[40] *Charter of Human Rights and Responsibilities Act 2006*, s 8(3).

[41] *Charter of Human Rights and Responsibilities Act 2006*, s 11.

[42] *Charter of Human Rights and Responsibilities Act 2006*, s 12.

- the right to privacy[43]
- freedom of expression[44]
- freedom of association[45]
- the protection of the best interests of the child[46]
- cultural rights, including specific protection of the distinct cultural rights of Aboriginal people[47]
- the right to a fair hearing[48]
- the rights of children in the criminal justice system, including the requirements that: children aged 10–17 who are detained be separated from adults; children convicted of an offence be treated in an age-appropriate manner for his or her age; and that an accused child must be brought to trial as quickly as possible[49]
- the right of a child charged with a criminal offence to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation.[50]

Under the Charter, public authorities have an obligation to act compatibility with human rights and to give proper consideration to human rights when making decisions.[51]

The Supreme Court has confirmed that in all decisions taken within the context of the administration of youth justice, the best interests of the child should be a primary consideration.[52]

Charter rights may be limited only so far as the limitations can be demonstrably justified in a free and democratic society, taking into account all relevant factors.[53]

When the YJ Reform Act was introduced to Parliament, it was accompanied by a Statement of Compatibility with the Charter. The Statement set out relevant rights engaged by the Bill and concluded that Charter rights were either not limited by the proposed amendments, or that limitations were reasonable and justified.[54]

3.4.3 International human rights law

Australia is also a party to the United Nations Convention on the Rights of the Child. Article 3(1) requires that in all actions concerning children, the best interests of the child shall be a primary consideration.

Article 37(b) of the Convention states that detention or imprisonment of a child is to be used only as a measure of last resort and for the shortest appropriate period of time.

[43] *Charter of Human Rights and Responsibilities Act 2006*, s 13.

[44] *Charter of Human Rights and Responsibilities Act 2006*, s 15.

[45] *Charter of Human Rights and Responsibilities Act 2006*, s 16(2).

[46] *Charter of Human Rights and Responsibilities Act 2006*, s 17(2).

[47] *Charter of Human Rights and Responsibilities Act 2006*, s 19.

[48] *Charter of Human Rights and Responsibilities Act 2006*, s 24.

[49] *Charter of Human Rights and Responsibilities Act 2006*, s 23.

[50] *Charter of Human Rights and Responsibilities Act 2006*, s 25(3).

[51] *Charter of Human Rights and Responsibilities Act 2006*, s 38(1).

[52] *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251,104, [262]; Convention on the Rights of the Child, article 3.

[53] *Charter of Human Rights and Responsibilities Act 2006*, s 7(2).

[54] Legislative Assembly, Parliament of Victoria. 2017, *Parliamentary Debates*, 8 June 2017, 3339 (Jaala Pulford).

Article 37(c) requires that children are separated from adults when detained unless it is in the child's best interests not to do so. Australia lodged a reservation to this provision, to the effect that it is accepted only to the extent that separating children from adults is considered feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia.

The Convention also provides that the objective of sentencing a juvenile offender must be her or his 'reintegration' into society or 'rehabilitation' (Article 40(1)).

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules') were adopted by the General Assembly in 1985 and provide further context of what the best interests of the child looks like in the youth justice context.

The Beijing Rules provide that:

- The juvenile justice system shall emphasise the wellbeing of the juvenile (Rule 5).
- Any reaction to juvenile offenders shall be proportionate to the circumstances (Rule 5).
- Appropriate scope for discretion shall be allowed at all stages of proceedings (Rule 6).
- Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial (Rule 11).
- The well-being of the juvenile shall be the guiding factor in consideration of her or his case, noting that 'strictly punitive approaches are not appropriate' (Rule 17(d)).
- The placement of a juvenile in an institution shall always be a last resort and for the minimum necessary period (Rule 19).
- Each case shall from the outset be handled expeditiously, without any unnecessary delay' (Rule 20). The commentary to Rule 20 states that 'The speedy conduct of formal procedures in juvenile cases is a paramount concern. Otherwise, whatever good may be achieved by the procedure and the disposition is at risk'.

International human rights law also recognises the right of everyone to personal security (for example, Article 9 of the International Covenant on Civil and Political Rights).

4. Principles and objectives

The review is required under section 492B(1) of the CYFA to consider whether the policy objectives of the YJ Reform Act remain valid and whether the amendments made by the Act remain appropriate to achieve those objectives.

At noted in section 2 above, there are no listed statutory principles and objectives in the YJ Reform Act. The review has taken the policy objectives of the YJ Reform Act to be the key aims set out in the Second Reading Speech (set out in Table 1 below).

Table 1: Key aims of the YJ Reform Act

Key aims (Second Reading Speech)
Prevent a child's life of crime before it starts, and divert children early before their behaviour escalates to persistent offending
Recognise that suitable young people should be given the opportunity to rehabilitate
Address community concerns about crimes committed by children and young people, including where an adult recruits a child to offend
Improve safety and security in youth justice facilities, including to support the rehabilitation and wellbeing of children in custody

4.1 Findings

The review has considered the policy objectives of the YJ Reform Act against the objectives set out in the *Youth Justice Strategic Plan 2020–2030* and *Wirkara Kulpa – Aboriginal Youth Justice Strategy 2022–2032* (refer to Table 2 below).

Table 2: Comparison of policy objectives for the YJ Reform Act and key policy documents

Key aims of the YJ Reform Act (Second Reading Speech)	Youth Justice Strategic Plan 2020–2030 (YJSP) Aboriginal Youth Justice Strategy 2022-2032 (***Wirkara Kulpa***)
a. Prevent a child's life of crime before it starts, and divert children early before their behaviour escalates to persistent offending	Improving diversion and supporting early intervention and crime prevention (YJSP Reform Direction 1) Diverting young people and addressing over-representation (*Wirkara Kulp*a, Domain 3)
b. Recognise that suitable young people should be given the opportunity to rehabilitate	Reducing reoffending and promoting community safety by supporting children and young people to turn their lives around (YJSP Reform Direction 2) Strengthening partnerships with children and young people, families and all services and professionals who support their rehabilitation and positive development (YJSP Reform Direction 3) Diverting young people and addressing over-representation (*Wirkara Kulp*a, Domain 3)
c. Address community concerns about crimes committed by children and young people, including where an adult recruits a child to offend	Reducing reoffending and promoting community safety by supporting children and young people to turn their lives around (YJSP Reform Direction 2) Builds community confidence in the system and enhances community safety by delivering evidence-based programs that reduce young people's offending (YJSP Reform principle 3)
d. Improve safety and security in youth justice facilities, including to support the rehabilitation and wellbeing of children in custody	Investing in a skilled, safe and stable youth justice system and safe systems of work (YJSP Reform Direction 4)

As outlined in Table 2 above, the Strategic Plan reform directions can generally be aligned with the broad policy objectives set out in the YJ Reform Act's Second Reading Speech.

Wording changes could better align the YJ Reform Act's aims with the Youth Justice Strategic Plan. For example, aim (b) of the YJ Reform Act talks about 'suitable' young people being given the opportunity to rehabilitate whereas the Strategic Plan recognises the greater capacity and opportunity for all young people to rehabilitate. Further, the emphasis in aim (c) of the YJ Reform Act on addressing 'community concerns' shifts in the Strategic Plan to building community confidence and achieving community safety by delivering evidence-based programs that reduce young people's offending.

The review notes that the policy objectives of the YJ Reform Act largely do not consider the principles, goals and priorities now articulated in *Wirkara Kulpa – Aboriginal Youth Justice Strategy 2022–2032* (other than the shared goal of diversion).

However, the review makes no specific recommendations at this time as the:

- overarching policy objectives of the YJ Reform Act are not set out in legislation, and
- a new legislative framework for youth justice is currently being developed and is expected to align with the policy objectives set out in the Armytage and Ogloff Youth Justice Review, the Youth Justice Strategic Plan, and *Wirkara Kulpa*.

The objects and purposes of specific provisions of the YJ Reform Act, and whether the amendments remain appropriate to achieving their policy objectives, are considered further in sections 5–8 below.

5. Court-based youth diversion

The YJ Reform Act introduced a statewide legislative basis for court-based diversion into Division 3A of the CYFA. The review is required under section 492B(3)(c) of the CYFA to consider the operation of youth diversion strategies. The operation and effect of youth diversion is discussed below.

5.1 Overview of Children's Court Youth Diversion

The statewide CCYD service commenced operating in the Children's Court of Victoria in January 2017. A less formal diversion program based on section 59 of the *Magistrates' Court Act 2017* had been in operation since 2015.

As the Armytage and Ogloff Youth Justice Review observed, at the time the statewide service commenced there was 'very low investment in community-based early intervention and support …. Approaches to diversion [were] limited and ad hoc and provide[d] little focus on addressing criminogenic needs'.[55]

The YJ Reform Act established a tailored pre-plea youth diversion scheme in the criminal division of the Children's Court of Victoria and in the Children's Koori Court.

The CCYD provides a mechanism for children who have committed low-level offences to be diverted from the criminal justice system and address their offending behaviour before it escalates into persistent offending. The provisions were 'intended to address the underlying reasons for low-level offending, assist rehabilitation and prevent children from becoming entrenched in the criminal justice system'.[56]

[55] Penny Armytage and James Ogloff. 2017, *Youth Justice Review and Strategy: Meeting needs and reducing offending, Executive summary*, p. 23.

[56] Legislative Assembly, Parliament of Victoria. 2017, *Parliamentary Debates*, 8 June 2017, 3339 (Jaala Pulford).

The legislative amendments also give effect to recommendation 127 of the Royal Commission into Family Violence to establish a statutory youth diversion scheme within two years (subject to successful evaluation of the Youth Division Program Pilot).

The following purposes of diversion are set out in the Act:

> (a) a child should be diverted away from the criminal justice system where possible and appropriate;
>
> (b) the risk of stigma being caused to a child by contact with the criminal justice system should be reduced;
>
> (c) a child should be encouraged to accept responsibility for unlawful behaviour;
>
> (d) a child's offending should be responded to in a manner that acknowledges the child's needs and assists with rehabilitation;
>
> (e) a child should be provided with opportunities to strengthen and preserve relationships with family and other persons of importance in the child's life;
>
> (f) a child should be provided with ongoing pathways to connect with education, training and employment.[57]

The CCYD has foundations in the Risk-Needs-Responsivity (RNR) model recommended in the Armytage and Ogloff Youth Justice Review. The model emphasises that justice interventions in the Children's Court jurisdiction need to target the criminogenic risk factors that influence offending. The RNR model and CCYD emphasise the need for interventions to provide young people with tools to address their own behaviours.[58]

5.2 Operation of Children's Court Youth Diversion

The operation of youth diversion, including an outline of the key demographics of CCYD participants, is described below.

5.2.1 The diversion process

At any time before taking a formal plea from the child in a criminal proceeding, the Children's Court of Victoria may on its own motion, or on application by the child or the prosecutor, adjourn the proceeding to enable the child to participation in and complete a diversion program.[59]

Diversion requires the consent of the prosecutor and the child.[60]

The Court must consider the following matters as far as practicable when determining whether to adjourn a matter for diversion to be undertaken:

- the seriousness and nature of the offending
- the seriousness and the nature of any previous offending
- the impact on the victim (if any)
- the interests of justice and any other matter the Court considers appropriate.[61]

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[57] *Children, Youth and Families Act 2005*, s 356C.

[58] Penny Armytage and James Ogloff. 2017, *Youth Justice Review and Strategy: Meeting needs and reducing offending, Executive summary*, p. 12.

[59] *Children, Youth and Families Act 2005*, s 356D.

[60] *Children, Youth and Families Act 2005*, s 356D(3).

[61] *Children, Youth and Families Act 2005*, s 356D(4).

The diversion period may range from one day (allowing time for the young person to write a letter of apology to a victim for a low-level shoplifting offence) to up to 16 weeks, involving multiple diversion activities designed to connect the young person to a range of longer-term services and supports, to help reduce the likelihood they will reoffend. Diversion plans focus on repairing the harm caused by offending and strengthening the young person's connections to positive supports.

Diversion coordinators:

- attend all scheduled sittings of the Criminal Division of the Children's Court of Victoria
- conduct assessments following prosecution consent and a magistrate's referral
- provide advice to the court on the young person's suitability for diversion
- develop a plan, tailored to the young person's circumstances
- engage the young person to foster completion of the diversion plan
- report back to the court on a young person's compliance with the court's direction.

Upon successful completion of the diversion activities included in the diversion plan, the Act allows for the child to be discharged by the court without any finding of guilt.[62] If the child does not complete diversion, they are required to return to court, enter a plea and be dealt with through the normal court process. In these circumstances, the child's acknowledgment of responsibility is inadmissible, but the court will be able to take the partial completion of any diversion activities into account during any sentencing.[63]

5.2.2 Scope of provision and eligibility criteria

CCYD is available to all young people who appear before the criminal division of the Children's Court of Victoria. The primary target cohort for CCYD is young people charged with low-level offences, who have had no or limited previous involvement with the criminal justice system. Specifically, the legislation stipulates that pre-plea, a magistrate can adjourn the matter to enable a young person to participate in CCYD if:

- the young person has accepted responsibility for their behaviour (this is not considered a formal admission of guilt) and consented to diversion, and[64]
- the prosecutor has applied for or consented to diversion being granted.[65]

A number of road safety offences are excluded from diversion.[66] Offences that carry a mandatory penalty are also not eligible for court-based diversion.

There is no legislated limit on the number of diversions that a young person can have, acknowledging age-informed decision making and the time required to address the complex underlying needs of the young person.

5.2.3 Use of diversion in practice

The Children's Court of Victoria diverted 243 young people in 2015 and 621 young people in 2016 under its earlier, less formal program prior to the introduction of the YJ Reform Act.

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[62] *Children, Youth and Families Act 2005*, s 356I.

[63] *Children, Youth and Families Act 2005*, s 356I(2).

[64] *Children, Youth and Families Act 2005*, s 356E(1).

[65] *Children, Youth and Families Act 2005*, s 356D(3)(a).

[66] *Children, Youth and Families Act 2005,* s 356B.

As shown in Table 3 below, the use of diversion has increased significantly since 2017, with 5,322 diversions taking place between 1 July 2017 and 30 June 2021.[67]

Table 3: Number of CCYD diversions

Year	Number of diversions
2017–18	1,404 diversions were ordered. Of these, 94% were successfully completed. By comparison in 2017–18 there were 2,355 cases in which sentencing orders were made.
2018–19	1,582 diversions were ordered. Of these, 93% were successfully completed. By comparison there were 2,071 cases in 2018–19 in which sentencing orders were made.
2019–20	1,170 diversions were ordered. Of these, 95% were successfully completed. By comparison there was 1,628 cases in 2019–20 in which sentencing orders were made.
2020–21	1,166 diversions were ordered. Of these, 98% were successfully completed. By comparison there were 1,213 cases in 2020–21 in which sentencing orders were made.

Source: Children's Court of Victoria, Submission to the YJ Reform Act review, p 4.

(a) Detailed demographic characteristics of diversion participants

The CCYD Evaluation (the report of which is in the process of being finalised) undertook detailed analysis of the CCYD data for the period from January 2017 to December 2020, matched in the Justice Data Linkage database for the reoffending analysis. This analysis is of a specific cohort of CCYD participants and does not represent all CCYD participants in the period under consideration for the YJ Reform Act review. Table 4 sets out the demographic characteristics of CCYD participants for the Evaluation period, matched for reoffending analysis.

[67] Children's Court of Victoria. *Submission to the review*, p. 4.

Table 4: Demographic characteristics of CCYD participants from January 2017 to December 2020 – matching for reoffending analysis[68]

Demographic characteristics of reoffending analysis cohort – matched for reoffending analysis	Unique participants	
	n	%
Gender		
Female	1,210	28.9
Male	2,977	71.1
Ethnic group		
Australian (Non-Aboriginal)	1,393	33.3
Aboriginal	510	12.2
Pacific Islander	144	3.4
African Sudanese[69]	131	3.1
Middle Eastern	130	3.1
Asian	94	2.2
African Other	77	1.8
Other	153	3.7
Not known	1,555	37.1
Aboriginal status		
Aboriginal	510	12.2
Not Aboriginal	3,677	87.8
Age at diversion		
10 to 13 years	207	3.9
14 to 17 years	3,384	80.8
18 to 26 years	596	14.2
Multiple diversions		
Single diversion	3,506	83.7
Multiple diversions	681	16.3
Total unique CCYD participants in reoffending analysis	**4,187**	**100.0**

Source: CCYD Evaluation

[68] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service,* April 2022.

[69] Information captured in the Justice Data Linkage (JDL) database does not distinguish between whether a young person's ethnicity is Sudanese and South Sudanese. The Sudanese and South Sudanese group includes young people identifying as Dinka and Nuer.

Overall, young people included in the reoffending analysis were most likely to be male (71 per cent), non-Aboriginal (88 per cent) and aged between 14 and 17 years old (81 per cent). Ethnicity status was not known for more than one third of participants (37 per cent), though the cohort included young people from the following ethnic or cultural backgrounds:

- young people of Australian heritage (33 per cent)
- young people who identified as being Aboriginal (12 per cent)
- young people of African Sudanese heritage (3 per cent)
- young people of other African heritage (2 per cent).[70]

As noted in the *Youth Justice Strategic Plan 2020-2030* young people from CALD groups are overrepresented in the youth justice system, particularly those from Sudanese, Māori and Pacific Islander backgrounds.[71] In Victoria, the number of African Australian young people on youth justice community orders, in remand or in custody has steadily increased in recent years—from six per cent in 2015–16 up to 13 per cent in 2019–20.[72] There has been a 287 per cent growth in the number of South Sudanese and Sudanese young people under Youth Justice supervision (other than CCYD, including community supervision, remand, and custodial supervision) between 2014–15 and 2020–21.[73] However, this increase has not been matched by an increase in the proportion of this cohort being referred to CCYD. Five per cent of CCYD participants during the reporting period for the CCYD Evaluation were identified as being African Australian, and only three per cent of these had South Sudanese or Sudanese heritage.[74]

As outlined above, Aboriginal young people are also overrepresented in all stages of the Victoria's criminal justice system. Over the life of CCYD, the proportion of Aboriginal young people being referred for diversion has consistently remained between 12 and 14 per cent of the total number of CCYD participants.[75] This generally reflects the proportion of Aboriginal young people across the youth justice system over the same period.

Just over one third (36 per cent) of young people referred to CCYD over the reporting period for the CCYD Evaluation had either current or prior engagement with Child Protection.[76] This is consistent with the proportion of young people sentenced or diverted who have some level of involvement with Child Protection (noted in the Sentencing Advisory Council's findings).[77] Over one quarter of participants in CCYD were still involved with Child Protection six months after participation in CCYD.[78]

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[70] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[71] Department of Justice and Community Safety. 2020, *Youth Justice Strategic Plan 2020-2030 – Delivering culturally appropriate interventions and supports to address the overrepresentation of cultural groups in Youth Justice*, viewed 19 April 2022, <https://www.justice.vic.gov.au/youth-justice-strategic-plan-2020-2030-delivering-culturally-appropriate-interventions-and-supports>.

[72] Note: Data relating to the total number of African Australian young people on youth justice orders (including those in the community, in remand and in custody) has been sourced from the Youth Justice CRIS.

[73] Note: that data captured by Youth Justice historically did not distinguish whether a young person's ethnicity was South Sudanese or Sudanese.

[74] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[75] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[76] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[77] Sentencing Advisory Council. 2019, *'Crossover Kids': Vulnerable Children in the Youth Justice System Report 1: Children Who Are Known to Child Protection among Sentenced and Diverted Children in the Victorian Children's Court*, p. xxiii, p. 78.

[78] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

The Sentencing Advisory Council noted in 2020 that the gap between sentenced children and diverted children widened as the level of child protection involvement increased.[79]

(b) Use of diversion by offence type

Overall, the group of young people included in the reoffending analysis were most likely to have received diversion for a first offence (90 per cent) and been charged with assault, theft, or property damage (refer to Table 5).

Table 5: Offending characteristics of CCYD participants from January 2017 to December 2020 – matched for reoffending analysis[80]

Offence type	Number of charges related to diversion court appearance
Theft	4,102
Assault and related offences	3,466
Property damage	2,295
Breaches of orders	1,301
Regulatory driving offences	814
Burglary/Break and enter	784
Deception	781
Disorderly and offensive conduct	768
Robbery	650
Drug use and possession	501
Weapons and explosives offences	431
Justice procedures	380
Public nuisance offences	345
Stalking, harassment and threatening behaviour	321
Dangerous and negligent acts endangering people	310
Sexual offences[81]	247
Arson	148
Drug dealing and trafficking	101
Transport regulation offences	46

[79] Sentencing Advisory Council. 2019, 'Crossover Kids': Vulnerable Children in the Youth Justice System Report 1: Children Who Are Known to Child Protection among Sentenced and Diverted Children in the Victorian Children's Court, p. xxiii, p. 78

[80] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[81] The CSA subdivision category for sexual offences used was 'A30 Sexual Offences', which includes the following offence groups: A31 rape, A32 indecent assault, A33 incest, A34 sexual offences against children, and A39 other sexual offences.

Other government regulatory offences	45
Cultivate or manufacture drugs	14
Abduction and related offences	4
Public security offences	4
Blackmail and extortion	≤3

Source: CCYD Evaluation

Note: Most young people received one or more charges. The numbers in this table represent the number of total charges across all individuals, not the number of individual young people charged. A single young person may have received charges across multiple categories.

5.3 Impact of the Children's Court Youth Diversion

After five years of operation, CCYD was expected to have achieved or contributed to reduced rates of re-offending amongst young people, and to have supported young people to make positive attitudinal and behavioural changes. The sections below describe what the data indicates and what key participants in the system have described about the impact of youth diversion in practice.

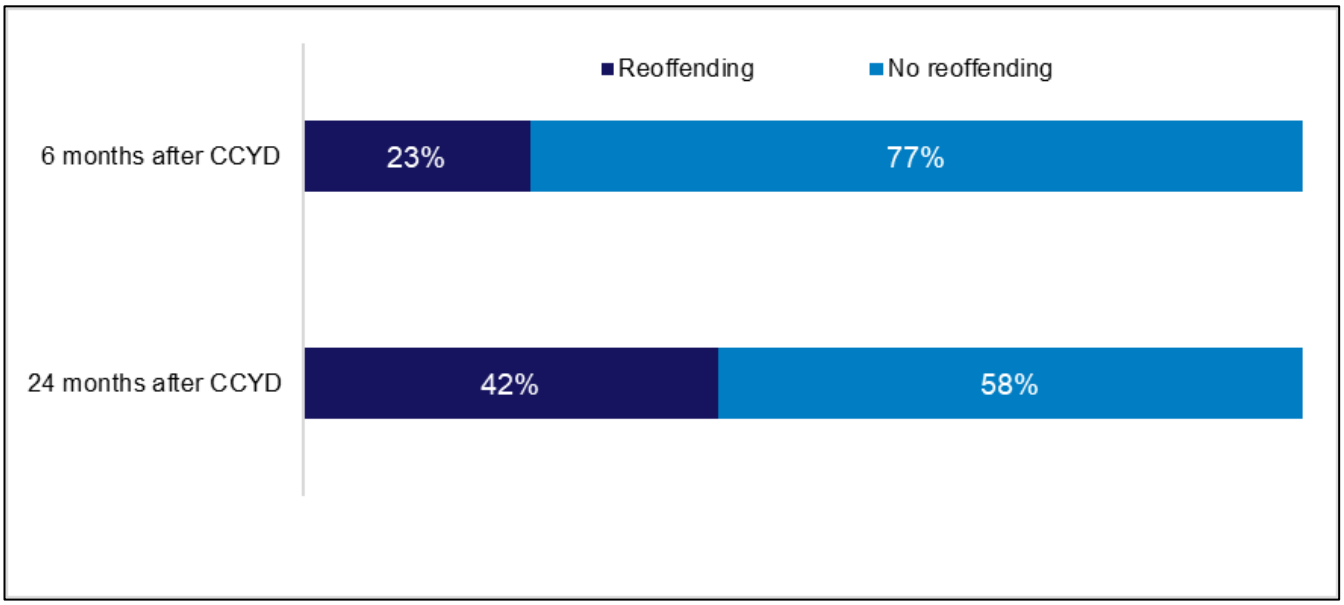
5.3.1 What the data indicates

The data described below is drawn from analysis undertaken for the CCYD Evaluation. A more significant statistical analysis was possible for diversion compared to other the legislative provisions under consideration in this review because of the large number of diversion participants.

(a) Impact on reoffending rates

As Figure 9 shows, CCYD was associated with reduced offending for over three-quarters (77 per cent) of CCYD participants. This means that less than one quarter (23 per cent) of CCYD participants had reoffended within six months of completing their diversion.

Figure 9: Percentage of young people who reoffended after completing a diversion[82]



Base: 6 month cohort n=4187; 24 month cohort n=3122
Source: CCYD Evaluation

When the reoffending window was extended to 24 months (for those who received a diversion between 2017 to 2018), the proportion of young people who had reoffended increased to 42 per cent. Such increases are to be expected when examining recidivism amongst any group over a longer timeframe. Notably this means that by two years post-diversion more than half of CCYD participants still had not reoffended.[83]

Frequency of reoffending increased after CCYD (but was less frequent than the control group)

Most CCYD participants who reoffended tended to do so with increasing frequency—over three quarters of reoffending participants had received more than one proven charge post-diversion:

- 39 per cent had between two and four proven charges post-diversion (up from 9 per cent prior)
- 39 per cent had five or more proven charges post-diversion (up from 6 per cent prior).[84]

However, when compared to a control group (discussed further below) reoffending among CCYD participants was comparatively less frequent and less serious than among young people with similar offending history and characteristics who received an alternative lower-tier court outcome.[85]

Reoffending is serious in nature, but that's not the whole story

To determine if there was an upward or downward trajectory in the seriousness of charges after CCYD, the CCYD Evaluation counted participants once only prior and once post-diversion and categorised participants by their most serious charge.

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[82] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[83] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[84] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[85] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

Table 6: Most serious charge 6 months prior and 6 months post for those participants that reoffended only[86]

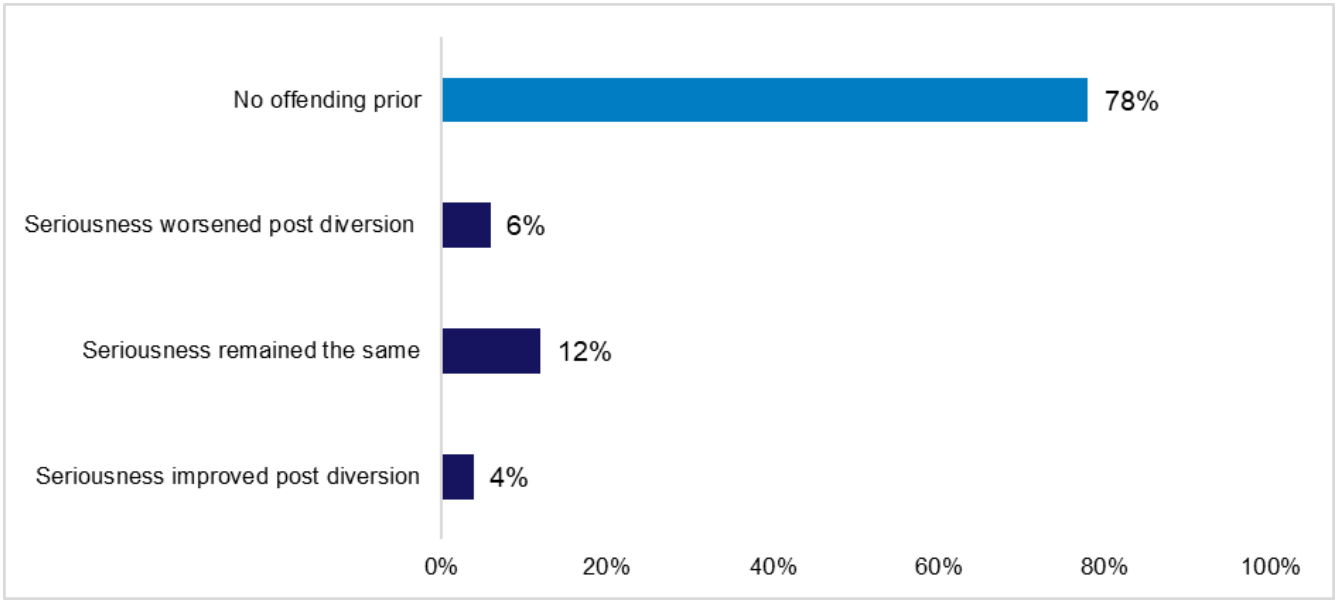
Seriousness of charges	6 months prior to CCYD		6 months post CCYD	
	n	%	n	%
High seriousness	95	10	501	53
Medium seriousness	102	11	383	40
Low seriousness	10	1	67	7
No charge	744	78		

Base: CCYD participants who reoffended n=951
Source: CCYD Evaluation

As shown in Table 6 above, CCYD participants who reoffended were likely to receive charges in the medium or high seriousness categories (only seven per cent received low seriousness charges). When examining the trajectory for those young people who had prior offending history as well, most remained in the same seriousness group (12 per cent) or reduced the seriousness of their offending (from high to medium or medium to low). Only six per cent had committed crimes in a more serious category after receiving a diversion.

Figure 10 illustrates the change in seriousness of participants offending before and after CCYD. As most CCYD participants did not offend prior to their diversion, this group has been categorised separately (see 'no offending prior'; 78 per cent).

Figure 10: Change between most serious prior and most serious post proven charge per participant who reoffended[87]



Base: CCYD participants who reoffended n=951
Source: CCYD Evaluation

[86] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[87] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

Statistical factors that contribute to post-diversion re-offending

With such a large sample of past CCYD participants to draw on, the CCYD Evaluation was able to conduct a logistic regression analysis to determine if there were any statistically identifiable factors that contributed to reoffending. The regression analysis undertaken by the CCYD Evaluation examined the relationship between a young person's characteristics and their likelihood of reoffending six months post-diversion.[88] Logistic regression analysis requires data for all variables be present for each participant. Any participants with missing variables were automatically excluded from the model leaving a total of 2,146 CCYD participants in the analysis.

Overall, the logistical regression analysis found that the following CCYD participants were statistically **more likely** to reoffend post-diversion:

- Young males were more likely to reoffend than young females.
- Those who did not successfully complete diversion were more likely to reoffend than those who did (however this finding should be treated with caution as there were only 28 participants with unsuccessful diversions included in this analysis compared with 2,025 successful diversions).
- CCYD diversions that ended in an unsuccessful or other outcome (e.g. community order, remand, warrant being issued or other outcome) were more likely to reoffend compared with successful diversions. This finding should also be treated with caution as there were only 90 participants with 'other' recorded as an outcome compared with 2,025 CCYD participants who had successful diversions.
- Increases in the number of contacts with alcohol and other drug (AOD) services, sexual assault services or family violence services during CCYD also increased the chances of reoffending. Again, these findings should be treated with caution due to small numbers (only 119 participants had recorded contact with an AOD service, 16 with a sexual assault service and 12 with a family violence service).[89]

The following groups of CCYD participants were statistically **less likely** to reoffend:

- CCYD participants with no prior charges or low seriousness of prior charges were less likely to reoffend than those with high seriousness prior charges.
- Young people aged 18 to 24 were less likely to reoffend than those aged 10 to 13 at the time of their diversion.
- Increases in the number of contacts with disability services six months prior to diversion was associated with decreased likelihood of reoffending. This finding should be treated with caution as there were only 18 participants with a disability service contact prior to diversion.[90]

This analysis did not identify any statistical link between Aboriginal status or ethnicity and likelihood of post-diversion reoffending. However, justice sector practitioners working closely with CALD and Aboriginal young people articulated how common areas of disadvantage experienced by these groups can create barriers to accessing CCYD in the first instance. These insights are discussed further in section 5.3.2(d) and (e).

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[88] A logistical regression model determined which combination of demographic and diversion characteristics (independent variables) was most useful in explaining whether a young person reoffended within six months following their diversion (dependent variable).

[89] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[90] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

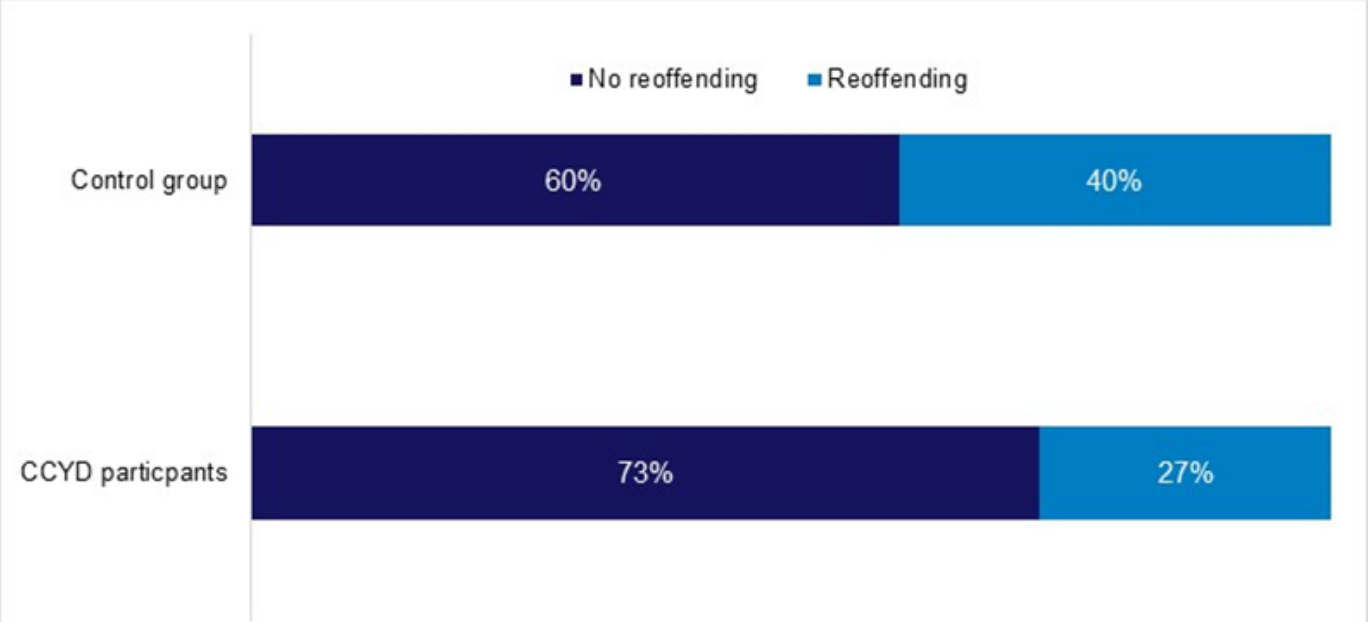
Comparing CCYD reoffending outcomes to alternative lower-tier sentences

The statistical analysis undertaken by the CCYD Evaluation explored the relative strength of CCYD on reoffending rates compared with alternative outcomes. The Crime Statistics Agency used propensity score matching to determine if young people who received a diversion through CCYD (the treatment group) experienced better outcomes relative to a control group of similar young people who received alternative sentences from the Children's Court. The control group is further described at Appendix D.

As shown in Figure 11 below, young people who received diversion through CCYD were less likely to be charged in the six-month follow-up period (27 per cent) compared to those who received an alternative lower-tier court outcome (the control group; 40 per cent).

As noted above, reoffending among CCYD participants was also comparatively less frequent and less serious than among young people with similar offending history and characteristics who received an alternative lower-tier court outcome.

Figure 11: Comparison of reoffending rates between CCYD participants and the control group[91]



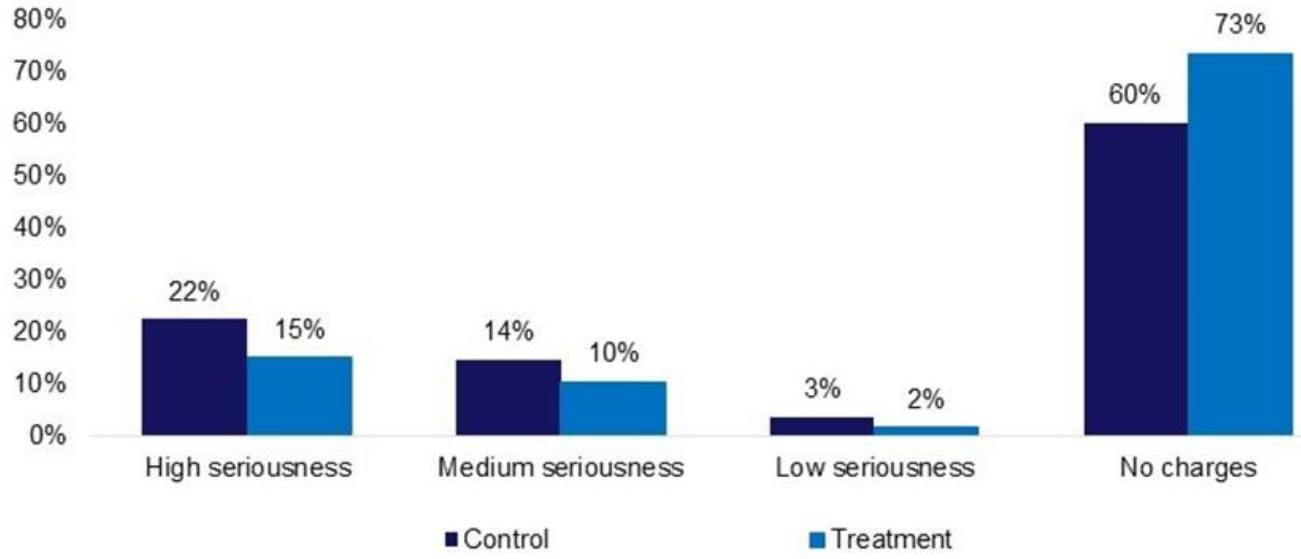
Base: Control group n=2051; Matched CCYD participants n=2051

Source: CCYD Evaluation

Participants in the control group were also more likely to be charged with high seriousness offences; 22 per cent of young people in the control group compared to only 15 per cent in the treatment group (Figure 12).

[91] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

Figure 12: Percentage of participants by seriousness of charges in the follow-up period[92]



Base: Control group n=2051; Matched CCYD participants n=2051
Source: CCYD Evaluation

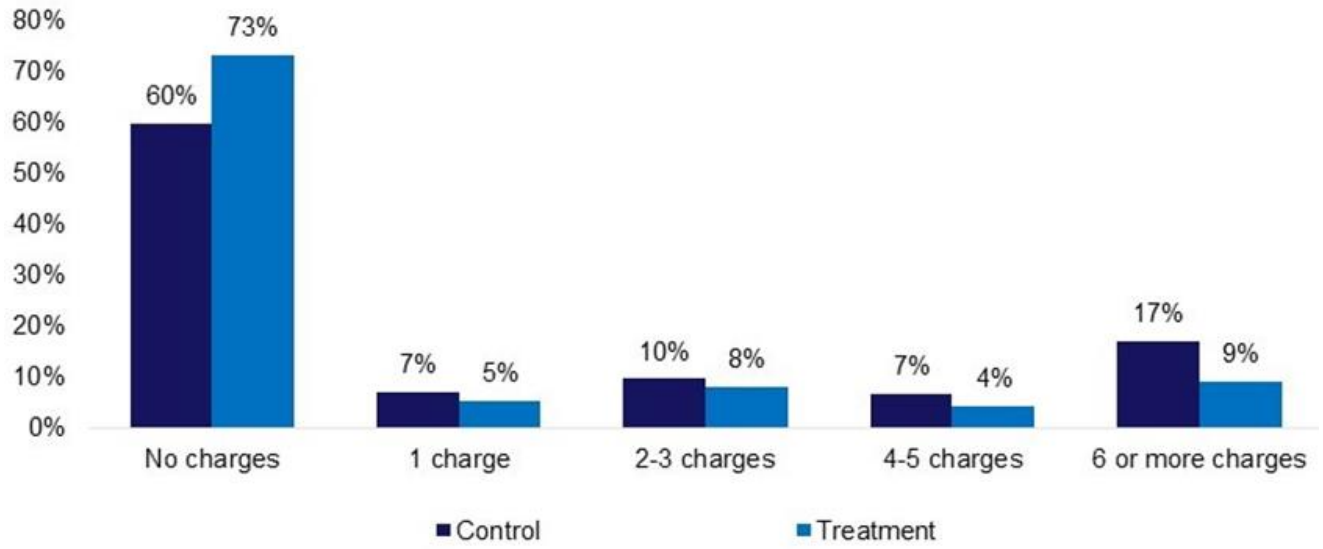
Control group participants were also likely to have a higher frequency of reoffending than young people who had participated in CCYD (Figure 13):

- Nearly one quarter (24 per cent) of young people in the control group returned to court for between one and five proven charges; compared to only 17 per cent of young people from the treatment group.
- Nearly two in 10 (17 per cent) of the control group had six or more proven charges compared to only nine per cent of those who had participated in CCYD.[93]

[92] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[93] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

Figure 13: Percentage of participants by frequency of charges in the follow-up period[94]



Base: Control group n=2051; Matched CCYD participants n=2051
Source: CCYD Evaluation

Odds ratios were used to measure the effect of CCYD on reoffending (refer to Appendix D). Results suggest that young people who participated in CCYD had a lower chance of reoffending relative to young people that did not receive a diversion. Young people who received a diversion had a:

- lower chance of any reoffending in the follow-up period
- lower chance of high, medium and low seriousness offences in the follow-up period
- less chance of frequent reoffending in the follow-up period.[95]

(b) Timeliness of diversion

In the Children's Court jurisdiction, timely processing of charges and finalisation of court matters has particular importance. It is widely acknowledged that for young people who have offended, the sooner a rehabilitative intervention can be implemented, the higher the chances that it will be effective.

The reoffending analysis conducted by the CCYD Evaluation examined the time between charge and CCYD commencement date. This analysis found that just under half (47 per cent, n=1958) of CCYD participants were diverted within three months of being charged (Table 7). However, there were 582 (14 per cent) young people who waited between six and 12 months for their diversion; and 171 (4 per cent) waited over a year from the time they were charged until their diversion commenced.[96]

[94] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[95] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[96] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

Table 7: Time between charges being laid and the diversion starting by whether participant reoffended[97]

Time between charge & diversion	Not charged within 6 months post-diversion		Charged within 6 months post-diversion	
	n	%	n	%
Within 3 months	1,490	62.3	468	23.9
Between 3 and 6 months	903	75.9	287	24.1
Total	2,393	77.3	755	22.7

Source: CCYD Evaluation

There was no clear statistical link between the amount of time between charges being laid, diversion starting and successful completion or reoffending rates. However, stakeholder interviews highlighted that when the time between the charge and court outcomes is extensive (that is, over six months), there were negative consequences for the young people involved (discussed further in section 5.3.2(c)).

(c) Connection to services and supports

The CCYD Evaluation also sought to determine the extent to which CCYD had enhanced protective factors for participating young people. The data analysis component is discussed below. Stakeholder insights are discussed further in section 5.3.2.

Over the evaluation period, CCYD diversion plans connected young people with a wide range of interventions and services, reflecting the diversity of CCYD participants. Analysis of the CCYD database confirmed that diversion plans included planned referrals to multiple service types including youth support services, mental health supports and culturally specific supports.[98]

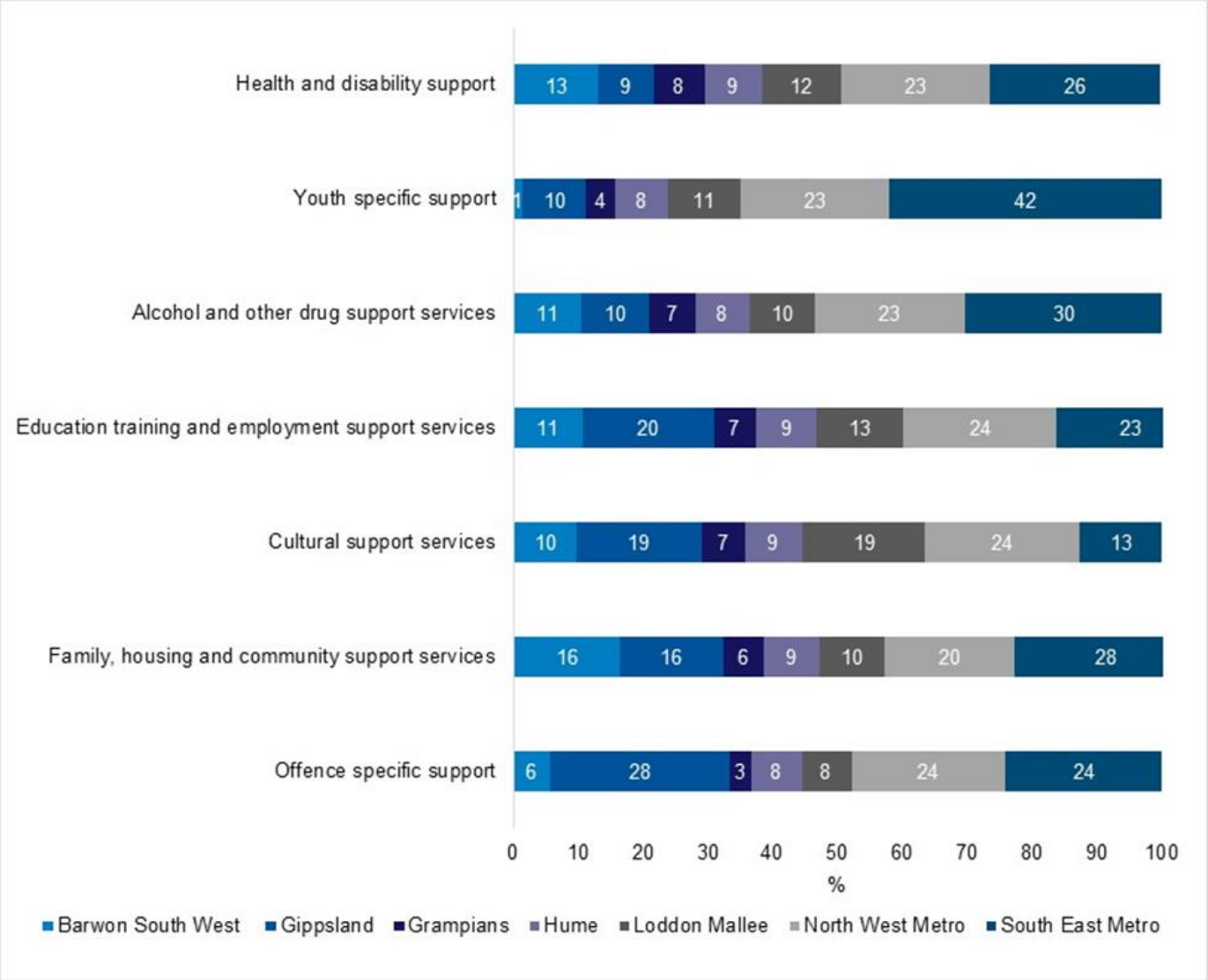
The high-level distribution of service referrals across regions is shown in Figure 14. Overall, the two large metropolitan regions—South East Metro and North West Metro—accounted for around half of all service related activities recorded in CCYD plans. The one service area where this was not the case was cultural related services, where the Gippsland and Loddon Mallee regions comprised a larger proportion of planned referrals (both at 19 per cent). This reflects the larger proportion of Aboriginal young people living in those regions.[99]

[97] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[98] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[99] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

Figure 14: Distribution of service referrals included in CCYD plans of referrals between 1 January 2017 and 30 November 2020, across DJCS regions[100]



Source: CCYD Evaluation, Youth Justice CCYD database

Service-related diversion goals sat on a continuum depending on the complexity of the young person's needs and the seriousness of the offence they had been charged with, as well as the availability of suitable services in the local area. Some service goals were very prescriptive—with the young person agreeing to contact and engage with a specific service and/or practitioners. Others were broader in nature, with the young person agreeing to accept a referral to engage with a generic service type.

The extensive service connections facilitated through CCYD reflect the close working relationships and strong connections that have been formed between CCYD coordinators and other justice sector agencies and support services.

[100] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

Data from the Victorian Social Investment Integrated Data Resource (VSIIDR) database was used to explore the ongoing health and human services contacts and education engagement of the broader population of CCYD participants. This analysis did not identify any strong statistical relationships between participation in CCYD and ongoing service connections. However, data availability in the VSIIDR database was limited, and analysis could only be conducted for young people who were diverted between 1 January 2017 and 31 December 2018. The small numbers limited the strength of any regression analysis to determine if ongoing connection with services contributed to improved reoffending outcomes.[101]

The CCYD database does not record if service connections were successfully made, or if any are ongoing after the diversion is completed.

(d) Engagement with education and/or employment

Only 19 per cent (n=411) of the CCYD participants could be matched to education records in the VSIIDR database.[102] However, even with this small number, there was a demonstrated decrease in absenteeism after completing diversion. The proportion of the cohort with unexplained absences from school decreased in the six months after diversion (from 87 per cent prior to diversion to 58 per cent after diversion).[103]

Evidence gathered throughout the evaluation indicates that CCYD does have a strong impact on educational engagement. At least half of all diversion plans included education focused goals. This equates to helping over 2,000 young people work towards reconnecting with education, acknowledging the importance of educational engagement as a protective measure to keep young people away from the criminal justice system.[104]

CCYD coordinators work closely with the Education Justice Initiative (EJI) to help young people engage with education services. The Regional Education Children's Court Liaison Officers and Koori Education Children's Court Officers employed by EJI are key partners for CCYD coordinators, helping to identify a young person's education needs and setting education focused goals to be completed over the diversion period. EJI plays a crucial role in helping CCYD coordinators develop education goals that are realistic for a young person to achieve, given their circumstances.

5.3.2 What stakeholders told this review (and the CCYD Evaluation)

This review of the YJ Reform Act heard consistent support for the role of court-based diversion from justice and community sector stakeholders and young people. For example, Victoria Police told the YJ Reform Act review that 'the components of the YJ Reform Act which focus on diverting children and young people away from the criminal justice system will likely have the greatest impact on positive outcomes for both the child/young person as well as the community'.[105]

As a preliminary matter, a number of stakeholders told the YJ Reform Act review about the importance of pre-charge cautioning so that matters are dealt with before getting to the court stage, and therefore before a court-based diversion program.[106]

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[101] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[102] CCYD participants had to be under 18 years at the time of their diversion, and have at least one enrolment in a Victorian public education institution at the time of their diversion to be counted. Education data in VSIIDR was only available for the period 1 January to 21 December 2018. Education only included those enrolled in public schools in Victoria, and does not include those in private, Catholic or other independent schools.

[103] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[104] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[105] Victoria Police. *Submission to the review*, pp. 5-6.

[106] Victorian Aboriginal Legal Service. *Submission to the review*, p. 11; Meeting Aboriginal Justice Caucus, April 2022; Meeting with young people through the Centre for Multicultural Youth, April 2022.

Stakeholder perspectives on the impact of diversion and opportunities for improvement are outlined below.

(a) The positive effects of diversion for young people

Young people and professional stakeholders saw many benefits from youth diversion.

Young people's views on how CCYD helped them to stop offending

Past CCYD participants provided examples to the CCYD Evaluation of how diversion had helped them to stop offending. Most agreed that an alternative court outcome would not have been as effective in supporting them to change their behaviours.[107] Factors that past CCYD participants associated with the effectiveness of diversion compared to other court outcomes included:

- The requirement to take responsibility for their actions and think about the consequences of their behaviour.
- Having to work hard to complete their diversion activities and demonstrate their willingness to change to the court.
- Positive engagement with CCYD coordinators and the perceived flow on effect of protective factors from this engagement, including improved future life opportunities.
- Recognition of positive changes they had already made and receiving a court outcome that did not come with stigma or long-term impacts associated with the permanent record of other court outcomes.
- Being provided with one-on-one support from a CCYD coordinator, access to practical tools and connections to other support services to help them change, as opposed to the administering of cautions or good behaviour bonds, which do not include these supportive measures.[108]

Reoffending is not the whole picture: diversion can help to achieve longer-term outcomes

Qualitative interviews with past CCYD participants who had received more than one diversion gave the CCYD Evaluation insight into factors that can contribute to reoffending, and the positive role that CCYD can play in supporting young people. Young people spoke of multiple factors limiting their ability to change after receiving their first diversion including:

- not being cognitively ready to change
- having difficulty in removing themselves from negative influences
- unstable living circumstances
- not having access to a mobile phone or family members to assist with completing diversion activities.[109]

A shift in just one of these factors could be enough for a young person to successfully engage with the CCYD process during a subsequent diversion and cease reoffending.

[107] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[108] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[109] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

Justice sector practitioners working with young people outlined for the CCYD Evaluation how participation in CCYD could provide foundational support to young people experiencing challenges to prepare them for change at the next stage of intervention or limit their further progression into more serious offending. This was particularly important for young people in out of home care, who were more frequently engaged with the youth justice system often due to 'acting out' behaviours in a residential setting that was not their family home. As one practitioner noted for the CCYD Evaluation that even if a young person continues to offend, CCYD can provide a reprieve, stopping the young person from accumulating multiple prior charges that may impact on that young person being considered a suitable candidate for a diversion in the future.[110] In this context, CCYD can be the most effective justice intervention for that young person at that point in time.

> Multiple diversions, particularly for kids in residential care, if the kid comes back, that doesn't mean that the first CCYD hasn't been a valuable intervention. It may have been in its own way a success… If that first set of charges wasn't dismissed by way of diversion, and they were found proven, even if that young person was given a low-level outcome like an undertaking, then those charges [would be] sitting on their record.
>
> **Quote from a CCYD coordinator with extensive experience supporting young people in out of home care (comment made to the CCYD Evaluation)**[111]

Factors young people associated with the effectiveness of diversion

Past CCYD participants interviewed for the CCYD Evaluation provided qualitative examples of the direct impact CCYD had in helping them to stop offending. Most agreed that an alternative court outcome would not have been as effective in supporting them to change their behaviours. The factors that young people associated with the effectiveness of diversion compared to other court outcomes included:

- recognition of positive changes already made without the stigma or long-term impacts associated with the permanent record of other court outcomes
- the requirement to take responsibility for their actions and genuinely consider the impact of their behaviour
- having to work hard to complete their diversion activities and demonstrate their commitment to changing their behaviour
- positive engagement with CCYD coordinators and the perceived benefits of protective factors from this engagement.[112]

Some parents and young people told the CCYD Evaluation that CCYD was not always responsible for initial improvements in offending behaviour among CCYD participants. The young person may have stopped offending of their own accord, triggered by the seriousness of their circumstances. In these instances, CCYD was thought to have acted as an enabler, through positive reinforcement and a proportional response.[113]

[110] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[111] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[112] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[113] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

CCYD contributed to positive attitudinal and behaviour changes

Young people who engaged with the CCYD Evaluation recognised that prosocial supports received through CCYD had contributed to positive attitudinal and behaviour changes, and many had maintained these positive changes after completing their diversion.[114]

Reduced reoffending rates among CCYD participants was the most tangible behavioural change attributed to CCYD. Justice sector practitioners, young people and parents all reported to the CCYD Evaluation additional examples of positive attitudinal and behaviour changes due to participation in CCYD.[115] In particular, the following attitudinal and behavioural changes have been attributed to the CCYD service:

- **Opportunities for self-reflection leading to understanding consequences and taking responsibility:** a key theme repeated by past CCYD participants was how diversion helped them to understand the consequences of their actions. Young people articulated how discussions with a CCYD coordinator, or participation in an offence-specific cognitive behavioural change activity helped them to consider their behaviour from the perspective of other people impacted by their negative behaviours. This awareness was often followed by actively seeking to manage their own behaviours and make positive changes.
- **Realisation that CCYD provided a second chance and opportunity to change:** past CCYD participants also frequently reported that being referred to CCYD by the court led to the realisation that they had been provided with a second chance, or opportunity to change.
- **Relief at being given a second chance was often accompanied by the realisation that successful participation in CCYD could lead to increased opportunities later in life:** young people noted that one of the key benefits of CCYD, and a driver for willingly participating in diversion activities, was the desire to have a clean record to help them achieve future education and employment goals. The guarantee that their charges would be withdrawn once CCYD was completed was a strong motivator for most of the young people interviewed.[116]

CCYD facilitated service connections for young people and their families

The qualitative interviews conducted for the CCYD Evaluation provided insight into the extent to which service connection goals in diversion plans were realised, and the perceived benefits of these service connections. Past CCYD participants and parents reiterated the importance of service connections being proportional and matched to needs; and indicated CCYD appears to be doing this effectively. At one end of the continuum, young people with stable housing circumstances and existing prosocial supports required very little in the way of service connection through CCYD. For others, whose offending behaviour may have coincided with deterioration in their mental health, unstable housing circumstances or other underlying disadvantage—comprehensive service connections were required. Young people whose needs were at this higher end of the continuum reported that service connections facilitated through CCYD helped them change their attitudes and behaviours.[117]

[114] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[115] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[116] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[117] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

In its submission to this review of the YJ Reform Act, the Children's Court of Victoria noted its experience that 'where programmes are recommended by the [CCYD] Service, they are well tailored to acknowledge the young persons' needs and to assist with rehabilitation'.[118] The Court noted that programs would include participation in education, engagement with a health professional, accommodation or family-related interventions.[119]

CCYD can connect young people to education

The role of CCYD in connecting young people to education did not feature strongly in interviews with young people conducted by the CCYD Evaluation, beyond recalling that their diversion plan included a commitment stating that they 'had to go to school'. Some parents did mention that it was helpful to have a court mandated requirement for their children to return to the school setting and spoke of the benefits of having a tangible motivator to encourage regular attendance.[120]

Education engagement featured most strongly in the CCYD Evaluation group interview with justice sector practitioners working with Aboriginal young people. For these practitioners, connecting young Aboriginal people to school and education was often the first step in the diversion process. The local CCYD coordinator, Aboriginal District Service and Koori Education Children's Court Liaison Officer (KECCLO) routinely worked together to focus on connecting young Aboriginal people to education and to strengthen opportunities for positive influences in their lives.[121]

The practitioner group also noted the important role their local KECCLO played in facilitating this process. The KECCLO had deep cultural ties to the local Aboriginal population and was recognised as being able to connect and engage with a young person, identify specific barriers to their education engagement and work with the family to help get that young person back to school.[122]

> I am very proactive as well, so once I get the [court] list, I'll check with the Victoria school registry, so then I can tell whether the kid is enrolled at any certain school in the whole of Victoria, or any other tertiary provider, like TAFE. So then I will reach out to all those guys… So then we're in the know.
>
> **Quote from a KECCLO (comment made to the CCYD Evaluation)**[123]

(b) Stakeholder perceptions of different professional roles involved in CCYD

When considering the professional roles involved in delivering CCYD, stakeholders particularly focused on the role of CCYD coordinators and the role of police prosecutors.

The role of CCYD coordinators

During the CCYD Evaluation, CCYD coordinators were frequently identified as a key enabler in helping young people to achieve positive outcomes through diversion. They facilitated effective cross-agency collaboration to help CCYD achieve system level outcomes.[124]

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[118] Children's Court of Victoria. *Submission to the review*, p. 5.

[119] Children's Court of Victoria. *Submission to the review*, p. 5.

[120] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[121] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[122] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[123] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[124] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

When interviewed for the CCYD Evaluation, young people and parents praised the work undertaken by CCYD coordinators, who were reported to provide support and information in non-judgmental, accessible ways. Young people referred to CCYD coordinators as helpful, supportive, and outlined how coordinators assisted them to visualise a clear path to get out of their current situation.[125]

The role of Victoria Police prosecutors

Victoria Police have a crucial role in the diversion process. The YJ Reform Act made access to CCYD reliant on prosecutorial consent. The decision to consent or not is largely exercised by Victoria Police prosecutors given the nature of the matters considered for diversion.

In the CCYD Evaluation interviews, many justice sector practitioners acknowledged an improvement in the prosecution's responsiveness to diversion over time. Stakeholders observed that this was in large part due to the introduction of the Specialist Children's Court Prosecution Unit (SCCPU) within Victoria Police. The SCCPU has created a pool of specialist youth prosecutors who understand the benefit of restorative approaches in the Children's Court jurisdiction. There was general agreement across practitioner groups that over time there has been a noticeable shift, with prosecutors increasingly more likely to support CCYD than oppose it.[126] As a small sample, Victoria Police told the review that from June 2021 to April 2022 (a partial financial year) it had refused consent to diversion requests for individual young people 54 times.[127]

However, a number of stakeholders raised concerns with the YJ Reform Act review about the requirement to have the prosecutor's consent to diversion. There were a range of reasons expressed for this concern: that as a function it is an inappropriate role for the prosecution; that it is an unnecessary limitation on the magistrate considering the best interests of the child; that it introduces delay which keeps young people in the system for longer; and that it is a barrier to some cohorts getting full access to diversion opportunities. These concerns are outlined briefly below.

When considering the requirement for prosecutorial consent to diversion, the Children's Court of Victoria observed that it raised a question about the appropriate role of the Court and the role of the prosecutor:

> The CCV certainly does not say that prosecutors often withhold consent in cases where diversion is appropriate. But it believes that it is more consonant with the roles of a judicial officer and a prosecutor in a criminal jurisdiction—
>
> - for the prosecutor to have the right to make submissions along the lines of the matters listed in ss. 356F & 356G as to why diversion should not be ordered; but
> - for the judicial officer to have an unfettered discretion to decide whether or not the purposes of diversion could properly be advanced in each particular case.[128]

The Law Institute of Victoria raised similar concerns in its submission to the recent parliamentary *Inquiry into Victoria's criminal justice system.* It contended that it is inappropriate for diversion programs to require prosecutorial consent in the first place. It said that this places Victoria Police in a 'quasi-judicial position by usurping the role of the court in preventing the magistrate from considering the viability of a diversion'. It argued that access to a diversion program should be at the magistrate's discretion.[129]

The Victorian Equal Opportunity and Human Rights Commission submitted to this review that the court should have discretion to consider the best interests of the child:

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[125] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[126] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[127] Victoria Police. *Information provided to the review, Children's Court Youth Diversion Veto Statistics*, 9 May 2022.

[128] Children's Court of Victoria. *Submission to the review*, p. 5.

[129] Law Institute of Victoria. 2021, *Submission 112 to the Inquiry into Victoria's criminal justice system*, p. 72.

> requiring prosecutorial consent before a court can order a diversion program poses an unnecessary barrier to the benefits afforded by the youth diversion scheme, which is otherwise in the best interests of the child … The Victorian Supreme Court has described the best interests of the child as the 'central element' of the right protected by section 17(2) [of the Charter], and that it should be the 'primary consideration' in all decisions involving the administration of youth justice.[130]

On the other hand, Victoria Police told the review that removing the requirement for prosecutorial consent would unduly fetter prosecutorial discretion. They noted that '[t]his is particularly so in circumstances where the court is effectively making a decision to dispose of a matter without the need to take a plea or make a finding of guilt, and with limited input from the prosecution'.[131]

From a practical perspective, Victoria Legal Aid noted that the prosecutorial consent requirement can delay the resolution of matters involving young people. It submitted that its 'practice experience is that the requirement for police to consent to diversion is a significant barrier to consistent and timely access to diversion'.[132] The Law Institute of Victoria noted a number of challenges for private practitioners engaging with prosecutorial consent in its submission to the recent parliamentary *Inquiry into Victoria's criminal justice system*, including that Victoria Police diversion matrices have not been widely accessible to private practitioners, and that who a practitioner should approach about diversion in the first instance, and the escalation process when a dispute as to eligibility arises, have been unclear.

Victoria Police told the review that it has a Children's Court Review Process that enables a young person to request that the Office in Charge of a prosecution unit review a decision to withhold consent to diversion. If the Officer in Charge maintains the original decision, the process allows for the young person to request that the Specialist Children's Court Prosecutions Manager, or the relevant Group Inspector, independently reviews that decision. Victoria Police reported that for the period 29 October 2021 to 6 May 2022 six matters were escalated to Manager/Group Inspector level for review: of those six matters, consent to diversion was provided in four matters and withheld in two matters.[133] Victoria Police also told the review that to support and promote consistent state-wide decision-making it provides regular training and internal networking opportunities to improve and share knowledge and best practices.[134]

Victoria Legal Aid told the review that children can be in the system for many months and that police will sometimes 'require more referrals and interventions than the CCYD co-ordinator recommends'.[135] It outlined the following case example:

> **Tom** (not his real name) is a teenager with an intellectual disability, he likes to watch the footy with his family and recently started working. He also has a sibling with a disability who requires around the clock care. His first encounter with police was for a family violence incident driven by alcohol, where he was arrested and brought to the police station. His family supported him and no further action was taken, however he continued to struggle with alcohol and was charged with property and driving offences (theft, stolen goods, unregistered scooter and driving without a licence). Police cited the family violence incident as being a reason that he's not considered a 'first time offender' and repeatedly refused to consent to diversion. Ultimately Tom was able to get diversion, however despite his youth, intellectual disability and family support, the consent took several months and required multiple court adjournments for Tom's lawyer to coordinate several referrals; during this time Tom was on onerous bail conditions.[136]

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[130] Victorian Equal Opportunity and Human Rights Commission. *Submission to the review*, p. 5; *Certain Children (No 2)* [2017] VSC 251 [261]-[262].

[131] Victoria Police. Information provided to the review, 9 May 2022.

[132] Victoria Legal Aid. *Submission to the review*, p. 8.

[133] Victoria Police. Information provided to the review, 9 May 2022.

[134] Victoria Police. Information provided to the review, 9 May 2022.

[135] Victoria Legal Aid. *Submission to the review*, p. 8.

[136] Victoria Legal Aid. *Submission to the review*, p. 8.

In another example, Victoria Legal Aid noted that:

> **Daniel** (not his real name) is a proud Wurundjeri kid, however he has a history of severe trauma and victimisation, and was relinquished from his birth parent's care due to their own struggles with mental health issues. When Daniel was 14 years old his participation in offending was heavily correlated with being a victim of family violence at home. He thought if he didn't participate in the group offending, his peers "would turn on him". He was charged with participating in group acts of kidnapping and armed robbery.
>
> Despite Daniel's history of trauma, vulnerability and mental health issues, diversion was repeatedly refused by police. After close to a year, a prosecutor sitting in the Children's Koori Court consented to diversion. This example illustrates how important it is to address the overrepresentation of aboriginal children in the justice system, for the diversion decision to sit with the specialist Children's Koori Court magistrate, rather than with the prosecution.[137]

In its submission to this review, the Victorian Aboriginal Legal Service noted that inconsistent decisions by police informants and the prosecution at court refusing to consent were two of the factors that can limit access to diversion for Aboriginal young people.[138] The Centre for Multicultural Youth told the review that:

> Young people have expressed the view that they believe poor community relations between police and young people is playing out in terms of multicultural young people being less likely to receive a diversion.[139]

Other organisations that raised concerns about the prosecutorial consent requirement in their submissions to the parliamentary *Inquiry into Victoria's criminal justice system* include the Victorian Council of Social Services, the Centre for Innovative Justice, Anglicare Victoria, the Office of the Public Advocate, Brimbank Melton Community Legal, the Human Rights Law Centre, the Victorian Aboriginal Legal Service, the Australian Community Support Organisation, Amnesty International and Smart Justice for Young People.[140]

The review's findings in relation to the role of prosecutorial consent are outlined at section 5.4.4(c) below. The review notes that the evidence before the review shows that:

- prosecutorial consent is provided in a large number of cases, as evidenced by the overall number of diversion participants
- African Australian young people are under-represented in diversion compared to their numbers in the youth justice system overall, however, the review has not had access to information that would allow conclusions to be drawn about the reasons for this.

The review recommends (recommendation 3) that more data is reported on in the future to support consideration of (and transparency with key stakeholders about) the ongoing operation and impact of diversion, including:

- the number of matters raised in court requesting CCYD be considered
- the key demographic characteristics of young people considered by CCYD
- offence type/s people considered for CCYD have been charged with

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[137] Victoria Legal Aid. *Submission to the review*, p. 12.

[138] Victorian Aboriginal Legal Service. *Submission to the review*, p. 12.

[139] Centre for Multicultural Youth. *Submission to the review*, p. 6.

[140] Office of the Public Advocate. 2022, *Submission 153, Inquiry into Victoria's criminal justice system*, p. 29; Brimbank Melton Community Legal Centre. 2022, *Submission 131, Inquiry into Victoria's criminal justice system*, p. 17; Monique Hurley. 2021, *Inquiry into Victoria's criminal justice system, Transcript of evidence*, p. 38; Victorian Aboriginal Legal Service. 2022, *Submission 139, Inquiry into Victoria's criminal justice system*, p. 161; Australian Community Support Organisation. 2022. *Submission 91, Inquiry into Victoria's criminal justice system*, p. 22; Amnesty International. 2022, *Submission 89, Inquiry into Victoria's criminal justice system*, p. 20.

- where prosecution consent has been/has not been given to CCYD (if the requirement is retained)
- the number of participants in CCYD
- the key demographic characteristics of CCYD participants
- offence type/s CCYD participants have been charged with, and
- the outcome/s of CCYD (this is, whether diversion has been successfully completed or not).

The review considers that this information would provide a clearer picture of the operation of the diversion provisions and decision-making in relation to individual young people, including at what point decisions are being made, the nature of offending alleged, the ethnicity of the accused, and the outcomes of decision-making and any diversion ordered.

(c) Other challenges with diversion in practice

Stakeholders raised several other challenges with the operation of diversion in practice.

Timeliness

Several stakeholders raised concerns about the timeliness of court-based diversion opportunities. For example, Victoria Police noted in its submission to this review of the YJ Reform Act that 'currently, it can take six to eight months [from the point of being charged] for a young person to go before a court, or for pre-court diversion opportunities to be identified. [Victoria Police] considers that addressing these delays will help to more effectively prevent a child's 'life of crime' before it starts'.[141]

Interviews for the CCYD Evaluation highlighted that when the time between the charge and court outcomes is extensive (that is, over six months), there were negative consequences for the young people involved. People described that young people and parents became worn down by the process and could be likely to accept a different court outcome, that may remain on their permanent record, rather than waiting for the diversion to be approved. The negative impact was proposed to be more acute for young people already experiencing disadvantage.[142]

Circumstances where there is an absence of family supports

Justice sector practitioners also noted in the context of the CCYD Evaluation that in some circumstances, family dynamics could pose challenges to successful engagement in CCYD for young people. Practitioners recalled several various circumstances in which family dynamics, or additional cultural and language barriers had created barriers for a young person. These included:

- cultural and language barriers contributing to a mistrust of the justice process, and reluctance to agree to a CCYD assessment
- family members having had historical involvement with the justice system
- the diversion approval process becoming drawn out and the family wanting to end it quickly.[143]

[141] Victoria Police. *Submission to the review,* p. 2.

[142] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[143] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

In contrast, young people interviewed for the CCYD Evaluation tended to be living in stable accommodation with their family. Many of these young people reflected on ways in which their family had helped throughout their diversion experience. This included supporting them to navigate the court process, or to undertake their diversion activities (for example, taking the young person to appointments or working through the process of writing a letter of apology).[144]

Victoria Police was among the organisations calling in its submission to the YJ Reform Act review for 'multi-agency resources to support families and help develop protective factors … to reduce offending behaviours in children and young people'.[145]

The impact of the COVID-19 pandemic

The arrival of COVID-19 in Victoria in February 2020 and subsequent outbreaks of the virus, led to significant disruptions to the operations of all Victorian courts and impacted the delivery of CCYD.

The Children's Court cancelled all face-to-face court hearings in response to the restrictions on movement and work required under the directive of the Chief Health Officer. The primary mode of court engagement shifted from in-person to online. The initial cancellation of face-to-face court hearings created a backlog of matters across all Victorian court jurisdictions. In response, the then President of the Children's Court issued a practice direction requiring all diversion matters to be heard on-the-papers, meaning that the young person would not be required to be involved in proceedings. The on-the-papers process enabled diversion matters to proceed during the restriction period, helping to ease the backlog and reduce the time taken for Children's Court criminal matters to be finalised.

CCYD coordinator engagement with young people also pivoted to a remote outreach model during this period.

Subsequent practice directions have ensured that the on-the-papers process has remained in place for diversion matters. Most young people and parents interviewed during the CCYD Evaluation had experienced CCYD in this virtual context.[146]

The pivot to on-the-papers and online engagement created an opportunity to reset key elements of the CCYD approach. It enabled a longer assessment phase, providing legal practitioners and CCYD coordinators with more time to conduct assessments and put in place comprehensive diversion plans for young people. This was thought to be particularly beneficial for young people in out of home care, who often had complex criminogenic needs requiring the engagement of multiple services and agencies to address these needs effectively.

> I think that is a benefit of on-the-papers, that you can do that prep. Follow up with the care team and do a really robust assessment with their input… develop a coordinated plan that takes into account what is already happening around that young person.
>
> **Quote from a CCYD coordinator (comment made to the CCYD Evaluation)**[147]

[144] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[145] Victoria Police. *Submission to the review*, p. 2.

[146] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[147] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

Young people and parents interviewed for the CCYD Evaluation also found the on-the-papers process beneficial, particularly the removal of the requirement to physically attend the court. Those who had experience with both face-to-face and virtual court settings reiterated that the virtual court experience reduced the anxiety associated with attending court in person. Hearing matters on-the-papers also assisted in reducing the backlog on courts and in reducing associated wait times for court users, which have been compounded due to COVID-19.[148]

Some stakeholders consulted for the CCYD Evaluation acknowledged that the online environment could also be a barrier to participation in CCYD, particularly for young people from CALD and Aboriginal backgrounds with no existing connections to legal supports or support services. Legal practitioners outlined how the virtual process made it more difficult to contact and engage with those young people.[149]

> But with the COVID, [young people and their parents] get given the court date and people aren't sure if they have to turn up at all. We get a list of phone numbers (from the court registry) of young people that don't have lawyers. But then you are cold calling, you know? Like, I'll call them up and I say 'Hi my name is xx and just believe me I'm a lawyer, just believe me'… I wouldn't trust someone just calling me like that!
>
> **Quote from a legal practitioner (comment made to the CCYD Evaluation)**[150]

Inconsistent guidance

The CCYD Evaluation process highlighted that there are variances in the application of decision-making frameworks across court locations and between individual practitioners.[151] Some level of variance is to be expected and indicates effective application of the legislation and the importance of individual circumstances when making decisions about diversion for a young person. Almost every person consulted for the Evaluation recalled exceptional cases where they had approved or recommended diversion for a young person who 'on paper' would not have appeared suitable.[152]

However, some stakeholders did express to the CCYD Evaluation their frustrations with the level of variance in diversion decision making across courts and individual practitioners and suggested that this variance was impacting on the service's ability to consistently reach all young people who would benefit from CCYD.[153]

The most common areas of variance reported by stakeholders to be causing confusion or frustration included:

- differences in the way that individual magistrates and prosecutors determine what offences are too serious for diversion

[148] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[149] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[150] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[151] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[152] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[153] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

- the level of information required by some prosecutors prior to providing consent, as well as a tendency for prosecutors with less experience in the Children's Court jurisdiction to dictate conditions for the diversion, prior to providing consent (conditional diversion is a feature of the adult jurisdiction, however, consent to diversion in the Children's Court should be unconditional)
- the legal advice given to young people by defence lawyers – especially Aboriginal young people – not to admit to committing offences – which was extended to advice to not accept responsibility for the offences, which then renders the young person ineligible for diversion.[154]

(d) CCYD outcomes for young people from culturally and linguistically diverse backgrounds

Justice sector practitioners who worked closely with young African Australians and young people from other CALD backgrounds, identified a range of factors that impacted access to diversion and achievement of CCYD outcomes. Some factors have been mentioned in section 5.3.2(c), such as challenges associated with the on-the-papers process. Discussions with practitioners also identified an additional set of factors that could impact on CCYD outcomes for young people from CALD backgrounds. These included family understanding of the process, language and cultural barriers, a higher proportion of this cohort entering the process via a remand or bail pathway and the positive enabling role of Youth Justice's Community Engagement Officers.

The importance of family support and understanding

In its submission to this review of the YJ Reform Act, the Centre for Multicultural Youth observed that family support is critical to young people participating in diversion successfully:

> Yet families often lack the understanding and confidence to successfully navigate and advocate for their young people, increasing the chances of further contact with the justice system. There may be shame or embarrassment with having their child involved with justice issues. In a number of case[s], they do not have a full understanding of the diversion conditions and the consequences of beaching the conditions, and a lack of understanding on the need for families to support young people in court. In some cases, the young person's family is not aware of their children having entered a diversion program.[155]

Justice sector practitioners also reported to the CCYD Evaluation that language barriers were often compounded by a lack of access to interpreters for family members at multiple points throughout the pre-court and court process.[156]

> These family members and parents want to be involved, and the kids want them to be involved in a lot of cases as well, it's just that language barrier.
>
> **A practitioner working with CALD young people (comment made to the CCYD Evaluation)**[157]

[154] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[155] Centre for Multicultural Youth. *Submission to the Review*, p. 6.

[156] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[157] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

Additional engagement challenges associated with the on-the-papers process

Language barriers and limited understanding of the Australian judicial system could make navigating the virtual court process even more difficult for CALD young people and their families. One legal practitioner told the CCYD Evaluation how, during the on-the-papers period, she would often be called out to the court to speak with confused parents of CALD young people who had turned up at the physical court seeking information. The practitioner outlined how the parents would have received a notice that their child was to attend a virtual court date but had no understanding of what this entailed or how get support virtually.[158]

> For a lot of these people [from CALD backgrounds] coming to physical court when they have a piece of paper is a lot easier…I will get a lot of [calls from court registrars saying] 'oh this young person has come to the court today, can you reach out to them and speak to them?' And I will go out, and the parent will say to me 'it has been months and I don't know what is going on, and there are all these rules, but I don't understand them'.
>
> **Quote from a legal practitioner working with CALD young people (comment made to the CCYD Evaluation)**[159]

The importance of strong relationships with CALD young people and their communities

A substantial number of young people from CALD backgrounds have received Victoria Police consent to participate in CCYD and have been successfully diverted from further offending. However, CALD young people, especially those with African heritage, have remained underrepresented in the CCYD population and comparatively overrepresented in the broader youth justice system. As mentioned previously, Victoria Police is a gateway to accessing CCYD at multiple points in the process. Justice sector practitioners working closely with CALD communities outlined to the CCYD Evaluation how this can create barriers to successful outcomes for young people of African heritage and other CALD backgrounds in instances where their communities may lack strong relationships with police.[160] The depth and strength of these relationships is a key element to improving opportunities for access to diversion for CALD young people. Some practitioners also noted that CALD young people and their families could experience negative outcomes, most notably feelings of being stigmatised, from the prosecution declining to agree to their participation in the CCYD diversion process.

> It is pretty stigmatising when you go back to a young person and say the police aren't agreeing at the moment to diversion and we have to seek internal review of that decision and that is going to take a couple of months.
>
> **A legal practitioner working with CALD young people (comment made to the CCYD Evaluation)**[161]

When the young person's pathway to the criminal division was via remand or bail court

Stakeholders told the CCYD Evaluation that coming to diversion through remand or bail court can have an impact on CCYD outcomes for CALD young people. These included negative impacts of supervision orders and custodial settings prior to charges being proven in a court, and unrealistic bail conditions requiring the young person to refrain from engagement with other young members of their family and community. This can create lasting stigma for the young person and their family.

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[158] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[159] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[160] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[161] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

> [Even for] matters that ultimately result in a diversion, a lot of [African/CALD] young people are put on bail as a starting point … Often there are non-association conditions – but they might be family members, or they go to the same school together – so before the matter goes to court these kids are on police bail which is already stigmatising and creating issues with their connections to family and community.
>
> **Quote from a legal practitioner working with CALD young people (comment made to the CCYD Evaluation)**[162]

The positive enabling role of cultural support workers

Cultural support workers were identified by stakeholders consulted during the CCYD Evaluation as one of the most effective enablers for helping CALD young people understand the CCYD process, and articulate the benefits associated with receiving a diversion over alternative court outcomes. Justice sector practitioners provided multiple examples of situations where they had relied on the two Youth Justice African Community Engagement Officers to help engage with a young person, or their family. Practitioners emphasised the importance of young people being able to engage with someone who could understand their cultural perspective and speak their language.[163]

(e) CCYD outcomes for Aboriginal young people

Justice sector practitioners working with Aboriginal young people consulted for the CCYD Evaluation identified a similar set of barriers and enabling factors to those working with CALD communities, restating concerns about difficulty in securing pre-charge cautions for young Aboriginal people and the negative impacts of bail as a pathway into the criminal justice system. Practitioners also highlighted additional factors that could act as barriers or enablers to achievement of outcomes specific to the Aboriginal context.[164] These factors are outlined below.

Ongoing effects of intergenerational trauma

Aboriginal young people often experience significant disadvantage compounded by intergenerational trauma. Justice sector practitioners reported that these multiple levels of disadvantage could result in Aboriginal young people coming to the attention of police at a young age and could also make it more difficult for them to engage with the court and requirements of their diversion plans.

> Sometimes it's really hard when a young person just has so many different factors of unstableness … it's hard to create realistic diversion goals, and also [find] the best way to support that young person going forward.
>
> **Quote from an Aboriginal support service practitioner (comment made to the CCYD Evaluation)**[165]

[162] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[163] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[164] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[165] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

Pre-court CCYD outreach is an enabler to engaging with young Aboriginal people

Pre-court CCYD outreach was one of several enablers that has helped overcome systemic barriers for Aboriginal young people and helped them achieve successful outcomes from diversion. A justice sector practitioner reported to the CCYD Evaluation that commencing engagement with a young person during the pre-court stage of the process allowed more time to build a relationship with the young person, and to develop a tailored and culturally appropriate diversion approach. This outreach process was reported to be more effective because engagement could occur away from the hectic court environment (referring to the experiences in court prior to the introduction of the on-the-papers process). Pre-court outreach gave the young person and their family greater opportunity to consider their situation and options without feeling rushed into making a decision.[166]

Engagement with cultural supports to establish holistic and wraparound services pre-court

Justice sector practitioners also noted during the CCYD Evaluation that where appropriate, and with consent of the young person, pre-court CCYD outreach was conducted in collaboration with the local Aboriginal community-controlled organisation.[167] This collaborative engagement assisted the CCYD coordinator to create diversion plans for Aboriginal young people that had strong ties to local community and cultural understandings. Practitioners reported to the CCYD Evaluation that this collaborative approach was effective due to the deep connections that the Aboriginal service had to the local community, allowing them to commence working with the young person prior to a court outcome being finalised. The combination of early outreach and collaboration with cultural support services was an effective enabler to increase the likelihood of CCYD being accepted by the young person, and the diversion process itself being successful.[168]

Creating diversion plans with small achievable goals to boost protective factors

Developing diversion plans with small and achievable goals was another enabler to successful CCYD outcomes for young Aboriginal people. Justice sector practitioners noted the importance of including opportunities for 'small wins' in diversion plans, such as getting a learner's permit, getting a birth certificate or applying for financial assistance through Centrelink. These small steps were reported to help the young person build a positive sense of self-worth, to give them confidence to address some of their more challenging attitudes and behaviours. This approach was especially beneficial if the young person was coming from a position of extreme disadvantage – where addressing their more complex needs would require the long-term engagement and support of the local Aboriginal service.

> We try and balance that with some really good positive goals… like help them with getting their learners, or just getting birth certificates and getting on Centrelink payments, just little boosts. From my experience, once they start getting a few of those positive things down they just their self-esteem boosts and they get a little bit more self-worth and confidence. Then we can try looking into programs or counselling or health checks, or all those different things.
>
> **Quote from an Aboriginal support service practitioner (comment made to the CCYD Evaluation)**[169]

[166] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[167] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[168] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[169] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

The positive enabling role of cultural support services

The importance of connecting young Aboriginal people to Aboriginal support services and workers is evident throughout all the barriers and enablers described above. Access to and engagement with Aboriginal services and support workers was identified by people consulted for the CCYD Evaluation as one of the most effective factors to helping Aboriginal young people achieve positive outcomes from CCYD. The holistic approach of Aboriginal support services like MDAS and the role of KECCLOS was reported as being particularly important in this context.[170]

Justice sector practitioners also noted the positive role of the Victorian Aboriginal Legal Service in supporting young Aboriginal people during the pre-court and court stages of the process.[171]

Diversion should be as widely available as possible

The Commission for Children and Young People (CCYP) has advocated for broad access to diversion, noting the chronic over-representation of Aboriginal children and young people in the youth justice system. It stated in its *Our Youth, Our Way* report that:

> Opportunities for Aboriginal children and young people to access Children's Court diversion should be as broad as possible. Access should not be restricted by prior offending or by particular categories of offences, or dependent on an admission of guilt, where the child or young person is otherwise suitable for diversion. Access to Children's Court diversion should also not be conditional on the prosecutor's consent.[172]

This position was reiterated in the CCYP's submission to this review of the YJ Reform Act.[173]

(f) CCYD outcomes for young people in out of home care or with child protection involvement

Justice sector practitioners working with children involved in both the criminal justice system and the child protection system identified a specific set of factors that could act as barriers or enablers to achievement of outcomes for this cohort. These are outlined below.

Complex criminogenic needs, existing services and the need for a proportional CCYD response

Young people in out of home care have complex needs. Many of these young people are experiencing difficulties with substance abuse, trauma, limited engagement with education along with estrangement from their family. The Sentencing Advisory Council has noted that:

> trauma and related developmental issues may be particularly relevant considerations for children who have spent time in highly conflictual, violent or abusive environments or family environments involving intergenerational criminal behaviour. Such environment may affect a child's understanding of behavioural and moral norms and their capacity to control their behaviour due to the effect of trauma, mental health issues, and developmental or neurological issues.[174]

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[170] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[171] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[172] Commission for Children and Young People. 2021, *Our Youth, out way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system*, p. 34.

[173] Commission for Children and Young People. *Submission to the review*, p. 9.

[174] Sentencing Advisory Council, 2020, *'Crossover Kids': Vulnerable Children in the Youth Justice System, Report 3: Sentencing Children Who Have Experienced Trauma,* p. 11; See *Bugmy v The Queen* [2013] HCA 37 [40]; Catherine Elliott, 2011, *Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice*, 75(4) The Journal of Criminal Law 289, p. 297–300.

Justice sector practitioners emphasised during the CCYD Evaluation that for crossover kids (meaning young people involved in both the child protection and youth justice systems), the role of CCYD was not to put new supports in place to address these needs.[175] These young people usually have an abundance of different support services and teams involved in their lives. Rather, the diversion process provided an opportunity to reenergise existing support teams. To achieve this, CCYD coordinators often work with the existing teams to refocus existing care plans.

Reporting from the Sentencing Advisory Council reinforces this view, noting that '[f]or children involved in both the criminal justice and the child protection systems, particularly children in out-of-home care, separate divisions may create barriers to holistically addressing the child's "'needs' and 'deeds'".[176]

Victoria Police reinforced this need to work with existing supports. It told this review of the YJ Reform Act that 'there may be merit in exploring a separate stream/process or methodology of diversion for children in out of home care. Noting that these children are already managed through, and have access to bespoke services, it may be more effective to build upon these services for diversion purposes'.[177]

In the case of younger CCYD participants (those aged under 14), stakeholders commented during the CCYD Evaluation that the CCYD plan might also include additional activities to focus on their emotional development, or other smaller more achievable tasks that sit alongside the more comprehensive plans.[178] As noted in the previous section – smaller more achievable tasks were reported to provide the young person with a sense of ownership and achievement (as opposed to the intangible nature of the bigger issues in their life).

Justice sector practitioners also reported to the CCYD Evaluation that they would arrange for the young person to be involved in care team discussions around preparing new care plans.[179] This was an enabling process – providing an avenue for the young person to take ownership of their actions and increase the potential for attitudinal and behaviour changes.

The criminalisation of young people in out of home care

One of the factors contributing to a high proportion of 'crossover kids' being involved in the criminal justice system are the situational circumstances around them being in out of home care. Some justice sector practitioners reported to the CCYD Evaluation that police would often be called to respond to incidents in an out of home care setting that likely would not have escalated to police involvement if they had occurred in the family home.[180]

> Yeah, I think this might be stating the obvious, but with out of home care kids there is a lot more of that property damage, all that stuff that happens within the residential unit.
>
> **Quote from a justice sector practitioner (comment made to the CCYD Evaluation)[181]**

[175] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[176] Sentencing Advisory Council. 2020, *'Crossover Kids': Vulnerable Children in the Youth Justice System, Report 3: Sentencing Children Who Have Experienced Trauma,* p. 33.

[177] Victoria Police*. Submission to the review*, p. 4.

[178] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[179] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[180] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[181] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

Justice sector practitioners also noted that an extensive amount of work is being undertaken across the department, Victoria Police and DFFH to address these systemic issues. Practitioners referenced the *Framework to reduce criminalisation of young people in out of home* care,[182] which outlines a commitment between these three justice agencies to reduce the criminalisation of young people in out of home and residential care. All practitioners interviewed for the CCYD Evaluation agreed that they had seen on the ground improvements coming out of this work, with the reintroduction of proactive policing through YROs noted as being particularly beneficial.[183]

> The framework and the commitment to it is there and it is slowly gaining traction. I think as the culture changes within the system, we will only see things like diversion work better …. for these young people.
>
> **Quote from a justice sector practitioner (comment made to the CCYD Evaluation)[184]**

On-the-papers had both positive and negative impacts on CCYD outcomes for this cohort

As outlined in section 5.3.2(c), the then President of the Children's Court issued the on-the-papers practice direction early in the court's pandemic response, and for many young people this mechanism reduced the impact of the delays associated with COVID-19 restrictions. On-the-papers also slowed down the court stage of the diversion process. Justice sector practitioners reported to the CCYD Evaluation that this additional time has provided CCYD coordinators with the opportunity to undertake more complex and robust assessments required with crossover kids (without having to request an adjournment). It also reduced instances of these young people being in the court and in discussions with their lawyers without having an appropriate Child Protection guardian present or engaged in the criminal justice process.[185]

However, the additional delays that occurred due to COVID-19 and the initial closing of courts (prior to the on-the-papers process being finalised) was also identified by stakeholders interviewed for the CCYD Evaluation as having a detrimental impact for some young people in out of home care.[186] Justice sector practitioners provided examples of crossover kids being placed on remand or on supervised bail, and then having to wait a substantial amount of time for their matters to be processed by the courts (in extreme cases this was up to 12 months). This equated to the young person essentially being under youth justice supervision without being found guilty, and without the additional supports and benefits that come with being placed in CCYD. These matters are now being processed quickly, with the young person often receiving a same day diversion. While practitioners noted that this was a positive outcome for the young person in some ways, in others, it was detrimental as they had received 12 months of youth justice contact unnecessarily.[187]

> The impact that COVID has had, we have had matters where young people have been on our supervised bail for over 12 months, and essentially completed a YJ order. But the question is, could they have been identified for diversion earlier on? Yes, absolutely! Then they wouldn't have had 12 months of youth justice contact.
>
> **Quote from a justice sector practitioner (comment made to the CCYD Evaluation)[188]**

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[182] Victorian Government. 2020, *Framework to reduce criminalisation of young people in residential care*.

[183] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[184] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[185] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[186] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[187] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[188] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

(g) Offences precluded from diversion

In it submission to this review of the YJ Reform Act, Victoria Legal Aid questioned the exclusion of some road safety offences from diversion and provided the following case example to illustrate this point:

> **Brendan** (not his real name) is 16 years old. He lives with his girlfriend's mother after his father was sent to prison and his mother left the state to escape his violent father. Brendan loves riding dirt bikes and one day when he was 15, police found him riding a modified mountain bike which had a petrol engine fitted to it. Brendan immediately pulled over when the police flashed their blue and red lights and provided his name and address. The bike was impounded and Brendan was charged with driving a motor vehicle without a licence, using an unregistered motorcycle, riding without a helmet, and using an unroadworthy vehicle. Brendan had never previously been charged by police and has no prior convictions. Given the relatively minor nature of the conduct he should have received a diversion and avoided a criminal record at his young age. However, Victoria Police refused to consent to a diversion because of internal police policy, which provides that police may not consent to diversion where a person's charges have resulted in a vehicle being impounded. As a result, Brendan will receive a criminal record.[189]

(h) CCYD outcomes for victims of crime

This review heard little detail from external stakeholders about the victim's experience of diversion. The Victims of Crime Commissioner encouraged the review to consider the needs of victims and alignment with the Victims' charter.[190] The experience of victims is considered further by the review in its findings below.

5.4 Findings: Court-based youth diversion

Since the introduction of CCYD, the role of diversion has been confirmed as a core component of Victoria's youth justice system.[191]

In April 2022, the Government released its Youth Justice Diversion Statement noting that '[p]revention, diversion, and early intervention are the most effective and fiscally responsible ways of reducing youth crime'.[192] Taking into account the evidence considered by the CCYD Evaluation and material gathered as part of this process, this review of the YJ Reform Act has found that youth diversion is making a significant contribution to system-wide policy goals. In particular, youth diversion is supporting the goals of diverting young people from the criminal justice system and improving community safety (by providing opportunities for young people to turn their lives around early in their engagement with the youth justice system).

Youth diversion is also meeting its statutory purposes, including reducing stigma, encouraging the young person to accept responsibility, and providing a focus on rehabilitation.

Further, this review has found that the greater use of diversion since the state-wide scheme was established in legislation in 2017, is supportive of children and young people's human rights.[193]

The review's findings are detailed further below.

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[189] Victoria Legal Aid. *Submission to the review*, p. 9.

[190] Victims of Crime Commissioner. 2022, *Correspondence to the review*.

[191] Penny Armytage and James Ogloff. 2017, *Youth Justice Review and Strategy: Meeting needs and reducing offending, Executive summary*, p. 34; Victorian Government. 2020, *Youth Justice Strategic Plan 2020–2030*, p. 13; Victorian Government. 2022, *Wirkara Kulpa – Aboriginal Youth Justice Strategy 2022–2032*.

[192] Victorian Government. 2022, *Diversion: keeping young people out of justice to lead successful lives*, p. 5.

[193] See *Charter of Human Rights and Responsibilities Act 2006*, s 17. Article 40(3)(b) of the Convention on the Rights of the Child provides guidance on what the best interests of the child involve for children alleged as, accused of, or recognised as having infringed criminal law. It states that '[w]herever appropriate and desirable, [States Parties should establish] measures for dealing with such children without resorting to judicial proceedings'.

5.4.1 Effects on offending and community safety

Overall, CCYD has reduced reoffending rates and has thereby improved community safety:

- **CCYD has had a positive impact on reoffending rates:** CCYD was associated with reduced offending for over three quarters (77 per cent) of CCYD participants considered by the CCYD Evaluation (analysis undertaken by the Crime Statistics Agency of the specific cohort that had sufficient data to be matched in the JDL).[194] This means that less than one quarter (23 per cent) of CCYD participants in the cohort had reoffended within six months of completing their diversion. CCYD participants in the cohort who did reoffend tended to do so at a higher frequency than they had prior to their diversion, though the seriousness of their offending was more likely to remain stable or decrease, than to increase in severity.[195]
- **Reoffending rates, frequency and seriousness tended to increase over time**: however, such increases are to be expected when examining recidivism amongst any group over a longer timeframe. When the reoffending window was extended to 24 months (for those who received a diversion between 2017 to 2018), the proportion of young people in the cohort who had reoffended increased to 42 per cent.[196] Notably this means that by two years post-diversion more than half of CCYD participants in the cohort analysed still had not reoffended, which is a positive finding.
- **CCYD participants were statistically more likely to show reductions in the frequency and seriousness of reoffending compared with young people who were not diverted:** statistical analysis conducted for the CCYD Evaluation showed that in the analysis cohort, young people who participated in CCYD were significantly less likely to reoffend than those in a control group of young people who had received an alternative court outcome.[197] Reoffending among CCYD participants in the analysis cohort was also comparatively less frequent and less serious than among young people with similar offending histories and characteristics in the control group.[198]

5.4.2 Effects on the wellbeing of young people

CCYD has been a positive intervention which supports the wellbeing of young people:

- **CCYD has effectively reached young people early in their engagement with the justice system:** CCYD participants during the CCYD Evaluation period of January 2017 and December 2020 were most likely to have come before the court for the first time (90 per cent).[199]

[194] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[195] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[196] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[197] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022. The Crime Statistics Agency (CSA) conducted propensity score matching and logistic regression analysis to determine if participation in CCYD produced better reoffending outcomes for young people compared with a control group who received lower-tier sentences (good behaviour bond, probation, accountable undertaking, non-accounting undertaking). CSA used one-to-one-nearest-neighbour matching without replacement (using the R statistical programming language) to confirm that the treatment and control groups in the matched data set had similar characteristics, to estimate the treatment effect more accurately.

[198] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[199] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

- **CCYD doesn't stop all young people reoffending, but that doesn't mean the diversion was not successful in some way:** young people in contact with the justice system often have multiple and complex needs that require time to address effectively. Evidence of reoffending among CCYD participants does not necessarily indicate CCYD was not successful. As one stakeholder noted during the CCYD Evaluation, even if a young person continues to offend, CCYD may have provided the most effective justice intervention for that young person at that point in time.[200] CCYD can put in place a foundational level of support to help that young person be more prepared for change at the next stage, or stop further progression into more serious offending behaviours. This is reflected in the design of the diversion service which allows young people to receive multiple diversions, acknowledging their developmental profile and complexity of criminogenic risk factors associated with offending in young people.
- **CCYD contributes to enhanced protective factors for young people:** CCYD contributed to a range of prosocial outcomes for young people. This included providing targeted support to CCYD participants to reduce offending and/or providing positive reinforcement to embed changes the young person had made independently of the diversion process. Past CCYD participants, parents and justice sector practitioners provided examples to the CCYD Evaluation of different ways in which CCYD had enhanced protective factors including:
    - strengthened connections with positive influences including family and positive friendship groups
    - connected young people with services that met their needs including culturally specific services, youth support services and offence specific rehabilitative services
    - increased engagement in education and/or vocational activities including helping young people to commence full-time employment
    - a proportional response that provided young people with an opportunity to demonstrate remorse and change in an official setting (i.e., through the courts).[201]
- **CCYD contributes to positive attitudinal and behavioural shifts:** young people recognised in the CCYD Evaluation that the prosocial supports they received through CCYD had contributed to positive attitudinal and behaviour changes, and many had maintained these positive changes after completing their diversion.[202] Even in instances where attitude or behaviour change had occurred independently to the diversion process, CCYD was attributed with positively reinforcing the changes. [203]

5.4.3 Effects on the system

This review notes that CCYD has also had positive effects on the youth justice system:

[200] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[201] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[202] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[203] Department of Justice and Community Safety. Information provided to the review, the evaluation of the Children's Court Youth Diversion Service, April 2022.

- **CCYD is facilitating coordination at the system-level:** CCYD has resulted in improved collaboration and partnerships across the Victorian justice sector. There was strong support among CCYD stakeholders during the CCYD Evaluation for the shared aim of diverting as many young people as possible away from the tertiary end of the youth justice system.[204] Overall, the information collected for the CCYD Evaluation indicates that CCYD is contributing to system change supported by strong collaborations centrally and at a local level between Youth Justice, the Children's Court, Victoria Police, Victoria Legal Aid (VLA), Victorian Aboriginal Legal Services (VALS), the Education Justice Initiative (EJI) and other key agencies.[205]

5.4.4 Opportunities for improvement

This review of the YJ Reform Act has also identified a number of opportunities for improvement and makes recommendations below to: guide consistent decision-making; continue to monitor the impact of service delivery; align decision-making on diversion with standard judicial processes; and enhance diversion opportunities for young people from groups who are over-represented in the justice system.

(a) Guiding consistent decision-making

The reach of CCYD is influenced by the decision-making frameworks utilised by the various practitioners involved in determining if a young person will be referred to CCYD or not—currently, defence lawyers, prosecutors, CCYD coordinators and magistrates. Information considered by the CCYD Evaluation highlighted that each agency applies a slightly different lens to their diversion decision-making frameworks:

- Defence lawyers' diversion decision-making lens is focused on the risk to the young person.
- Vitoria Police prosecutor's diversion decision-making lens is focused on the risk to public safety, the risk to the victim and ensuring that they have sufficient information to confidently apply their discretionary power.
- CCYD coordinators' diversion decision-making lens is focused on the risk to the young person, understanding their individual circumstances and needs and determining the suitability of CCUD as a mechanism for addressing these needs.
- Magistrates' diversion decision-making lens is focused on applying the restorative and therapeutic sentencing principles of the Children's Court including identifying options for the rehabilitation of the young person in the community and balancing this against the harm caused to a victim and the safety of the broader community.[206]

Overall, these frameworks faithfully represent the legislative intent for CCYD. However, material considered by the CCYD indicates that there are variances in the application of the decision-making frameworks across court locations and between individual practitioners.[207]

This review of the YJ Reform Act recommends that the CCYD Steering Committee review existing frameworks that guide decision-making among partner agencies and develop clearer guidelines to improve consistency.

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[204] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[205] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[206] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[207] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

Recommendation 1: That the CCYD Steering Committee collectively review the existing frameworks that guide decision-making among partner agencies and develop clearer guidelines to improve consistency across courts and maximise the reach of CCYD.

(b) Monitoring the impact of service delivery

This review recommends continued monitoring of the processes and practice directions related to engagement with the Court and CCYD, including remote engagement. While on-the-papers and virtual engagement with the courts was, overall, seen by stakeholders as a benefit for young people, the requirement to engage with CCYD coordinators and other services remotely was not.[208] Nearly all young people interviewed for the CCYD Evaluation stated that their CCYD experience would have been improved if they had been provided with the opportunity to have face-to-face engagement with their CCYD coordinators, and related support services.[209] This reflects a broader challenge for the sector associated with changed ways of working due to COVID-19.

Recommendation 2: That the President of the Children's Court of Victoria and DJCS (with input from the CCYD Steering Committee) continue to monitor the processes and practice directions related to CCYD, including remote engagement with the court to ensure that:

- all young people are given sufficient opportunities to engage with legal supports during the pre-court stage
- all young people are given sufficient opportunities to engage with CCYD coordinators and other supports
- appropriate mechanisms are identified to support the culturally and linguistically diverse (CALD) community and other disadvantaged groups throughout the remote pre-court and court processes.

As a priority, the Children's Court of Victoria, government and stakeholders need access to information which shows how youth diversion is being used in relation to young people from priority groups. Access to this type of data reporting is key to understanding the effects of diversion in practice and should be available across the system on a regular basis to inform operations. This review recommends that the Children's Court of Victoria publicly report annually on the number of participants in CCYD, key demographic characteristics of participants, the nature of the offence, prosecutorial consent (where this remains relevant), and the outcomes of diversion.

[208] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[209] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

Recommendation 3: That the Children's Court of Victoria, with assistance from DJCS and Victoria Police as required, consider how to increase the availability of information on the operation of the CCYD, including by considering annual public reporting on:

- the number of matters raised in court requesting CCYD be considered
- the key demographic characteristics of young people considered for CCYD
- offence type/s people considered for CCYD have been charged with
- where prosecution consent has been/has not been given to CCYD [data to be collected by Victoria Police if the prosecution consent provision is retained]
- the number of participants in CCYD
- the key demographic characteristics of CCYD participants
- offence type/s CCYD participants have been charged with, and
- the outcome/s of CCYD (that is, whether diversion has been successfully completed or not).

(c) Aligning courts decisions on diversion with standard judicial decision-making processes

Overall, the collective evidence from a range of stakeholders suggests that most Victoria Police prosecutors working in the Children's Court of Victoria are supportive of diversion, and regularly endorse CCYD as a suitable court outcome. The large volume of young people who have participated in CCYD reflects this support.

However, whilst historically diversion was a decision pre-court for the police through the use of warnings and cautions, the expansion of diversion into a court-based system requires further thought about the appropriate role of the police prosecutors and the appropriate role of the Children's Court of Victoria.

This review has concluded that decision-making on court-based diversion is properly the role of the judicial officer. The review notes that referral to diversion is an adjournment by the court of the proceedings before it,[210] assessment of successful completion of diversion is a question for the court,[211] and the outcome of successful completion of diversion is a discharge by the court without any finding of guilt (not a prosecutorial decision to withdraw the charges).[212] Further, prosecutorial consent is not placed as a limit on judicial decision-making in relation to any other decision under the CYFA.

The current position of having the court's decision-making on diversion limited by prosecutorial consent also makes Victoria an outlier amongst Australian jurisdictions. While the statutory youth diversion schemes across Australia all have different features and ways of operating, and are therefore not a direct comparison to Victoria's CCYD, they provide useful context on the role of judicial decision-making and the requirement for prosecutorial consent:

- the *Young Offenders Act 1997* (NSW) makes provision for the prosecution to refer matters to a youth conference, but also makes provision for direct referral by the court[213]
- the *Youth Justice Act 1992* (QLD) makes referral to a restorative justice process a court decision having regard to submissions from the Chief Executive about the appropriateness of an offence for a referral[214]

[210] *Children, Youth and Families Act 2005*, s 356D(1).

[211] *Children, Youth and Families Act 2005*, s 356I(1).

[212] *Children, Youth and Families Act 2005*, s 356I(1)(b).

[213] *Young Offenders Act 1997* (NSW), s 40(3).

[214] *Youth Justice Act 1992* (QLD), s 163(1).

- the *Youth Offenders Act 1993* (SA) makes provision for the court to refer the matter to be dealt with by a police officer or by a family conference without a requirement for the prosecutor's consent[215]
- *the Young Offenders Act 1994* (WA) makes provision for referral to a juvenile justice team (for diversion) by the prosecution or directly by a court[216]
- the *Youth Justice Act 1997* (Tas) provides for the court to order attendance at a community conference without a requirement for the prosecutor's consent[217]
- the *Youth Justice Act 2005* (NT) provides for the court to order youth diversion without a requirement for the prosecutor's consent.[218]

The review has concluded that as a matter of policy, the prosecutor should not have a right of consent to diversion, but should have the right to make submissions to the court, which can then be appropriately considered in the judicial decision-making process. Assessment by Youth Justice should occur at the request of the court.

This position is consistent with that taken recently by the Legislative Council Legal and Social Issues Committee in its *Inquiry into Victoria's criminal justice* system. In its Inquiry report, the Committee recommended that the requirement for Victoria Police to consent to a diversion be reviewed to consider whether it should be 'replaced with a requirement to consider the recommendation of the prosecutor and/or informant'.[219] The Committee observed that:

> Transferring this decision-making power to a magistrate would ensure that arguments and evidence from both the prosecution and the defence as to why diversion is appropriate/inappropriate are considered. It will also ensure that the most appropriate pathway forward—which balances holding an individual accountable for offending with their prospects for rehabilitation—is identified for the accused person.[220]

In terms of matters that the prosecutor must currently consider in determining whether to consent to diversion or not:[221]

- the availability of suitable diversion programs is something that the court may consider directly, with supporting information from Youth Justice
- the impact on the victim (if any) could be outlined in submissions from the prosecution to the court
- the child's failure to complete previous diversion programs (if any) is information that is already before the court, and
- the alleged level of involvement of the child in the offending is something that the prosecution could address in submissions to the court.

The review's recommendation for the removal of the prosecutorial consent requirement is based on its conclusions about the appropriate role of judicial decision-making in court-based diversion. The review makes no findings about the impact of the prosecutorial discretion to consent or withhold consent, or court decision-making, in individual cases or for particular cohorts.

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[215] *Young Offenders Act 1993* (SA), s 17(2).

[216] *Young Offenders Act 1994* (WA), s 27, s 28.

[217] *Youth Justice Act 1997 (Tas)*, s 37, s 41.

[218] *Youth Justice Act 2005* (NT), s 64.

[219] Legislative Council Legal and Social Issues Committee. 2022, *Inquiry into Victoria's criminal justice system*, p. 227.

[220] Legislative Council Legal and Social Issues Committee. 2022*, Inquiry into Victoria's criminal justice system*, p. 227.

[221] *Children, Youth and Families Act 2005*, s 356F.

The review recommends more detailed data reporting in the future (recommendation 3) that would provide a clearer picture of the operation of the diversion provisions and decision-making in relation to individual young people, including at what point decisions are being made, the nature of offending alleged, the ethnicity of the accused, and the outcomes of decision-making and any diversion ordered.

Recommendation 4: That the Government standardise judicial decision-making on youth diversion and seek to repeal the requirement in section 356D(3) of the *Children, Youth and Families Act 2005* [or exclude the provision as part of the development of a new Youth Justice principal Act] for the prosecution to consent to diversion before it can be ordered by the Court. The legislation should instead allow for the prosecution to make submissions on whether it considers diversion should be ordered in a particular case.

(d) Enhancing opportunities for young people from groups who are over-represented in the youth justice system to participate in CCYD

Analysis undertaken for the CCYD Evaluation found no statistical link between Aboriginal status or ethnicity and successful completion of CCYD, or the likelihood of post-diversion reoffending.[222] However, the data considered suggests that African Australian young people are under-represented in diversion compared to their numbers in the youth justice system (five per cent in diversion compared to 13 per cent in 2019–20 in youth justice).[223] The Centre for Multicultural Youth observed that 'this cohort are neither inherently more vulnerable or predisposed to offending but are more likely to experience systemic barriers and face a range of complex needs that go unmet and place them at greater risk of justice engagement'.[224]

While data considered by this review shows that Aboriginal young people experience diversion in proportionate numbers to their representation in the youth justice system (around 12 per cent in diversion and in youth justice), the over-representation of Aboriginal young people in the system remains unacceptably high. On an average day in 2019–20, Aboriginal children and young people aged 10–17 were 10 times more likely than their non-Aboriginal counterparts to be under youth justice supervision.[225] Diversion has a role to play in addressing this situation as identified in *Wirkara Kulpa*, Victoria's Aboriginal Youth Justice Strategy.[226]

Justice sector practitioners identified several challenges specific to young people from these cohorts. These challenges were reported to commence before a young person had even been charged by police. For example, there was a perception held by some practitioners consulted that young Aboriginal or African Australian people were less likely to receive pre-charge cautions than other groups.

The Crime Statistics Agency has noted data that Victoria Police is less likely to issue cautions to:

- young people in lower socio-economic areas
- young Aboriginal people accused of offences
- people accused of drug offences in relation to methamphetamine as opposed to cannabis.[227]

Receiving a charge instead of a pre-charge caution could become a barrier to participation in CCYD and the associated supports it brings, if the young person accumulated more charges in the future.

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[222] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[223] Department of Justice and Community Safety. *Information provided to the review, the evaluation of the Children's Court Youth Diversion Service*, April 2022.

[224] Centre for Multicultural Youth. *Submission to review*, p. 4.

[225] Victorian Government. 2022, *Wirkara Kulpa – Aboriginal Youth Justice Strategy 2022–2032,* p. 17.

[226] Victorian Government2022, *Wirkara Kulpa – Aboriginal Youth Justice Strategy 2022–2032,* p. 34, p. 47.

[227] Legislative Council Legal and Social Issues Committee. 2022, *Inquiry into Victoria's criminal justice system*, p. 214.

Additional challenges reportedly experienced by young people from CALD and Aboriginal communities included inconsistent access to CCYD throughout the pre-court and court processes, and language and cultural barriers impacting parental engagement during the charge, pre-court and assessment stages. Barriers to participation and successful completion of CCYD for these cohorts was reportedly compounded by COVID-19 related restrictions, when all matters were heard online.

The review has therefore considered opportunities to improve access to and outcomes in diversion for these groups.

Removing barriers to diversion

Given the high rates of over-representation of some young people in the justice system, and the policy recognition that diversion is part of the solution to this, this review has considered whether barriers to diversion could be reduced.[228]

From an international human rights law perspective, the Beijing Rules say at Article 11 that '[c]onsideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority'. The YJ Reform Act established limits and guides the decision-maker's consideration of when diversion is 'appropriate' in a number of ways:

- **Limitations:**
    - the young person must acknowledge responsibility for the offence and consent to diversion[229]
    - the prosecutor must consent to diversion[230]
- **Considerations:**[231]
    - the seriousness and the nature of the offending
    - the seriousness and the nature of any previous offending
    - the impact on the victim (if any)
    - the interests of justice and any other matter the Court considers appropriate

When considering how such provisions may create barriers to diversion, the landmark report of the Royal Commission into the Protection and Detention of Children in the Northern Territory is informative. In 2017, the Royal Commission recommended a number of measures to improve diversion. The Royal Commission considered that successful diversion programs, as a fundamental aspect of a good youth justice system, will include a number of identifiable features, including: 'Availability without admission of guilt: To require an admission of the offence before allowing the young person into diversion; may discourage some young offenders from participating'.[232]

In particular, with relevance to the Victorian legislative context, the Royal Commission recommended:

- reviewing the definition of the 'serious offences' that exclude a young person from eligibility for diversion, with a view to removing preclusion from diversion for less serious offending (recommendation 25.9) (Victoria does not have a similar 'serious offence' exclusion but does exclude some road safety offences from diversion and legislation also imposes a statutory bar in some circumstances where there is a mandatory sentencing outcome for an offence)

[228] Victorian Government. 2022, *Youth Justice Strategic Plan 2020–2030*; Victorian Government. 2022, *Wirkara Kulpa – Aboriginal Youth Justice Strategy 2022–2032*.

[229] *Children, Youth and Families Act 2005*, s 356E.

[230] *Children, Youth and Families Act 2005*, s 356D(3).

[231] *Children, Youth and Families Act 2005*, s 356D(4).

[232] Royal Commission into the Protection and Detention of Children in the Northern Territory. 2017, *Final Report, Volume 2B*, p. 250-251.

- removing the requirement that a child or young person must admit to committing an offence when an officer is considering them for diversion and require instead that the child or young person 'does not deny' the offence (recommendation 25.12) (this is consistent with criteria in New Zealand).[233]

The Managing Judge of the Youth Justice Court told the Royal Commission that:

> Traffic offences are also outside the regime and this can potentially complicate the way in which matters that would otherwise go to diversion can proceed. For example, a youth may have committed offences of unlawful use of a motor vehicle but being the driver of the vehicle faces a charge of driving unlicensed. Whilst the more serious offending can be dealt with by a diversion, the unlicensed driving charge cannot.[234]

The requirement to admit the offence, the President of the Children's Court of NSW similarly told the Legislative Assembly Committee on Law and Safety in its *Inquiry into the adequacy of youth diversion programs in NSW* in 2018 that:

> one of the inhibitors to using the Young Offenders Act is that the child at the police station has to admit the crime. That is a real inhibitor sometimes … [W]e have advocated adopting the New Zealand system to enable children to be diverted under the Young Offenders act by using the process of "not deny" as opposed to admit the crime.[235]

This review considers that similar amendments should be considered in the Victorian context. Given the ongoing over-representation of Aboriginal and CALD young people in the youth justice system, there is an imperative to consider all appropriate avenues that reduce barriers to diversion.

The first recommendation is about maximising the range of appropriate offences for which diversion can be considered. The second is aimed at reducing the likelihood that young people are missing out on diversion because of concerns that they are admitting to an offence without trial. From a policy-perspective, accepting responsibility for unlawful behaviour should be a goal of diversion outcomes, not part of the threshold criteria before diversion can start.

Recommendation 5: That the Government consider how to remove barriers to diversion for young people from groups who are over-represented in the youth justice system. Further consultation should explore options including, but not limited to:

(a) reducing the exclusion of certain offences from consideration for diversion, and

(b) repealing the requirement in section 356E(1)(a) of the *Children, Youth and Families Act 2005* [or excluding such provisions from the new Youth Justice Act] for the accused young person to acknowledge responsibility for the offence to be eligible for diversion, and instead considering the New Zealand criteria that the young person 'does not deny' the offence (noting that the 'child should be encouraged to accept responsibility for unlawful behaviour' would remain a purpose of diversion in accordance with section 356C of the CYFA).

Supporting young people with designated Aboriginal and CALD workers

For Aboriginal young people and their families, the importance of connection to culture and kinship is paramount to rehabilitative and restorative practices.

[233] *Oranga Tamariki Act 1989* (NZ), s 246; Royal Commission into the Protection and Detention of Children in the Northern Territory. 2017, Final Report, Volume 2B, p. 276-277.

[234] Royal Commission into the Protection and Detention of Children in the Northern Territory. 2017, *Final Report, Volume 2B*, p. 268.

[235] Legislative Assembly Committee on Law and Safety (NSW). 2018, *Inquiry into the adequacy of youth diversion programs in NSW,* p. 18.

This review of the YJ Reform Act has also heard that there is great benefit in having CALD staff working in the youth justice system, creating a safe environment for young people and enhancing opportunities to engage with families. Young people the review met with emphasised that such staff need to be specific to the local community.[236]

The review notes that the priorities outlined in *Wirkara Kulpa*, Victoria's Aboriginal Youth Justice Strategy, and as emphasised by the Aboriginal Justice Caucus in its meeting with the review, are for pre-charge and pre-court diversion and for increasing the availability of the Aboriginal Youth Cautioning Program and other community-led models which increase the use of cautioning and diversion options, based on the principles of self-determination, early intervention and harm-reduction.[237]

The statutory requirement of this review is to consider court-based diversion as provided for in the YJ Reform Act. *Wirkara Kulpa* also has the goal of increased participation by Aboriginal children and young people in the CCYD Service.

As part of CCYD, young people are assigned a youth diversion coordinator. To facilitate access to and the experience of CCYD for Aboriginal and CALD young people, the review recommends the establishment of designated Aboriginal and CALD youth diversion coordinator positions, or the expansion of capacity in existing roles to undertake this function.

This recommendation is aligned with Recommendation 55 in the *Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system* report that the Government prioritise investment in Aboriginal-led diversionary programs.

Such workers would also increase capacity for engagement with families. *Wirkara Kulpa,* Victoria's Aboriginal Youth Justice Strategy, recognises that families are at the heart of Aboriginal culture and communities and has a 'deliberate focus on supporting and empowering families ... to walk alongside Aboriginal children and young people through every stage of the justice process and be part of their healing journey'.[238] The Centre for Multicultural Youth has similarly emphasised the importance of family involvement to support CALD young people, and the challenges with this occurring effectively within the current youth justice system (see discussion at section 5.3.2(d)).

Recommendation 6: That the Government consider how to support and strengthen opportunities for young people from groups who are over-represented in the youth justice system to participate in CCYD. Further consultation should explore options including, but not limited to establishing designated Aboriginal and CALD diversion coordinator positions to work with Aboriginal and culturally and linguistically diverse young people and their families, or in the alternative, expanding or exploring capacity within existing identified positions to undertake these roles.

Addressing the under-representation of African Australian young people in diversion

The review has found that African Australian young people are under-represented in youth diversion.

When the review met with young people and staff from the Centre for Multicultural Youth, the message was clear from that both groups that:

- the issues being considered by this review cannot be separated from consideration of the over-representation of African Australian young people in the justice system
- the relationship between the police and African Australian young people can be problematic and meeting participations reflected that it is hard to rebuild that trust

[236] Meeting with young people through the Centre for Multicultural Youth, April 2022.

[237] Victorian Government. 2022, *Wirkara Kulpa – Aboriginal Youth Justice Strategy 2022–2032,* p. 47.

[238] Victorian Government. 2022, *Wirkara Kulpa – Aboriginal Youth Justice Strategy 2022–2032*, p. 14.

- African Australian young people and their families face systemic racism in the justice system and in the Australian community, and
- there needs to be genuine engagement with communities and families affected by these laws, and that takes more time to build authentic relationships and should involve community leaders (younger and older).[239]

In its submission to this review of the YJ Reform Act, the Centre for Multicultural Youth emphasised this point: '[r]acism in the justice system and policing contributes to the disproportionate criminalisation of particular cohorts of young Australians from refugee and migrant backgrounds, compounding the challenges they face when they come into contact with the justice system, and resulting in inequitable outcomes, and ultimately, overrepresentation'.[240]

The review recognises that the under-representation of young people in diversion cannot be meaningfully considered on its own, but must be considered as part of an examination of the experiences of African Australian young people in the justice system and in Australian society.

In the *Youth Justice Diversion Statement* released in April 2022, the Government announced that it will establish a South Sudanese Australian Youth Justice Expert Working Group in 2022 to address the over-representation of South Sudanese young people in the criminal justice system.[241] The Working Group will bring together community and justice sector representatives and will be in a position to design community engagement activities. This is a positive development and this review considers that further measures to address the under-representation of African Australian young people in diversion should be considered as part of the work of this group. Firstly, this approach will allow the issue to be considered with broader community input than the timeframes for this review have allowed, and secondly, the issue can be considered in its broader context, rather than being confined to the provisions of the YJ Reform Act.

Recommendation 7: That the Government undertake further work with community and justice sector stakeholders, including through the South Sudanese Australian Youth Justice Expert Working Group which will be established in 2022, to address the under-representation of African Australian young people in CCYD.

(e) Strengthening information and engagement opportunities for victims of crime

Finally in this section, as requested by the Victims of Crime Commissioner, this review has considered the victim experience in accordance with the Victims' Charter and the principle that all people affected by crime are to have their particular needs taken into account.[242]

The review notes that diversion of a young person away from the criminal justice system to the CCYD service can have significant ramifications for case outcomes. Where a young person completes a diversion program to the satisfaction of the court, the court must discharge the young person without any finding of guilt. This can have significant emotional and practical consequences for a victim.

The withdrawal of criminal charges means that victims do not have the opportunity to complete a Victim Impact Statement, do not have formal recognition of victim status, and can have their access to victim compensation, financial assistance and restitution limited. From a personal perspective, victims can feel like their experience has been invalidated by the courts.

[239] Meeting with young people through the Centre for Multicultural Youth, April 2022; Meeting with staff, Centre for Multicultural Youth, April 2022.

[240] Centre for Multicultural Youth. *Submission to the review*, p. 4.

[241] Victorian Government. 2022, *Diversion: keeping young people out of justice to lead successful lives*, p. 23.

[242] *Victims' Charter Act 2006*, s 6(2).

Justice sector practitioners who work with victims have observed that many victims want to be valued and treated as an important contributor, rather than feel like they are 'working against' the system to be heard. They want to have opportunities to communicate the impacts of the crime on their lives, and for this to be seen as central to the criminal justice process rather than an afterthought.

Currently, victims are not advised when the Children's Court of Victoria is considering diverting a young person. Given the significant impact youth justice diversion can have on an outcome in a matter, this review has concluded that there needs to be communication about the diversion process for victims who want this.

There is a greater opportunity for victim inclusion in the CCYD process (and other relevant youth justice processes). The review makes an overarching recommendation about strengthening opportunities for victims of crime to engage in youth justice processes in a supported way in section 9 below.

6. Youth control orders

The review is required under section 492B(3)B) of the CYFA to consider the operation of youth control orders. The operation and effect of these provisions is discussed below.

6.1 Overview of youth control orders

Although the overall rate of youth offending was consistently decreasing in the years leading up the YJ Reform Act, a number of high-profile incidents were seen to have eroded public confidence in the youth justice system (see discussion at section 3.1). The Armytage and Ogloff Youth Justice Review concluded in 2017 that '[w]hatever the reasons, the system was caught off guard by the changing nature of youth offending and the complexity of young people's needs'.[243]

The youth control order (YCO) was introduced to balance the urgent need of protecting community safety, diverting children and young people from youth justice custodial facilities, and providing rehabilitation opportunities. It became available as a sentencing option following the commencement of Part 3 of the YJ Reform Act on 1 June 2018.

The YJ Reform Act provides the following objects of a YCO:

> (a) to provide a judicially supervised, intensive supervision regime for the child; and
>
> (b) to penalise the child by imposing restrictions on his or her liberty; and
>
> (c) to provide intensive, targeted supervision to the child, to help him or her to develop an ability to abide by the law; and
>
> (d) to engage the child in education, training or work (whether paid or unpaid); and
>
> (e) to give the child an opportunity to demonstrate a desire to cease offending.[244]

6.1.1 Youth sentencing options

According to the CYFA, in sentencing young offenders, the main goal is their rehabilitation.[245] This approach is different to sentencing adults. In sentencing adults, Victorian courts need to focus on punishment and deterrence as well as rehabilitation.

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[243] Penny Armytage and James Ogloff. 2017, *Youth Justice Review and Strategy: Meeting needs and reducing offending, Part 1*, p. iii.

[244] *Children, Youth and Families Act 2005*, s 409A.

[245] *Children, Youth and Families Act 2005*, s 362.

If the court finds a young person guilty of an offence, the court may:

- without conviction, dismiss the charge
- without conviction, dismiss the charge and order the young person give an accountable or non-accountable undertaking
- without conviction, place the child on a good behaviour bond
- with or without conviction, impose a fine
- with or without conviction, place the child on probation
- with or without conviction, make a youth supervision order
- convict the child and make a youth attendance order
- convict the child and make a youth control order
- convict the child and order that the child be detained in a youth residential centre
- convict the child and order that the child be detained in a youth justice centre.

In deciding what an appropriate sentence is, the magistrate must consider things like:

- the child's relationship with their family
- any reports requested by the court
- how the sentence suits the child
- the need to protect the community.[246]

The magistrate may also consider a range of other factors, such as:

- whether the child has been found guilty of any offence in the past
- any report, submission or evidence given on behalf of the child
- any victim impact statement.

Young people on community-based orders or in custody are supervised by the Youth Justice staff from DJCS.

The magistrate may also consider not giving a sentence immediately. This is called deferring a sentence.

This is usually done in the best interests of the young person. It allows them to take steps to address the issues that led to the offending behaviour. It may also be done to allow the person to participate in a group conference.

If the magistrate decides to defer sentencing, they may do so for up to four months. The case will be adjourned to another date, and there may be an order for a pre-sentence report to be done.

At the end of the deferral period, the magistrate will give a sentencing order. The sentence will take into account any progress the person may have made during the deferral period.

Youth control orders are part of the category of supervised community orders, with probation orders, youth supervision orders, and youth attendance orders. Supervised community orders can be appropriate for young people who display more complex offending behaviours and give young people opportunity to address their behaviours in a community-based environment.

[246] *Children, Youth and Families Act 2005*, s 362.

Probation

Probation is a community-based order imposed by a magistrate in the Children's Court. Young people who have committed offences when aged between 10 and 17 years can be placed on probation. Probation is usually given to young people who have offended once or twice before.

The duration of a probation order is generally 12 months. However, the order may be up to 18 months if the offence is punishable by imprisonment of more than 10 years, or the child has been found guilty of more than one offence.

The child must obey certain conditions for the duration of probation, including:

- reporting to a youth justice worker when required
- not reoffending
- obeying any instructions of a youth justice worker
- reporting any changes of address, school or employment
- not leaving Victoria without permission.

The Children's Court may impose additional conditions. For example, the child may need to attend school, reside at a particular place, undergo treatment or counselling, or not use alcohol or drugs.

If the child breaches the conditions of probation, the court may:

- confirm the probation order
- vary, add or substitute any condition of the order
- revoke probation and impose another sentence.

Youth supervision orders

A youth supervision order is a community- based order usually given to young people who have offended and appeared in court before and who have been found guilty of quite a serious offence, or numerous offences committed when under the age of 18.

A child on a youth supervision order is subject to a higher level of supervision than a child on a probation order.

A youth supervision order requires a child to:

- report to a youth justice unit
- undertake supervised community work if directed
- satisfy any other conditions.

The maximum period of a youth supervision order is generally 12 months. However, the order may be up to 18 months if the offence is punishable by imprisonment for more than 10 years, or the child has been found guilty of more than one offence.

Mandatory conditions of a youth supervision order include:

- not reoffending
- reporting to the youth justice unit as required
- obeying the instructions of a youth justice worker
- attending places specified in the youth supervision order (including community service work)
- reporting any changes of address, school or employment

- not leaving Victoria without permission.

If the child breaches the youth supervision order by reoffending or not complying with some part of the order, the Children's Court has the power to:

- vary the order and any conditions
- direct the child to comply with the order
- revoke the order and impose another sentence.

Youth attendance order

A youth attendance order is an alternative to detention for children aged 15 years or over at the time of sentencing.

The Children's Court can order a child on a youth attendance order to attend the youth justice unit of DJCS for a maximum of 12 months. The youth justice unit will specify:

- the number of hours that the child must attend, up to a maximum of 10 hours per week
- the dates and times that the child must attend
- the education and other program activities that the child will participate in, which may include counselling.

Under a youth attendance order, a child must:

- attend the youth justice unit as instructed
- not reoffend
- if directed, complete up to four hours of community service per week
- report any changes of address, school or employment
- comply with any special conditions set by the Children's Court.

If the child breaches the youth attendance order by reoffending or by not complying with some part of the order, the Children's Court has the power to:

- vary the order and any conditions
- direct the child to comply with the order
- revoke the order and impose another sentencing order, which could include detention in a youth justice centre for the remaining period of the order.

Youth control orders were introduced as a new sentencing option by the YJ Reform Act and are discussed in more detail below.

6.1.2 The youth control order

A YCO is served in the community under strict conditions. It is the most intensive sentencing order that a child can serve in the community in Victoria. Its introduction was intended to provide a further option for the court when considering sentencing of young people 'who would otherwise be sentenced to detention because of the seriousness or ongoing nature of their offending, but who have potential to be rehabilitated'.[247]

From 1 June 2018, the Children's Court could impose a YCO if:

[247] Legislative Council, Parliament of Victoria. *Parliamentary Debates*, 8 June 2017, 3339 (Jaala Pulford).

- the child commits an offence that is punishable by imprisonment
- the court is satisfied that the child is a suitable person to be placed on the order
- the child consents to the order
- a youth control order plan has been developed.[248]

The court can impose a youth control order for up to 12 months, but the order cannot extend longer than the young person's 21st birthday.[249]

Suitability assessment and planning

The process leading to the making of a YCO includes the court first referring the child to a YCO planning meeting.[250] This process involves:

- after a finding of guilt, the magistrate decides that the appropriate sentence would be detention in a youth justice centre or youth residential centre, but that a youth control order might be an alternative
- the matter is stood down for Youth Justice to conduct a suitability assessment considering:
    - legislative criteria
    - whether or not the young person consents
    - assessment tools (using the 'Risk Needs Responsivity' model)
- usually on the same day, but possibly after a short adjournment of up to seven days in some cases, Youth Justice will provide advice about suitability and make recommendations about participants (including a general recommendation to permit the convenor to invite others)
- whilst it is not mandatory under the legislation, Youth Justice will routinely ask the court to order a pre-sentence report under section 409(4) of the CYFA for the return date, which will usually be eight weeks away.

Planning meetings may be held at different stages of the process:

- before the making of a YCO to develop a YCO plan[251]
- after the making of a YCO to review or vary a YCO plan that is in force.[252]

Requirements for the meetings are set out in section 409T of the CYFA which deals with:

- the meeting being chaired by a convenor (who is an employee of the court)
- the convenor fixing a date for the meeting (this will be about six weeks after the finding of guilt and about a fortnight before the return date, with priority given to young people in custody)
- who is to attend the meeting (child, child's legal practitioner, youth justice officer, the convenor and others as directed by the court for example, members of the child's family, persons of significance to the child, police officers or child protection workers).

The convenor will spend several weeks preparing for the meeting. This will include:

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[248] *Children, Youth and Families Act 2005*, s 409C.

[249] *Children, Youth and Families Act 2005*, s 409B(2).

[250] *Children, Youth and Families Act 2005*, s 409D.

[251] *Children, Youth and Families Act 2005*, s 409S(a).

[252] *Children, Youth and Families Act 2005*, s 409S(b).

- engaging with the young person and family
- assessing the particular needs of the young person
- referrals to providers for assessments
- working with services to identify interventions.

On returning to court the following will be available:

- the convenor's report of meeting[253]
- the agreed YCO plan
- the Youth Justice pre-sentence report (which may address reasons why a lesser order might be more appropriate but will also be particularly relevant in the event the court decides not to make a YCO but to order detention instead).

Mandatory Conditions

When a YCO is made, the following are mandatory conditions:

- not commit another offence while the order is in force
- report to the Secretary of the DJCS within two working days after the order is made
- report to the Secretary as required while the order is in force
- comply with any lawful and reasonable directions given by the Secretary
- participate in education, training or work
- notify the Secretary of any change in residence, school or employment
- only leave Victoria with the permission of the Secretary.[254]

Optional Conditions

The court may also order the following optional conditions:

- participate in community service
- undergo alcohol or drug treatment
- attend counselling
- reside at a specific address
- abide by a curfew
- not have contact with specified persons
- participate in cultural programs
- not go to particular places or areas
- not use specified social media if this will protect the community.[255]

[253] *Children, Youth and Families Act 2005*, s 409V-409X, s 409Z.

[254] *Children, Youth and Families Act 2005*, s 409F(1).

[255] *Children, Youth and Families Act 2005,* s 409F(2).

Monitoring a young person on a youth control order

Young people on youth control orders must attend court at least once a month for the first half of the order. This is so the court can monitor the child's compliance with the order and ensure the conditions of the order are still suitable for the child. At the hearing, the court may vary the order if it thinks this would be appropriate.

Breaching a youth control order

If a young person breaches the conditions of a youth control order, an application can be made to the court for the order to be cancelled. The court may then revoke the order if:

- the child has failed to comply with the order to such an extent that they are no longer suitable to be on the order or
- the child commits an offence punishable by at least five years' imprisonment.[256]

If the court revokes the youth control order, it must sentence the child to detention. This is unless the court considers that detention is not appropriate due to exceptional circumstances.[257]

6.1.3 What do other jurisdictions do in this space?

Although all Australian jurisdictions have established at least one sentencing option as an alternative to detention that is placed at the top of the hierarchy of supervised orders, the YCO in Victoria has unique characteristics that differentiate it from other Australian jurisdictions.

Overseas, the Youth Justice Board of England and Wales introduced the Intensive Supervision and Surveillance Programme (ISSP) in 2001. It was developed with a focus on two main groups of offenders: (1) the small group of prolific young offenders who commit approximately a quarter of all young crime; and (2) those young people who are not prolific offenders but who commit crimes of a very serious nature and who would benefit from an early and intensive intervention. This program is perhaps the most similar example to the YCO in practice. It combines community-based supervision while providing multi-service responses aimed at addressing the factors that contribute to the young person's offending behaviour. Most young people spend six months on the ISSP. The most intensive supervision (25 hours per week) lasts for the first three months of the program. Following this, supervision continues at a reduced intensity (a minimum of five hours per week).

The ISSP was intended to provide courts with an intensive sentencing option for young people who were persistently offending and/or had committed serious offences.[258] The ISSP has been identified as a robust community-based sanction and 'a useful option for the youth courts, bridging the divide between custody and conventional community penalties'.[259]

6.2 Operation of youth control orders

YCOs have been used in a small number of cases. The limited data available is outlined below.

[256] *Children, Youth and Families Act 2005*, s 409Q.

[257] *Children, Youth and Families Act 2005*, s 409R.

[258] Youth Justice Board (UK). *ISSP the final report*, viewed 5 April 2022, <YJB 24-month reconviction-A5 (publishing.service.gov.uk)>.

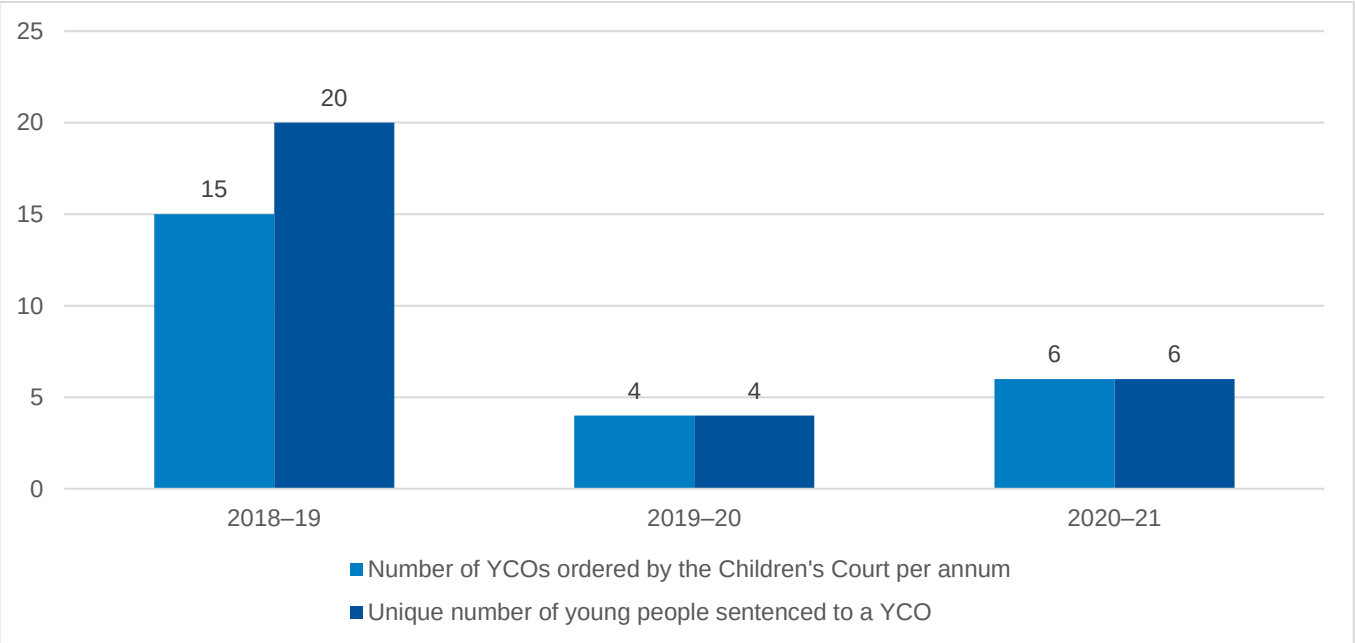
[259] R Moore et al. 2004, *ISSP: The Initial Report on the Intensive Supervision and Surveillance Programme*, p. 238.

6.2.1 Use of youth control orders in practice

Between the introduction of YCOs as a sentencing option in 2018 and June 2021, 56 young people have been assessed to determine initial suitability for a YCO. Of the 56 young people, 37 were deemed suitable after the initial assessment and 24 young people have been sentenced to a YCO. One child or young person was identified as an Aboriginal or Torres Strait Islander, eight came from CALD backgrounds and 14 were non-Aboriginal Australian.[260] The most common offences that led a child or young person to receiving a YCO were robbery, burglary, and carjacking.

Figure 15 below shows that the use of YCOs has decreased since 2018–19. The Children's Court of Victoria noted in its submission that COVID-19 is unlikely to have influenced the reduction in the use of YCOs, noting that the use of Youth Attendance Orders has 'held up notwithstanding the pandemic'.[261]

Figure 15: Youth control orders issued from 1 June 2018 to 20 June 2021



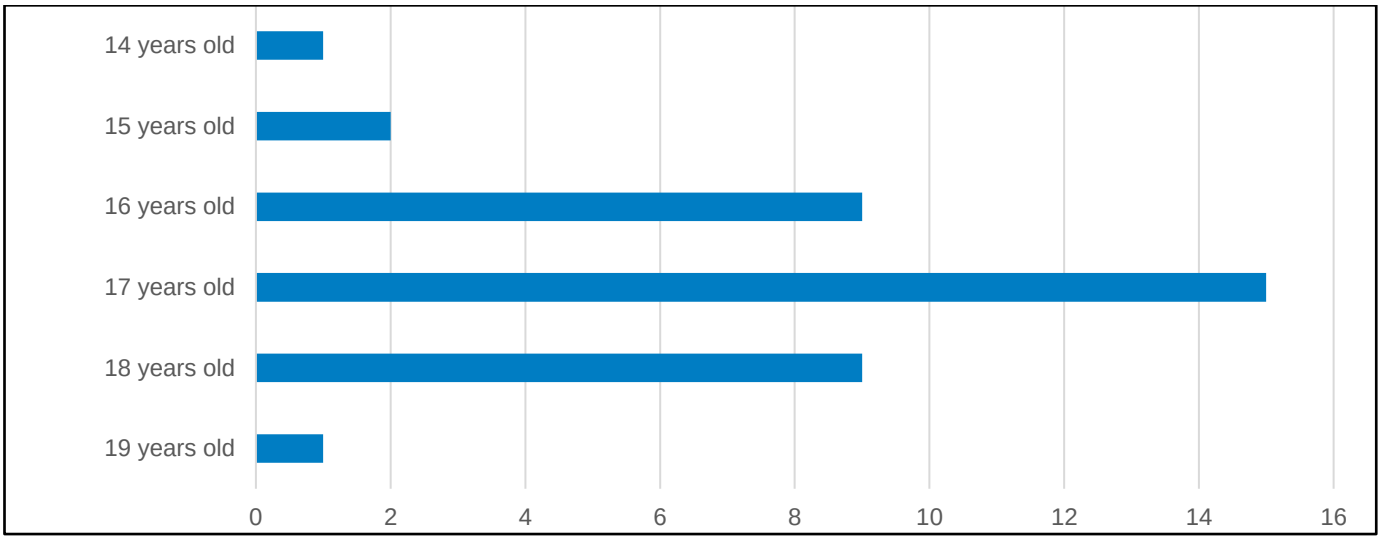
Note: Some young people were sentenced to multiple youth control orders concurrently.

In imposing the 24 YCOs, 35 planning meetings were conducted (a meeting can be completed multiple times for the young person if a variation needs to be made). The age range of young people by number of planning meetings held (sometimes multiple meetings for one person) is outlined in Figure 16 below.

[260] One young person had their YCO overturned on appeal and was resentenced to a different order.

[261] Children's Court of Victoria. *Submission to the review*, p. 2.

Figure 16: The age group of young people who were sentenced to a YCO, 1 June 2018 – 30 June 2021



The majority of YCOs have been issued for a period of between six and 12 months.[262]

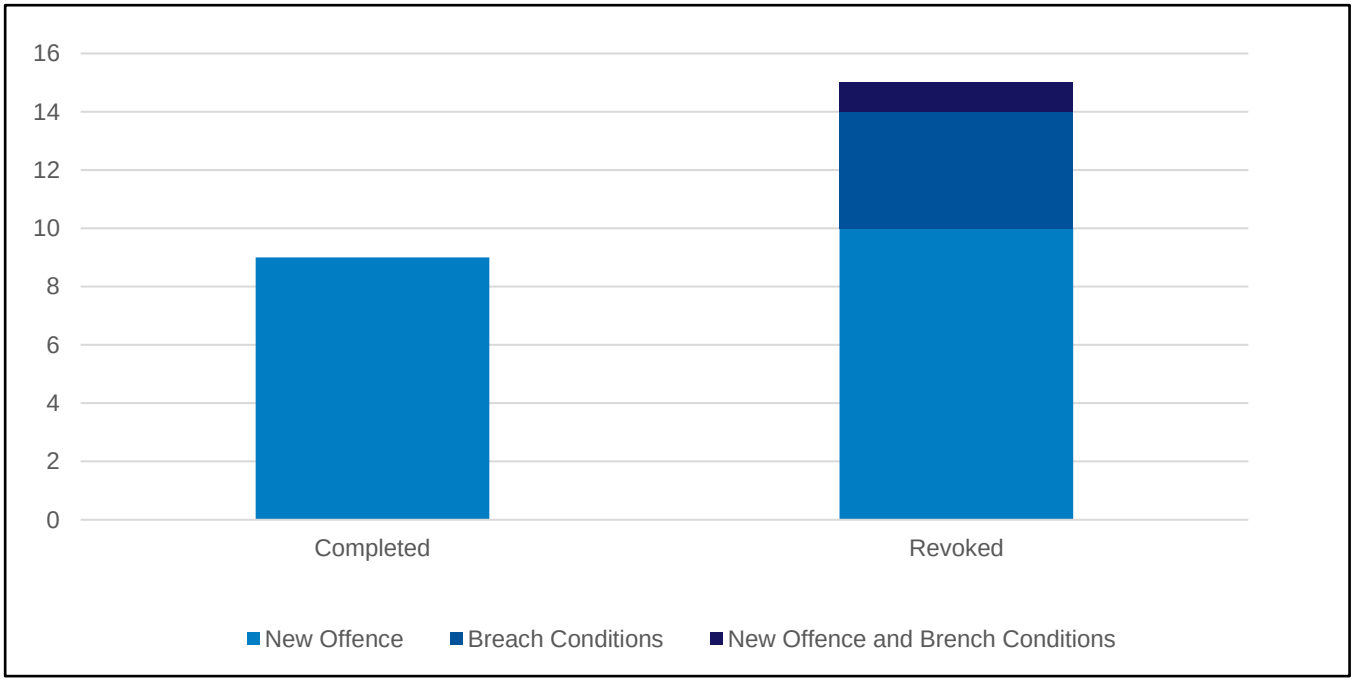
As Figure 17 shows, more than half of the 24 YCOs were revoked, and there were nine successful YCO completions. Of the revoked YCOs, 10 young people had their YCOs revoked because the committed new offences, and four had their orders revoked due to breach of other conditions. However, these breaches were still largely associated with new offending. For example, the young person failed to attend a counselling session that was a condition of the YCO, because they were in custody charged with a new offence. One young person had their YCO revoked for committing a new offence and breaching conditions. Revocations were not driven by breaches of other types of conditions placed on the YCO.

Under the CYFA, if the court revokes the youth control order, it must sentence the child to detention.[263]

[262] Data provided by the Children's Court of Victoria to the review, 4 May 2022.

[263] *Children, Youth and Families Act 2005*, s 409R.

Figure 17: YCO implementation status 1 June 2018–30 June 2021



6.2.2 YCOs in comparison to other sentencing options

Although the YCO is a supervised community-based order, it is used as an alternative to youth detention. Thus, the review has compared its use with both community-based orders and custodial orders. In general, the YCO is the least used of all sentencing options including community-based orders and custodial orders. As Figure 18 shows, the YCO is the least used and only made up 1.2 per cent of all community supervision sentences. The YCO was also little used compared with youth justice centre orders, see Figure 19.

Figure 18: Proportion of children and young people on YCOs as compared to any other supervised community-based court order (since 1 June 2018)

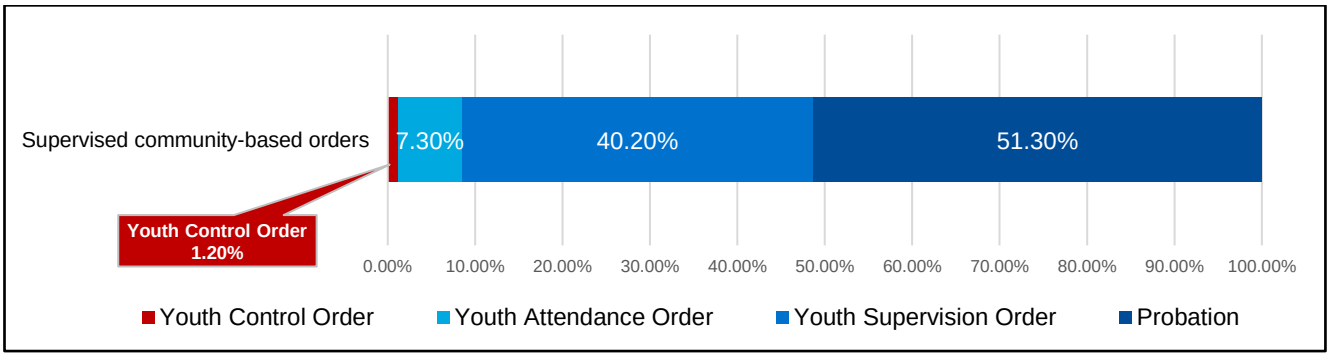
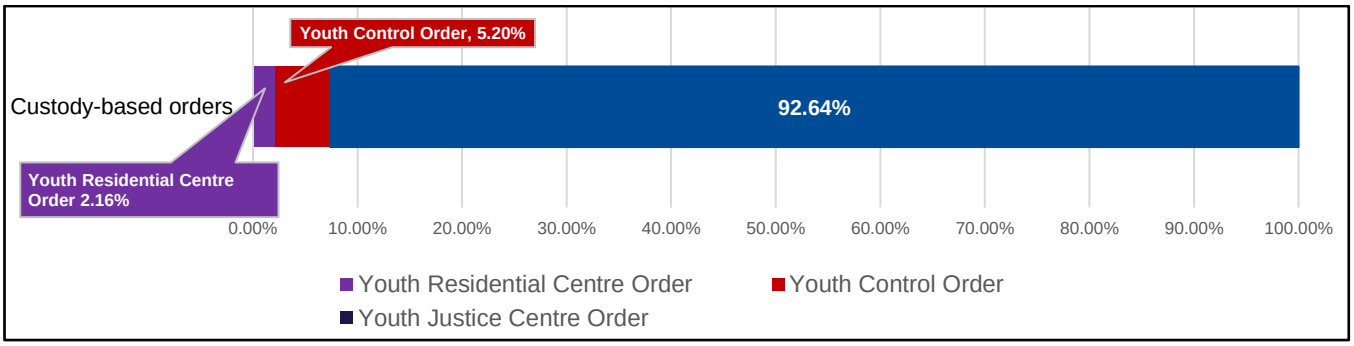


Figure 19: Proportion of children and young people on YCOs as compared to any other custody-based court order (since 1 June 2018)



6.3 Impact of youth control orders

The limited use of the YCOs in practice does not allow for meaningful statistical analysis. Stakeholder views on the impact of YCOs are discussed below.

6.3.1 What stakeholders told the review

The review received near-universal feedback from stakeholders that the YCO structure and requirements were generally too rigid to facilitate successful completion by the specific cohort of complex and high-risk young people that have had prior experience of the youth justice system.

Most supported the principle of having a sentencing option with more intensive conditions and which provided a last chance for young people to remain out of custody. For example, Victoria Legal Aid stated that:

> VLA supported Youth control orders (YCOs) being available in the youth sentencing hierarchy, noting that the target group is young offenders who are committing serious offences but who have the potential to be rehabilitated with intensive support and therefore are given the opportunity to serve a community sentence.[264]

The Centre for Multicultural Youth saw YCOs as 'an important alternative for young people … to detention'[265] and the Commission for Children and Young People saw 'a place for the youth control order in the CYFA's sentencing hierarchy'.[266]

However, many stakeholders also noted that YCOs have been too difficult to use and that they have not fulfilled the role intended in the sentencing hierarchy. For example, Victoria Police told the review that while considering that the YCO scheme 'has the potential to assist in reducing offending' it considers that in practice 'the scheme has had limited effectiveness and little to no impact on the 16- or 17-year-old cohort, their rehabilitation, or any tangible benefits to community safety'.[267]

Many stakeholders observed that there would need to be changes to the YCOs to improve use and completion rates. The review heard that in some regions, magistrates had stopped looking to YCOs as a realistic sentencing option. This view was reinforced by the Children Court of Victoria's submission to the review which observed that the statistics 'provide compelling evidence that the YCO has unfortunately not proved an effective sentencing order'.[268]

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[264] Victoria Legal Aid. *Submission to the review*, p. 9-10.

[265] Centre for Multicultural Youth. *Submission to the review*, p. 7.

[266] Commission for Children and Young People. *Submission to the review*, p. 8.

[267] Victoria Police. *Submission to the review*, p. 3.

[268] Children's Court of Victoria. *Submission to the review*, p. 1.

(a) Benefits of the youth control order model

Stakeholders identified a number of benefits in the YCO model. For example, justice sector practitioners noted that:

- **using Risk-Needs-Responsivity (RNR) tools pre-sentence** has been useful to ensure orders are tailored to the young person' risks and needs
- **having a multi-agency planning process** prior to imposing the order has been a useful way to engage the broader service system (beyond youth justice): the process makes clear the contributions that different services will make and builds in accountability from services to the young person and to the court— resulting in the delivery of strong wrap-around supports that address the causes of the offending behaviour; the planning process also provides the young person with agency, with one justice sector practitioner commenting that it 'empowers and encourages them to be involved in the process [and] I think that really goes to that rehabilitative process'
- **intensive case management** from youth justice has been useful in supporting a young person who is ready to change (Victoria Police commented that 'there should be a higher level of support provided to the child or young person' given this is the most intensive community order),[269] and
- **judicial monitoring** can be effective in supporting behaviour change by providing a regular check-in point for accountability and encouragement for the young person, particularly when the matter can come back before the same magistrate; it also provides accountability and visibility for community safety considerations.

Justice sector practitioners also highlighted that the original implementation of YCOs was accompanied by funding for a range of programs and services such as: Functional Family Therapy, Multisystemic Therapy, Multi-Agency Panels, the after-hours Youth Justice Community Support Service (YJCSS), and flexible brokerage, which have changed the landscape when considering the supports available to engage with young people and their families.

(b) Challenges of the youth control order model

Stakeholders also noted considerable challenges in the YCO model and how it has been applied in practice. These challenges are briefly outlined below.

Requirement for the young person to consent

Consent is a requirement for all supervised community orders, however, Victoria Police told the review that it considers that the 'requirement for the child or young person to consent to the YCO is a key factor in their low use … [as] supervision is seen as more onerous than detention'.[270] Others observed that given the intensive nature of the order, there needs to be an element of consent for it to be workable as an alternative to custody. They spoke of the benefits of involving the young person in the planning process and then agreeing to the conditions of the order as a powerful mechanism to support a change of mind-set and an engagement in the opportunity to change.

Intensity of conditions

The nature of conditions on a YCO was one of the biggest challenges raised by stakeholders. Many justice sector practitioners observed that the intensity of the YCO conditions do not align with the complexity of the lives of the young people who are considered for such an order. For example, the Children's Court of Victoria observed that:

[269] Victoria Police. Submission to the review, p. 3.

[270] Victoria Police. *Submission to the review*, p. 3.

> There is a fundamental disconnect between the commission of the sort of serious offences for which a YCO might have been expected to be ordered and the capacity, maturity and self-discipline of the young offender to comply with the strict requirements of the order.[271]

Victoria Legal Aid noted the inherent challenges experienced by the cohort of young people who are eligible for YCOs, commenting that the 'majority of children that come to the point of being subject to a term of imprisonment have histories of disengagement or non-compliance, and excluding children for those reasons does not align with the reality of their lives'.[272]

The feedback received was that even with young people who are willing to engage and comply, this and associated behaviour change can take time and is rarely linear. For example, a young person doing well on the order may experience disruption in their family life which temporarily impacts on their ability to attend school or training (for example, through temporary homelessness, family violence in the home, and needing to go and stay with relatives).

One judicial officer summed this up saying that 'often the more complex the situation, the less complex the response needs to be'. In practice, YCOs have often sought to impose a complex solution to a complex situation. This is illustrated in the case example in Box 3 below.

Box 3: Case example: Revocation of a youth control order

Alofa* is from a culturally and linguistically diverse background. From an early age he had been exposed to family violence and rejection from family, which was identified as contributing to substance use, absconding and association with anti-social peers.

Alofa's involvement with Youth Justice commenced at the age of 16. He had numerous periods of supervised bail and remand, Intensive Bail, a Probation Order, and Youth Supervision Orders for a range of property, motor vehicle, violent and drug-related offences. Throughout this time, Alofa returned to court for breach of community-based orders on three occasions for reoffending and non-compliance. In the year leading up to sentencing of the YCO, Alofa had spent an accumulation of over 250 days in custody on remand.

Alofa was 17 years old at the time of sentencing where a YCO was considered. At this time Alofa was facing several charges for offences committed over a two-month period. The most serious offences were multiple counts of robbery, involving the use of weapons. A youth justice practitioner observed that:

The young person was at risk of a custodial order due to the history of offending and non-compliance with previous community-based orders, and a history of limited engagement and participation with Youth Justice and referred support services.

Alofa requested that a YCO be considered. The matters were initially deferred for eight weeks to allow the YCO planning process, with Alofa remaining on remand during this time.

The planning process

When reflecting on the planning process, a youth justice practitioner said that:

It was beneficial for Youth Justice and the forensic treatment provider to be able to complete assessments on this young person's risks prior to sentencing, to allow the YCO plan to target the young person's evidence-based assessment of needs. The Youth Control Order (YCO) Planning Meeting (PM) was seen to be beneficial, allowing the young person to participate in open dialogue with their supports and contribute to planning. This was observed to improve the engagement and motivation of the young person and increase the confidence in their capacity.

[271] Children's Court of Victoria. *Submission to the review*, p. 2.

[272] Victoria Legal Aid. *Submission to the review*, p. 10.

Due to some changes in Alofa's circumstances and the need for further assessment, the deferral period was extended. The total deferral period on remand prior to sentencing was 14 weeks.

Alofa was sentenced to a six-month YCO, with conditions to engage in education, substance use and forensic treatment, adhere to a curfew and not to carry weapons. Services in place as part of the YCO plan included Youth Justice Community Support Service, an employment agency, housing supports for transitional housing property, a cultural mentoring program, forensic treatment, and substance use treatment.

Experience of the order in practice

When considering the operation of the YCO in practice, a youth justice practitioner observed that:

The young person's attitude to the YCO and engagement with each service varied early on, overall being low. An unstable day program [resulting from services not meeting their commitments from the planning process]*, a breakdown in accommodation and associated family relationship, and substance use contributed to non-compliance and impacted the young person's confidence in their capability to complete the order. … The COVID-19 pandemic also contributed to service delivery barriers regarding mode of service intervention and availability of services due to increasing community restrictions. This was observed to cause a loss of confidence in the support system and YCO plan for the young person.*

The nature of the YCO was also seen as a barrier:

The lack of flexibility on a YCO to be able to adjust the plan to meet this young person's presenting complexities and circumstances impacted on the capacity of the young person to meet the requirements and special conditions of the order.

The young person was subject to regular judicial monitoring hearings. However, in this case, judicial monitoring was not seen as a mechanism to deter non-compliance, improve the young person's engagement, and reduce their risk of reoffending. Youth Justice proceeded with revocation of the YCO, given there were no other options available to the court to respond to non-compliance.

Alofa spent three months on the YCO prior to revocation and was then sentenced to a two-month Youth Justice Centre Order. Youth Parole was not accessed, and Alofa was released on remission to continue supervision under their Youth Supervision Order. He has since reoffended and entered the adult system.

A youth justice worker observed that:

The YCO process and order did not have the intended consequences for this young person by diverting them from the justice system and custody, and if sentenced to custody initially, the young person may have seen an outcome in lesser duration and there may have been a greater participation in treatment in a contained environment, as well as access to Youth Parole.

The length of the planning process is … too long, particularly as it was completed on remand, restricting freedoms, extending uncertainty, and delaying consequence. If completed in the community, this would have afforded an opportunity to test and assess attitude, compliance, and commitment in an uncontrolled environment, as opposed to the young person transitioning to the community after an extensive period on remand to a highly restrictive order and level of supervision which they had not previously experienced.

Whilst in the target group for this order, this young person's significant complexities impacted on their capacity to meet the intensive requirements and conditions of this order following release. This was observed to impact on their confidence in the judicial and service system, and on their sense of achievement.

* Name has been changed to protect personal privacy.

Some justice and education sector practitioners raised concerns about the number of hours young people are expected to engage in education while on YCOs (up to 25 hours per week) as being unrealistic.[273] They noted that many young people within the youth justice system have complex histories of trauma and face significant barriers to engagement in education. There was a need for specialist support in schools and other educational institutions to deliver the tailored and flexible approaches required to support young people to re-engage with education over time.

Victoria Legal Aid noted that it saw '25 hours a week of work being routinely imposed' on YCOs.[274] A justice sector practitioner noted that:

> The young people who are looking at these orders are often living chaotic and unstructured lives – and we expect them to go from zero to attending school 25 hours a week. Some of them can't do two hours when they first start. The lack of flexibility means that these orders are just not well designed for the cohort they're dealing with.
>
> **Justice sector practitioner**

Many stakeholders felt that YCOs set young people up to fail. The Victorian Aboriginal Legal Service noted that it 'does not support [YCOs], which are punitive and overly onerous. YCOs do not support children and young people to heal and thrive; rather, they set young people up to fail'.[275]

A number of practitioners from both the justice and education sectors said that young people often tell each other not to go on YCOs (noting that the young person has to consent to the order). The general reputation of these orders is that the conditions are too hard to meet, so young people choose to go into custody straight away, get settled and get it over with. A young person at the Parkville Youth Justice Centre told the review that:

> I chose not to do a YCO. It's harder than coming to custody. You're set up to fail.
>
> **Young person, Parkville Youth Justice Centre**

The Victorian Aboriginal Legal Service noted that 'we have clients who would prefer to serve a custodial sentence than a YCO, because the conditions attached to the order mean that it is harder to complete successfully than a period of detention'.[276]

Victoria Police encouraged '[i]nnovative and imaginative thinking in the crafting of YCO conditions specific to the individual child/young person … as a way to provide the best support possible for each child's situation'.[277] This sentiment was echoed by a young person who told the review that:

> We need better support, not conditions that set you up to fail.
>
> **Young person, Malmsbury Youth Justice Centre**

Some regions have found ways to use YCOs flexibly. In the case example in Box 4 below, time commitments under the order started slowly and built up over the course of the order. The magistrate's willingness to take an active and flexible approach, and the availability of intensive case management support from Youth Justice appeared to be critical factors in making YCOs a more practical option for management of the young person in the community and giving them an opportunity to get back on track.

[273] For example: Centre for Multicultural Youth. *Submission to the review*, p. 7; Commission for Children and Young People. *Submission to the review*, p. 8.

[274] Victoria Legal Aid. *Submission to the review*, p. 10.

[275] Victorian Aboriginal Legal Service. *Submission to the review*, p. 7.

[276] Victorian Aboriginal Legal Service. *Submission to the review*, p. 7.

[277] Victoria Police. *Submission to the review*, p. 4.

Box 4: Case example: Successful completion of a youth control order

Sam* had been engaged with youth justice for a number of years and was now in her late teens. She had a complex family background and intergenerational experience of the justice system. When reflecting on why Sam was considered for a YCO, the youth justice worker observed that:

When she first came into the system, [Sam] didn't engage. She'd breached other orders in the past so may not have been the most obvious candidate for a YCO. But it was either give her a go at this YCO planning process or she goes into custody.

When considering what made the YCO successful, the youth justice worker said that:

She was ready for change. [Sam] had recently committed a couple of more minor offences, but she wasn't at the peak of her offending – there'd been a bit of a gap. She'd recently had reason to try hard to address her drug use. She was a bit older and getting more mature.

The planning process and case management approach was an important foundation.

I really took the approach of walking alongside her with the goal of working through together how we make this successful. I engaged her family to give them a sense of how hard she was working.

The youth justice worker also said that the nature of the plan itself was a critical factor in success.

The plan was flexible. She had the 16 week planning process and then the order was for 4 months. If it had been for 12 months it would have felt impossible. She had experience of custody and at times said that 'custody would be easier than this!'

But with that shorter period, she could always hopefully keep going for that little bit longer. And the expectations under the order built up over time. She didn't start with 25 hours of commitments – but we started with a plan for week 1 and built it up every single week. She was exhausted as it was. She'd gone from no structure to a YCO. But compulsory conditions on the order were important. She got targeted support and was engaging with services that she'd refused to turn up to in the past because she felt like she had to and that it was in her interests this time.

The youth justice worker also described several other critical factors that had aligned in this case:

- There was a Magistrate who was invested in the process and was open to a flexible approach to the order. He addressed Sam and gave her positive feedback on the effort she'd put in.
- Her lawyer was familiar with the youth justice system and was also really supportive and encouraging of Sam: we had a common goal that she wasn't set up to fail.
- Sam had a pre-existing relationship with one of the other support services.

The youth justice worker also noted that the YCO was made during the COVID-19 pandemic, so there was less in-person engagement which may have made the process less intense. When reflecting on what would have made the process better, the worker said that:

Having a highly engaged Magistrate during the planning process worked really well. We then had three different Magistrates for the judicial monitoring component. They were naturally less engaged with the individual case and we lost a bit of that impact of the court process being a place for positive reinforcement for Sam.

We didn't always get buy-in from the other services. Sometimes it was a matter of different levels of priority, but we could also make it easier by giving other services more guidance and templates which help them to participate in the process.

Sam successfully completed the YCO and hasn't returned to the youth justice system since: *In the end I said to her that she really proved everyone and herself wrong: she didn't think she could do it at the start either. But she was very resilient.* * Name has been changed to protect individual privacy.

The nature of the conditions

Some stakeholders also saw the nature of restrictive conditions as problematic: they saw conditions such as curfews, non-contact and social media conditions being routinely imposed, but difficult for young people to meet. Victoria Legal Aid observed that 'for young people with chaotic lives, such conditions can be isolating and highly stigmatising and in the case of a YCO will last for a significant time'.[278] A young person who spoke to the review said:

> When you're working and running late, a curfew can be really stressful. You don't know if you'll be able to get dinner.
>
> **Young person, Parkville Youth Justice Centre**

Another young person described their experience on a community order (not a YCO, but with conditions that could be common on a YCO) and how the nature of the conditions could make compliance difficult:

> When I was 15 I was on a community order with a curfew, I had to report into YJ [youth justice] three times a week, I had to attend appointments.
>
> Why does the YJ [youth justice worker] have to talk to my employer all the time? They [the employer] don't want to be harassed answering all these question after a hard day. It makes people even less likely to want to hire someone with a record.
>
> I wasn't allowed to get my Ls [learner driver permit] when I turned 16 as one of the conditions because I'd stolen a car. But I was really interested in driving: if I could have learned to drive and worked to save up to buy a car, I could have done it legally.
>
> In the end, all the conditions impacted my ability to comply.
>
> **Young person, Malmsbury Youth Justice Centre**

Victoria Legal Aid, the Commission for Children and Young People and the Victorian Aboriginal Legal Service called for a presumption against the use of restrictive conditions on youth orders except where necessary and achievable in the individual young person's circumstances.[279]

When reflecting on what types of programs and supports would be useful and help them to get back on the right track, young people spoke about things that are engaging: sports programs, a music program in a recording studio, and working with mentors who have skills you're interested in.[280] The review notes that the comments from young people are not balancing a full assessment of criminogenic need, but their comments provide insights on what can help to engage them in positive change. One young person told the review that:

> You need things that are engaging. Consider what they're interested in as an individual - that could be fixing cars, riding bikes, cutting hair – anything that engages them and lets them learn stuff that's relevant to their interests.
>
> **Young person, Malmsbury Youth Justice Centre**

When considering his experience of supervision in the community one young person said that he didn't mind turning up twice a week, but he'd get more out if it if it was more engaging than just sitting there: doing an activity, going for a walk. Several young people said the experience during the COVID pandemic of checking in over the phone with their youth justice worker was useful—it didn't take hours out of their day if they were working and they wondered if workers could do more outreach.[281]

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[278] Victoria Legal Aid. *Submission to the review*, p. 10–11.

[279] Victorian Aboriginal Legal Service. *Submission to the review*, p. 8; Commission for Children and Young People. *Submission to the review*, p. 8.

[280] Meeting with young people, Parkville Youth Justice Centre, April 2022.

[281] Meeting with young people, Parkville Youth Justice Centre, April 2022.

Victoria Police submitted the orders need to be 'specific and transparent, setting clear requirements of the young person to engage in regular beneficial and rehabilitative support service'.[282] Young people felt that the programs they can get made to do vary in their usefulness but that appropriate therapeutic treatment was useful. One young woman said that at one program:

> They asked us to touch our belly and imagine our emotions were a wave. It's not helpful. But I found talking to a psychologist was good. They treat you like a person, they check in with you, and you have practical conversations. You can be more open with them.
>
> **Young person, Parkville Youth Justice Centre**

Cultural considerations

The Aboriginal Justice Caucus raised the need to consider cultural safety when courts (and the Youth Parole Board) are imposing conditions on young people. They said that there should be guidance for decision-makers which should include safeguards to ensure that there is proper consideration of whether conditions are culturally appropriate for Aboriginal children and young people, having regard to the consideration of cultural safety.

In its submission as part of the ongoing project to develop a new Youth Justice Act, the Aboriginal Justice Caucus said that:

> there should be 'sentencing safeguards' included in the Act that ensure, for example:
>
> - to the extent possible, sentences or conditions do not disrupt education or connection with family, community and culture, or otherwise undermine a young person's healthy development and wellbeing.[283]

The Aboriginal Justice Caucus advocated for the inclusion of a specific sentencing principle for Aboriginal children and young people in the new Youth Justice principal Act. In its submission on the development of the Act, the Caucus said that:

> In dealing with an Aboriginal child or young person, sentences must:
>
> - support the social and emotional wellbeing of the child or young person and strengthen their connection to family, culture, Elders and community, noting that such responses will be more beneficial to Aboriginal children and young people and are likely to reduce the risks of reoffending;
> - support the participation and capacity of the child, their family, Elders and community to self-determine responses to offending behaviour, noting that this is consistent with the goal of preventing reoffending;
> - pay particular attention to the history, culture and circumstances of the Aboriginal child or young person; and
> - recognise that discriminatory systemic and historical factors have resulted in Aboriginal children and young people being over-represented in the criminal legal system and therefore sentences should reflect the need to reduce inequality and the resultant over-representation of Aboriginal children and young people.[284]

Members of the Caucus emphasised that training should come from the local community, not be generalised at a state-wide level, and that there was an opportunity to seek advice in individual cases from Aboriginal community-controlled organisations who work with young people involved with youth justice.

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[282] Victoria Police. *Submission to the review*, p. 3.

[283] Aboriginal Justice Caucus. 2021, *Equality and Justice for Our Kids: Aboriginal Justice Caucus submission on the development of a new Youth Justice Act for Victoria*, p. 40.

[284] Aboriginal Justice Caucus. 2021, *Equality and Justice for Our Kids: Aboriginal Justice Caucus submission on the development of a new Youth Justice Act for Victoria*, p. 37.

The revocation process

Several stakeholders also called for the removal or amendment of the 'revocation' provision. A number of reasons were given for this. One stakeholder said that the interventions built into the YCO should have a more therapeutic focus so 'breaches' were less likely to occur. Another said that the revocation provision undermines the effectiveness of the supports built into the YCO because it does not allow for gradual or flexible interventions that are most like to help the child rehabilitate and stop offending. Another stakeholder noted that criteria for revoking a YCO should be set at a higher threshold, for example, a YCO should not be revoked for minor reoffending (which is currently a breach of mandatory conditions imposed under the CYFA).

The review heard from justice sector practitioners that different magistrates took very different approaches to revocation of a YCO. In one region, a justice sector practitioner reported working with the magistrate to frequently change conditions if the young person's circumstances changed, rather than revoking the order if the original conditions could not be met. Other regions reported applying revocation more strictly and saying the YCOs did not present the court with any other option.

Victoria Legal Aid supported giving magistrates greater discretion to respond to breaches.[285] The Commission for Children and Young People recommended the removal of the presumption in favour of detention following revocation of a youth control order to enable greater judicial discretion.[286]

Families are not always engaged

The Centre for Multicultural Youth said it was concerned that too often, families are not sufficiently engaged with on the YCO conditions:

> CMY's experience is that in many instances, parents and families have not understood or are not aware of the conditions of their child's order, such as curfews or needing to attend specific appointments, which impacts on their ability to play this support role.[287]

An Aboriginal justice sector practitioner told the review that 'families are absolutely vital in supporting young people, but sometimes they don't even know what's happened. There needs to be better engagement with families'.

When asked what would help their families to be in a better position to support them when they're on an order, several young people said practical things like food vouchers, reflecting the basic needs that their families were struggling with.

While the review heard that the robust planning process involved in a YCO can mean that young people understand the conditions on these orders more than other types of community-based orders, stakeholders still raised concerns that the complexity of the conditions could be difficult for young people and their families to take in. This concern about family understanding was particularly highlighted by young people whose parents had low English literacy. One young person in custody told the review that:

> My family don't even understand what YJ [youth justice] is ... it would help if the YJ worker arranged for interpreters and things to be explained to them.
>
> **Young person, Parkville Youth Justice Centre**

[285] Victoria Legal Aid. *Submission to the review*, p. 11.

[286] Commission for Children and Young People. *Submission to the review*, p. 8.

[287] Centre for Multicultural Youth. *Submission to the review*, p. 7.

(c) Procedural issues

Justice sector practitioners also raised a number of procedural issues with the operation of the YCOs, in particular, the processes around a suitability assessment, what happens when a person turns 18 years of age and is still on a YCO, and the internal Youth Justice approval processes for reports to the court. These issues are described briefly below.

When a court requests a suitability assessment from Youth Justice

Upon a finding of guilt, if the Court is considering a YCO then the Court may ask Youth Justice for initial suitability advice to inform whether or not a YCO Planning Meeting should be ordered.

The amended CYFA provides that the Court does not have the power to a make a control order unless 'the Court has made enquiries of the Secretary and is satisfied that the child is a suitable person to be placed on a youth control order'.[288]

Assessment by Youth Justice as to suitability occurs over the period of the deferral, with informed advice provided to the Court prior to sentencing.

The DJCS's Practice Guidelines note that '[t]o ensure timely access to justice and sentencing, Youth Justice should aim to provide this initial advice on the day the young person is found guilty. In some cases, an adjournment may be required'.[289]

One justice sector practitioner considered that such advice to the court should be automatic, not delayed by weeks because of when in the process it can be formally requested.

6.4 Findings: Youth control orders

The review has found limited use of YCOs since the provision commenced in 2018. This is not surprising given the narrow cohort they are targeted to: young people who have committed serious offences (serious enough for custody to be a consideration), and who are able to be effectively supported in the community.

Some features of the YCO, and the broader supports that accompanied their implementation, have been useful additions to the youth justice system and have better enabled young people to receive intensive supports in line with the Risk-Needs-Responsivity (RNR) assessment.

However, when applied inflexibly, the YCO has not been effective in achieving its policy aims. Imposing intensive and tough restrictions, rapidly increasing hours of education and training, and sudden lifestyle changes can be challenging even for adults, let alone children and young people. When considering YCOs, the courts are often dealing with the circumstances of less mature young people who have been living unstructured and complex lives prior to the YCO being ordered. In many cases, when there are such difficult conditions to comply with, the YCO will ultimately lead young people to fail and return to custody. This is the opposite outcome of what the YJ Reform Act set up the YCO to achieve. Given these issues, justice sector stakeholders from many regions in Victoria have reported a lack of confidence in the usefulness and suitability of YCOs for this very complex cohort.

The review's findings are detailed further below, including opportunities to build on the useful features associated with YCOs through the development of a new Youth Justice principal Act.

6.4.1 Effects on offending and community safety

The limited use of YCOs means that they have, in practice, had a limited impact on offending and reoffending. However, the review makes several observations based on the limited data available.

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[288] *Children, Youth and Families Act 2005*, s 409C.

[289] Department of Justice and Community Safety. *Youth Control Order: Practice Guidelines 1 – Initial Advice to Court – Suitability for a Youth Control Order and Planning Meeting Participants*, p. 4.

In the small number of 24 young people who were sentenced to a YCO, more than half of them had their YCOs revoked. Sixty-seven per cent of YCOs were revoked due to the young person committing new offences. The 67 per cent recidivism rate suggests that the anticipated intensive and targeted supervision that could assist children and young people to abide by the law has fallen short of expectation.

Nine out of 24 YCOs were successfully completed. This represents a 38 per cent success rate which is nevertheless a promising sign in terms of youth justice interventions when targeted to young people in the right circumstances (noting the data discussed in section 3.1 above shows that in 2018–19, for example, only 24 per cent of people released from youth justice custody had not returned to the youth justice system within two years).

6.4.2 Effects on the wellbeing of young people

The limited use of YCOs means that it is difficult to assess the impact on the wellbeing of young people in any broad sense. When used flexibly and in circumstances where the young person is ready to change, case studies like that of 'Sam' in section 6.3.1(b) above, show that the YCO model can help the young person to turn their life around. However, where used inflexibly, the YCO demonstrates little positive impact on wellbeing. Indeed, YCOs may have a negative impact. The extensive time taken for planning may delay the young person being settled on a sentence and, if the YCO is not successful, decrease their confidence in the justice system and support services.

Aboriginal and Torres Strait Islander young people

Only one person ordered onto a YCO was identified as Aboriginal or Torres Strait Islander.

Young people from CALD backgrounds

The review notes that a third (eight of 24) of all YCOs ordered have been in relation to young people from a CALD background. There is no evidence before the review that this has been a negative measure for these young people. The opportunity provided by a YCO to give young people a last chance to be in the community (rather than in custody) has been welcomed by the Centre for Multicultural Youth. The bigger concern is that in many cases YCOs have been found to be an ineffective mechanism to achieve its goals. Opportunities for improvement to the YCO model are discussed further below.

6.4.3 Opportunities for improvement

The review has identified several opportunities for improvement and makes recommendations below to: better align the policy objectives of community-based orders with the framework established by the Armytage and Ogloff Youth Justice Review; build on the positive features associated with YCOs; strengthen court advice; improve the communication of orders; and strengthen the cultural consideration of Aboriginal children and young people when making orders.

(a) Aligning the policy objectives of community-based orders with the framework established by the Armytage and Ogloff Youth Justice Review

The review is asked under s 492B(1) of the CYFA to consider whether the policy objectives of the YJ Reform Act remain valid.

Many of the objects for YCOs set out in the YJ Reform Act remain relevant (to provide a judicially supervised, intensive supervision regime; to provide intensive, targeted supervision to the child; to engage the child in education, training or work; and to give the child an opportunity to demonstrate a desire to cease offending). However, the objective 'to penalise the child by imposing restrictions or his or her liberty' is no longer consistent with best practice youth justice policy approaches as understood following the comprehensive Armytage and Ogloff Youth Justice Review.

The Armytage and Ogloff Youth Justice Review noted 'that effective youth justice systems are oriented to address eight central criminogenic needs' (antisocial thoughts and attitudes, antisocial peers and associates; history of antisocial or offending behaviour; antisocial personality patterns; problematic family circumstances; problems at school or work; problems with leisure or recreation; and substance abuse), they are not designed around punitive responses.[290] The Review highlighted that a 'focus on rehabilitation will be the key, structured in a way that addresses criminogenic factors that drive offending'.[291]

The review notes that punishment or penalising young people is not one of the aims of the youth justice system set out in the *Youth Justice Strategic Plan 2020–2030*.

The review recommends that the purpose of 'penalising' young people be removed from community-based youth justice orders.

Recommendation 8: That the Government remove the purpose to 'penalise the child by imposing restrictions on his or her liberty' from community-based orders and give further consideration through the development of the new Youth Justice principal Act as to how the purpose of community-based orders can be aligned with the strategic vision for youth justice in Victoria (as set out in the *Youth Justice Strategic Plan 2020–2030*) to reduce offending and improve community safety, and to provide genuine opportunities for young people to turn their lives around.

(b) Building on the positive features associated with youth control orders in the new legislative framework

The review has found that while an additional community-based order with higher intensity has been a useful addition to the sentencing hierarchy, in practice, the YCO model has been applied with significant variation across Victoria. When applied inflexibly, the YCO model has been too rigid for the complexity of many young people's lives at this serious end of youth offending (when custody is being considered).

While the YCO could itself be amended to provide greater flexibility and to support greater consistency of interpretation and application, the review has been told that many magistrates and young people now avoid use of YCOs. Significant implementation effort would be required to change the current impression of YCOs amongst the judiciary, practitioners and young people. The current development of a new Youth Justice legislative framework provides an opportunity to build on the YCO and replace it with a new community-based order that can more flexibly draw on the YCO's more useful features.

The review has found that elements of the YCO model such as the use of assessment tools, planning meetings, intensive case management support, wrap around service responses, and regular monitoring have been effective for a certain cohort of young people who are ready to make change. Where these elements support young people, even if a small cohort, to remain out of custody and turn their lives around, the courts should retain the ability to draw on them.

The use of any restrictive conditions should be tailored to the circumstances of the young person and the nature of their offending. Restrictive conditions on YCOs can engage many Charter rights including the freedom of movement, freedom of expression, peaceful assembly and freedom of association.[292] Consistently with section 7(2) of the Charter, they should be the least restrictive measures possible to achieve the policy objective of supporting rehabilitation and reducing the likelihood of reoffending. The review does not support the retention of broad-brush restrictive conditions in legislation such as a ban on the use of social media, which is a primary form of communication for many young people. This is the equivalent to banning the use of a telephone and can operate to considerably isolate a young person.

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[290] Penny Armytage and James Ogloff. 2017, *Youth Justice Review and Strategy: Meeting needs and reducing offending, Executive summary*, p. 12, p. 6.

[291] Penny Armytage and James Ogloff. 2017, *Youth Justice Review and Strategy: Meeting needs and reducing offending, Executive summary*, p. 11.

[292] *Charter of Human Rights and Responsibilities Act 2006,* s 12, 15, 16.

The review notes that YCOs have been most successful where they have been tailored to the circumstances of the young person, such as building the intensity of conditions over time or changing conditions when circumstances change, and that courts should therefore have broader discretion in the types of conditions imposed and when revocation is triggered.

In addition, the review recognises that victims are affected by sentencing decisions and considers that there is further opportunity to consider victim safety where relevant when setting conditions for community-based orders, in addition to broader concepts of community safety.

Recommendation 9: That the Government build on the positive features associated with the YCO and consider replacing it as part of work on a new Youth Justice principal Act with a community-based order that:

(a) includes more flexible options for the use of: planning meetings, Risk-Needs-Responsivity (RNR) assessment tools pre-sentence, conditions requiring substantial time/program commitments, intensive case management, and judicial monitoring

(b) only uses restrictive conditions where necessary and achievable in the individual circumstances of the young person and in light of the nature of the offending, and does not use broad-brush restrictive conditions such as a ban on social media

(c) contains no presumption in favour of detention following revocation of an order, and

(d) requires the court to consider victim safety when setting conditions.

(c) Strengthening court advice

The implementation of YCOs have highlighted the challenges in getting the right advice to court at the right time and the importance of the working relationship between the court and youth justice when implementing complex legislative changes.

The review recommends that the Government strengthen the important work of the court advice service within Youth Justice.

The review also recommends that the Children's Court of Victoria and DJCS consider an appropriate state-wide approach to collaboration and communication to ensure that the court is effectively supported in its decision-making in all regions. The review observed that the working relationship was different in the various regions and often depended on the individuals involved more than a common approach adapted to regional contexts.

The United Kingdom (UK) provides one example of an alternative approach. In the UK, the youth offending teams provide the equivalent of Victoria's Youth Justice Court Advice Service. A practice framework is set out in a document called 'Making it Count in Court' which emphasises the approach of partnership working. The document states that:

> The investment in a collaborative system of working can show benefits such as a reduction in the number of adjournments, a reduction in requests for reports and increased confidence in the work of the [Youth Offending Teams]'.[293]

In the UK, collaborative ways of working are built through youth justice service level agreements, quarterly youth justice-specific court user groups, youth court panel meetings at least twice a year, and quarterly sentencing forums.[294] This partnership model builds awareness of issues in the broader youth justice system, outside of individual cases, but also helps to normalise the day-to-day communication of advice to the court at the local level.

[293] Youth Justice Board for England and Wales. 2009, *Making it Count in Court Guidance, Second Edition,* p. 16.

[294] Youth Justice Board for England and Wales. 2009, *Making it Count in Court Guidance, Second Edition,* pp. 18–20.

Recommendation 10: That the Government strengthen the role of Youth Justice in giving the courts relevant and timely information to support the consideration of each young person's risks and needs by:

(a) recognising the role of Youth Justice in advising the Court in the new Youth Justice principal Act

(b) reviewing the court advice service (as per the commitment in the Youth Justice Strategic Plan 2020-2030) to strengthen the quality of advice provided by Youth Justice to the courts, and

(c) working with the Children's Court of Victoria to further consider the state-wide approach to the relationship between the Court and Youth Justice to ensure effective communication and support for judicial officers in every region.

(d) Improving the communication of orders

The review notes that there have been a range of improvements to communication and engagement with CALD young people and their families, including Youth Justice's introduction of a practice guidelines on working with CALD young people and African Australian young people. In addition, the greater use of Multi-Systemic Therapy, Functional Family Therapy, and the trial of the Putting Families First initiative create stronger engagement pathways with families.

However, the review has found that more could be done to support the communication of youth justice orders to young people and their families. Communication assistance is particularly important when complex orders like YCOs are used.

Best practice in other jurisdictions is developing rapidly with the exploration of communication aids such as videos and visual resources, the use bilingual and bicultural workers, and interpreters. New Zealand has developed a court-appointed Communication Assistant service where speech-language therapists provide specialist advice to the court (described in Box 5 below).

Box 5: Example: Communication Assistant service—New Zealand

In New Zealand there is a Court-appointed Communication Assistant service. The service involves expert speech-language therapists being appointed by the Court to carry out a specialised assessment of the speech, language and communication skills of the person with a particular focus on how they are likely to manage communication demands posed by a court context (such as listening to, understanding and giving evidence, cross examination, and instructing lawyers).

The assessment explores what enables them to communicate as easily as possible, such as strategies that modify language or the use of visual supports.

A report is provided to the court with recommendations.

The Communication Assistant service may then be appointed as an Officer of the Court to act in a neutral, impartial role to assist all to communicate with the person in court proceedings.

There is a working party chaired by a judge exploring how best to develop the Communication Assistant roles in New Zealand courts.

Source: Talking Trouble website < >

The right to understand the legal process, in this case, the nature and implication of orders, is fundamental to an effective and fair criminal justice system. The Committee on the Rights of the Child notes that a fair trial requires that the child 'comprehend the charges, and possible consequences and penalties'. It goes on to note in General Comment No 24 that it is 'most appropriate if both the child and the parents/legal guardians receive the information in such a way that they can understand the charge(s) and the possible consequences'.[295]

[295] Committee on the Rights of the Child. 2019, *General Comment No 24: Children's rights in juvenile justice*, [57, 59].

The role of families in understanding orders is particularly important in the youth justice context. The review heard that young people from CALD backgrounds are sometimes missing out on family support because of communication barriers.

The review recommends that the Government give further consideration to how the use of communications advice and supports could assist justice sector stakeholders when explaining complex orders to young people and their families. Such a measure would support the right to equality before the law in section 8 of the Charter, as well as the best interests of the child in section 17(2), and the right to an appropriately adapted criminal procedure in section 25(3).

Recommendation 11: That the Government consider the specialist advice that could be made available to help justice sector stakeholders explain conditions on community-based orders to young people and their families. Further consultation should specifically explore the needs of people with disabilities, Aboriginal people, people from CALD backgrounds, and people with low English literacy, and should consider options including, but not limited to, the Communications Assistance model in New Zealand where communication specialists can assist the court, and the use of video or other forms of communication to supplement written court orders.

(e) Strengthening cultural considerations of Aboriginal children and young people when making orders

One of the domains of *Wirkara Kulpa – Aboriginal Youth Justice Strategy 2022–2032*, is creating a fair and equitable system for Aboriginal children and young people. *Wirkara Kulpa* states that this 'involves addressing 'racism and discrimination, unconscious bias and cultural ignorance'.[296]

The Aboriginal Justice Caucus raised with the review that when courts make orders like YCOs, there is a risk that the conditions set on those orders do not address cultural considerations.

By way of example, the *Bail Act 1977* imposes a requirement to consider issues that arise due to a person's Aboriginality when making bail decisions. The Bail Act requirements are outlined in Box 6 below.

Box 6: Bail Act requirements to consider issues that arise due to the person's Aboriginality

Section 3A of the Bail Act requires a court to:

take into account any issues that arise due to the person's Aboriginality, including –

(a) the person's cultural background, including the person's ties to extended family or place;

(b) any other relevant cultural issue or obligation.

Section 3A of the Bail Act interacts with section 19 of the Charter, which provides for cultural rights, and specifically recognises that Aboriginal persons hold distinct cultural rights. Under the Charter, Aboriginal people must not be denied the right to:

- enjoy their identity and culture
- maintain and use their language
- maintain their kinship ties, and
- maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

[296] Victorian Government. 2022, *Wirkara Kulpa – Aboriginal Youth Justice Strategy 2022-2032*, p. 12.

Section 3A was introduced in 2010 following a Victorian Law Reform Commission (VLRC) report on bail.[297] The VLRC recommended that bail authorities be required to take into account cultural factors and community expectations to prevent Aboriginal and Torres Strait Islander people from being remanded unnecessarily or bailed subject to inappropriate conditions.[298] It was considered important to take cultural considerations into account in relation to all aspects of the bail determination process, including assessing unacceptable risk and the setting of bail conditions.[299] The VLRC noted that:

It is important that … cultural factors and community expectations are taken into account when making bail decisions. Otherwise Indigenous Australians may be bailed on inappropriate bail conditions which they are more likely to breach, or remanded unnecessarily contributing to their overrepresentation in custody.

Without a specific direction to decision makers in the Bail Act, there is a risk that consideration of these matters will be inconsistent and will compound the historical and continuing disadvantage faced by Indigenous Australians in their contact with the criminal justice system.[300]

When the amendment incorporating section 3A was introduced into Parliament in 2010, the responsible Minister stated the following during the second reading speech:

Under section 3A, a decision-maker would be required to take into account matters such as an obligation to attend a community funeral or participate in community cultural activities when imposing conditions of bail on an accused who is Aboriginal.[301]

Since the Bail Act amendments were introduced, there has been extensive work to develop *Wirkara Kulpa,* Victoria's first Aboriginal Youth Justice Strategy. Aboriginal self-determination is the foundational principle that has shaped the development of *Wirkara Kulpa*. The Strategy aims to put Aboriginal children and young people at the centre of decisions about themselves, and to empower and include their families in planning and decision-making processes at key points of contact with the youth justice system.[302]

The review recommends that the new Youth Justice principal Act include sentencing principles for Aboriginal children and young people that would require cultural considerations when sentencing orders are made in the future and in way that aligns with the policy set out in *Wirkara Kulpa*, which includes domains of:

- empowering Aboriginal children, young people and families
- protecting cultural rights and increasing connection to family, community and culture
- diverting young people and addressing over-representation
- working towards Aboriginal-led justice responses
- creating a fair and equitable system for Aboriginal children and young people.[303]

Consideration should be given how sentencing principles can support these domains, including participation of the child and participation of the family and community of the child, and Elders, in the sentencing process.

[297] Victorian Law Reform Commission. 2007, *Review of the Bail Act: Final Report*.

[298] Victorian Law Reform Commission. 2007, *Review of the Bail Act: Final Report*, p. 180.

[299] Victorian Law Reform Commission. 2007, *Review of the Bail Act: Final Report*, p. 179.

[300] Victorian Law Reform Commission. 2007, *Review of the Bail Act: Final Report*, p. 180.

[301] Legislative Council, Parliament of Victoria. 2010, *Parliamentary Debates,* 29 July 2010, 3502 (John Lenders).

[302] Victorian Government. 2022, *Wirkara Kulpa: Aboriginal Youth Justice Strategy 2022–2032*, p. 11.

[303] Victorian Government. 2022, *Wirkara Kulpa: Aboriginal Youth Justice Strategy 2022–2032*, p. 34.

The review also notes that there is an opportunity to ensure that advice from Youth Justice to the court is also informed by cultural considerations, by expanding or further drawing on the expertise of Aboriginal practitioner roles within Youth Justice.

Recommendation 12: That the Government strengthen cultural considerations when sentencing orders are made in relation Aboriginal children and young people by:

(a) establishing sentencing principles for Aboriginal children and young people in the new Youth Justice principal Act that align with the policy set out in *Wirkara Kulpa – Aboriginal Youth Justice Strategy 2022-2032*

(b) seeking advice from the Judicial College of Victoria about the support required for judicial education to support implementation of the new sentencing principles, and

(b) exploring opportunities to expand or further draw on the expertise of Aboriginal practitioner roles within Youth Justice, particularly in the preparation of Youth Justice reports to the Court in relation to Aboriginal young people.

7. Serious youth offence categorisation

The review is required under section 492B(3)(e) of the CYFA to consider the categorisation of certain offences as serious youth offences, and under section 492B(3)(d), the operation of the system known as the dual track system. The operation and effect of these provisions are discussed below.

7.1 Overview of serious youth offence categorisation

The Government introduced a suite of legislative reforms through the YJ Reform Act to define certain serious offences committed by young people as Category A or B offences.[304] The objective of these reforms was to strengthen the criminal justice response to young people – particularly in relation to serious youth offences – to promote community safety overall. To reflect this intent, significant amendments were made to the CYFA, the Sentencing Act and the *Criminal Procedure Act 2009.*

Serious youth offence categorisation was used as the basis for the 'uplift' of cases from the Children's Court of Victoria to a superior court, to limit access to youth justice facilities for young people convicted of serious offences, and for the application of mandatory parole conditions. Each of these aspects of the YJ Reform Act are considered in more detail below, but first, the review outlines what the serious offence categories contain.

7.1.1 Serious offence categories and what they look like in practice

This subsection describes the types of offences that are deemed to be 'Category A' and 'Category B' offences. It then sets out data on offences young people have been charged with that fall within these categories. It also provides an overview of Category A and B offences that Aboriginal young people and young people from CALD backgrounds have been charged with, as the review has explored the potential impact of YJ Reform Act provisions on these groups.

Table 8 sets out a list of the Category A and B offences.

Table 8: A list of Category A and B offences

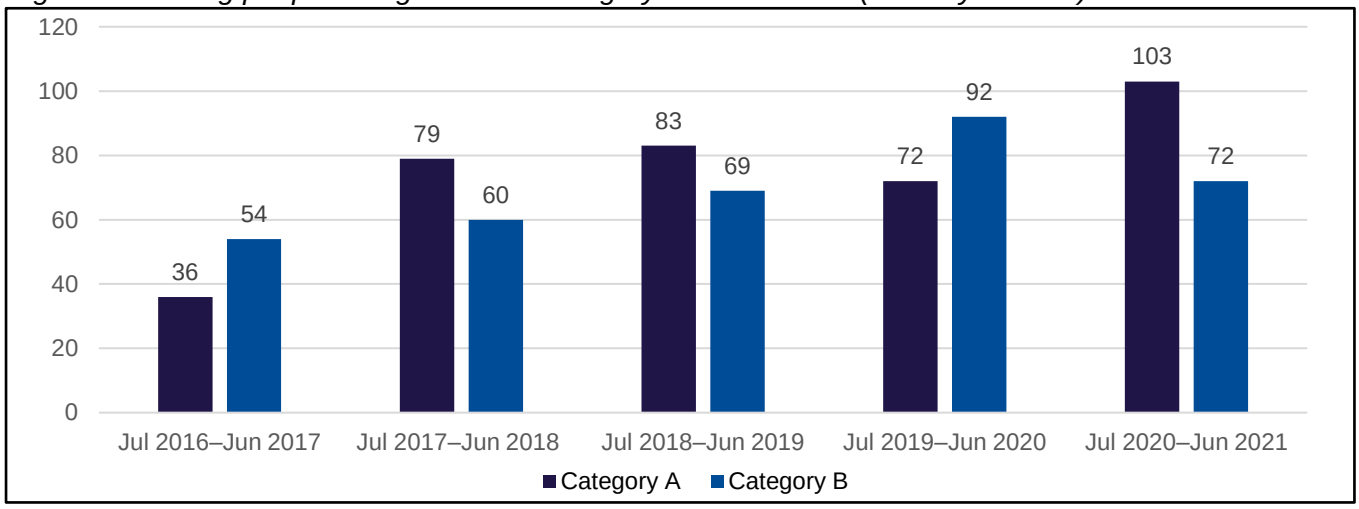
Category A	Category B

[304] *Children and Justice Legislation Amendment (Youth Justice Reform Act) 2017,* s 22; *Children, Youth and Families Act 2005*, s 3(1); *Sentencing Act 1991*, s 3(1); *Criminal Procedure Act 2009,* s 3.

Murder, attempted murder, manslaughter, child homicide, homicide by firearm, arson causing death Intentionally causing serious injury in circumstances of gross violence (Crimes Act, s 15A) Aggravated home invasion (Crimes Act, s 77B Aggravated carjacking (Crimes Act, s 79A) One or more of various terrorism offences	Recklessly causing serious injury in circumstances of gross violence (Crimes Act, s 15B) Rape (Crimes Act, s 38) Rape by compelling sexual penetration (Crimes Act, s 39) Home invasion (Crimes Act, s 77A) Carjacking (Crimes Act, s 79).

Figure 20 below shows the number of young people aged 10–17 charged with a Category A or B offence to 30 June 2021.

Figure 20: Young people charged with a Category A or B offence (10–17 years old)



Data was collected by the Crime Statistics Agency and is based on the age of the child or young person at the date Victoria Police recorded an outcome. The 2018–19 financial year reflects the first full year of data since the provisions commenced on 26 February 2018. Earlier data is included for reference as the offences themselves pre-dated these reforms.

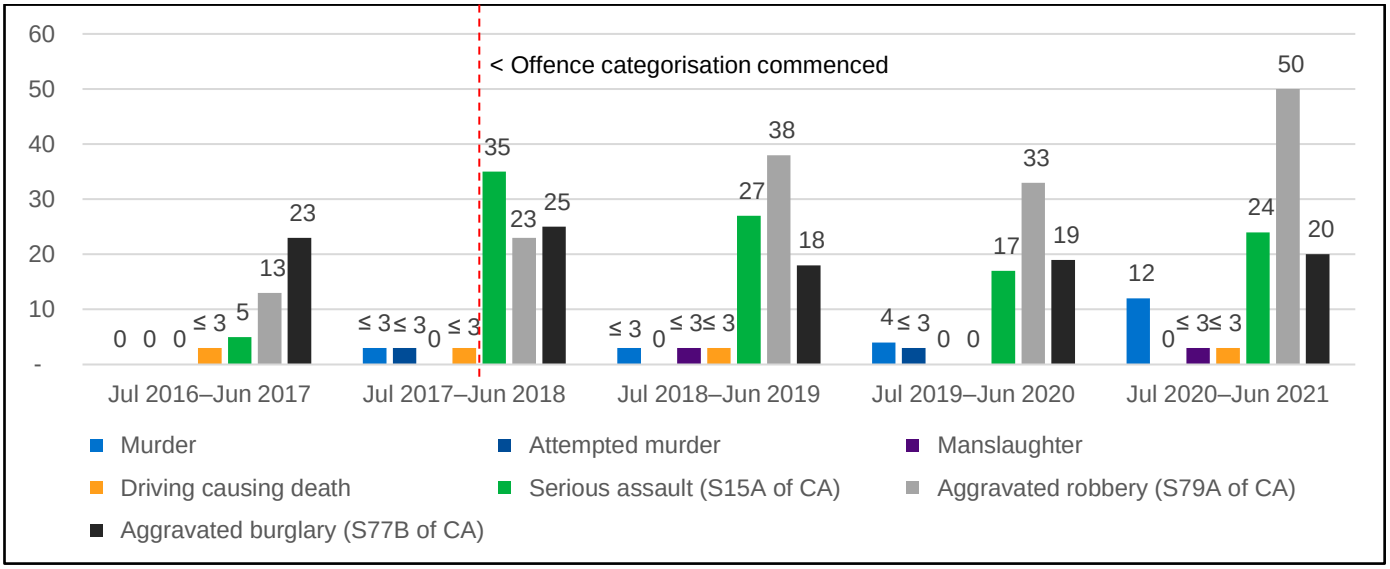
From July 2018 to June 2019, a total of 83 young people aged 10–17 were charged with a Category A offence and 69 were charged for a Category B offence. In the following reporting period for July 2019 to June 2020, there was a 13.3 per cent decrease in Category A offences compared to the previous year. However, Category B offences committed by children and young people aged 10–17 increased by 33.3 per cent in that same period.

This was followed by a 43.1 per cent increase for Category A offences committed by children and young people aged 10–17 in July 2020 to June 2021. Meanwhile, there was a 21.7 per cent decrease in Category B offences committed by children and young people aged 10–17 in July 2020 to June 2021. While these observations cannot be attributed to any one factor, the offence data for this reporting period should be interpreted within the context of the impacts caused by COVID-19 restrictions, which included lockdowns in the community during this period. It is also important to note that there are no clear trends observed in Figure 20 – the number of young people charged with Category A and B offences fluctuate from year to year.

Category A offences by offence type

Figure 21 shows the number of Category A offence types children and young people aged 10–17 were charged with in Victoria from July 2016 to June 2021.

Figure 21: Category A offence type overview (2016–21 before and after reform)



Note: Numbers between 1 and 3 are reported by the Crime Statistics Agency as ≤ 3. Offence categories are those used by the Crime Statistics Agency Offence Classification Convention. See paragraph below for further explanation of alignment to statutory provisions:

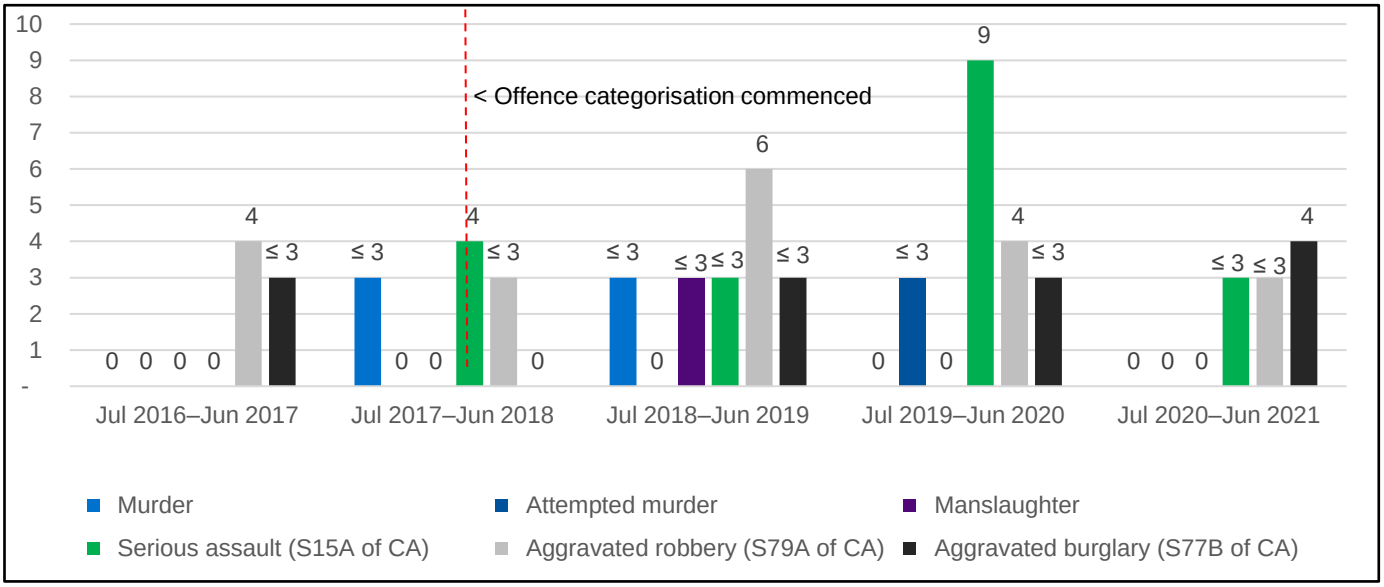
- aggravated carjacking is under the offence category of 'aggravated robbery' in data from the Crime Statistics Agency (section 79A of the Crimes Act)
- serious assault (intentionally causing serious injury in circumstances of gross violence) (only reporting on section 15A of the Crimes Act), and
- aggravated home invasion is under the offence category of 'aggravated burglary' in data from the Crime Statistics Agency (only reporting on section 77B of the Crimes Act).

On average, the three most common offences for which children and young people were charged across this period were: aggravated carjacking (reported as aggravated robbery); serious assault (intentionally causing injury in circumstances of gross violence, and aggravated home invasion (reported as aggravated burglary).

Aboriginal children and young people charged with Category A offences

Figure 22 shows the number of Aboriginal and Torres Strait Islander children and young people charged with Category A offences. This is broken down by offence type. Overall, the rates of Aboriginal children and young people being charged with Category A offences is extremely low (and noting that the Crime Statistics Agency groups results of between 1 and 3 as ≤ 3).

Figure 22: Number of Aboriginal and Torres Strait Islander children and young people charged with Category A by offence type

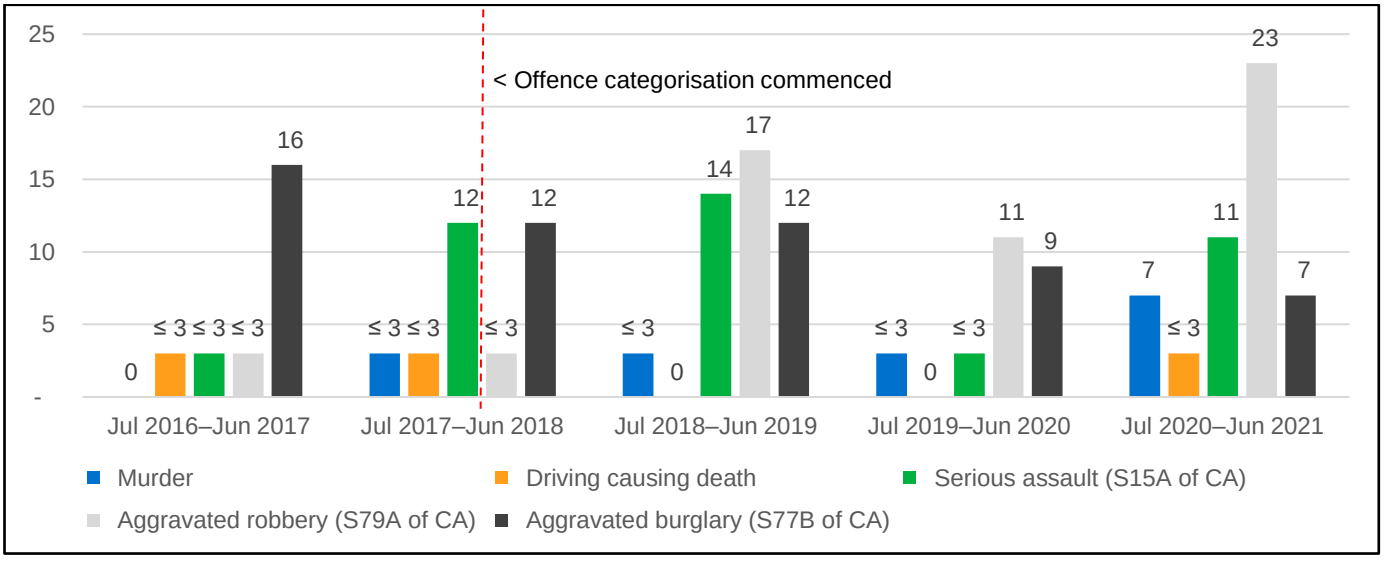


Note: Numbers between 1 and 3 are reported by the Crime Statistics Agency as ≤ 3.

Children and young people from a CALD background charged with Category A offences

Figure 23 shows the number of children and young people from a CALD background charged with Category A offences. This is broken down by offence type (and noting that the Crime Statistics Agency groups results of between 1 and 3 as ≤ 3).

Figure 23: Number of CALD children and young people charged with a Category A offence by offence type (2016–21 before and after reform)

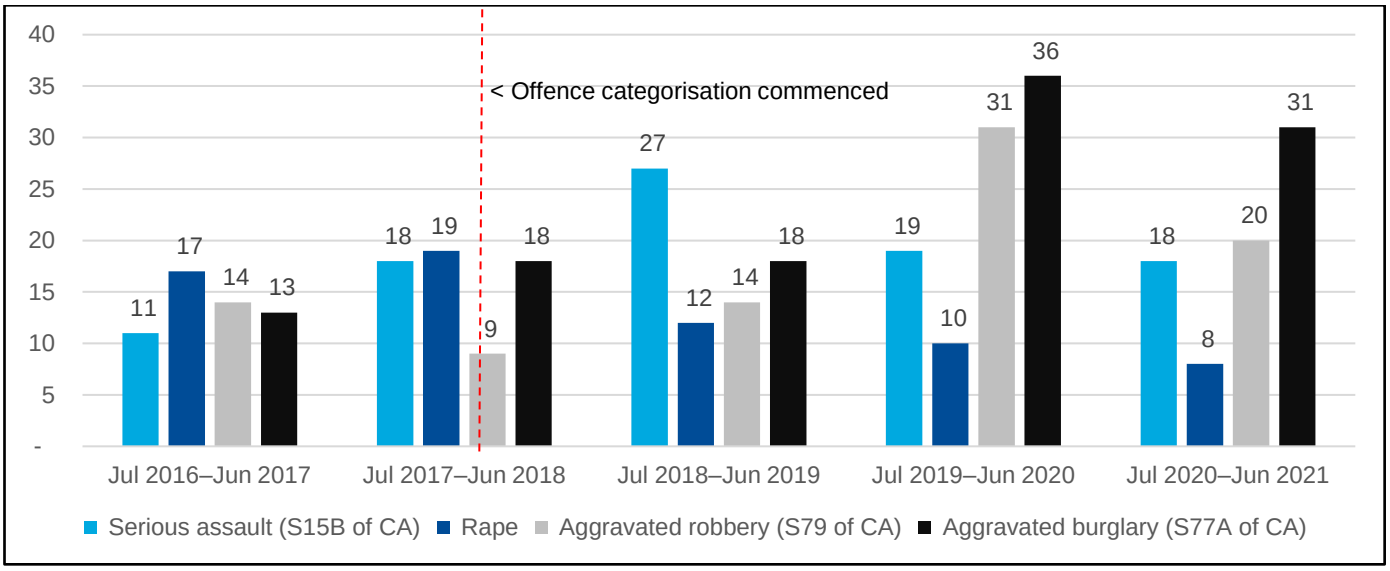


Note: Numbers between 1 and 3 are reported by the Crime Statistics Agency as ≤ 3.

Category B offences by offence type

Figure 24 shows the number of Category B offence types that children and young people aged 10–17 were charged with in Victoria from July 2016 to June 2021.

Figure 24: Category B offence type overview (2016–21 before and after reform)



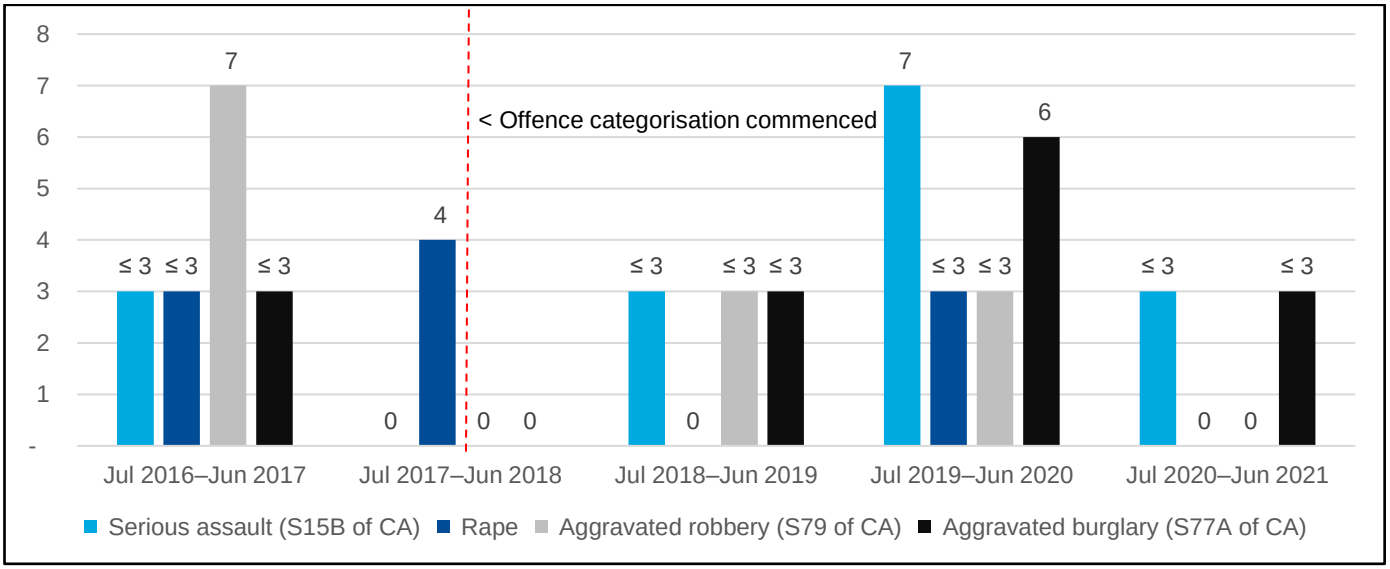
Note: Numbers between 1 and 3 are reported by the Crime Statistics Agency as ≤ 3. Offence categories are those used by the Crime Statistics Agency Offence Classification Convention:

- serious assault (recklessly causing serious injury in circumstances of gross violence) (only reporting on section 15B of the Crimes Act)
- carjacking is under the offence category of 'aggravated robbery' in data from the Crime Statistics Agency (section 79 of the Crimes Act), and
- home invasion under the offence category of 'aggravated burglary' in data from the Crime Statistics Agency (only reporting on section 77A of the Crimes Act).

Aboriginal children and young people charged with a Category B offence type

Figure 25 shows the number of Aboriginal and Torres Strait Islander children and young people charged with a Category B offence from July 2016 to June 2021. This is broken down by offence type (and noting that the Crime Statistics Agency groups results of 1–3 as ≤ 3).

Figure 25: Number of Aboriginal and Torres Strait Islander children and young people charged with a Category B offence type (2016–21 before and after reform)

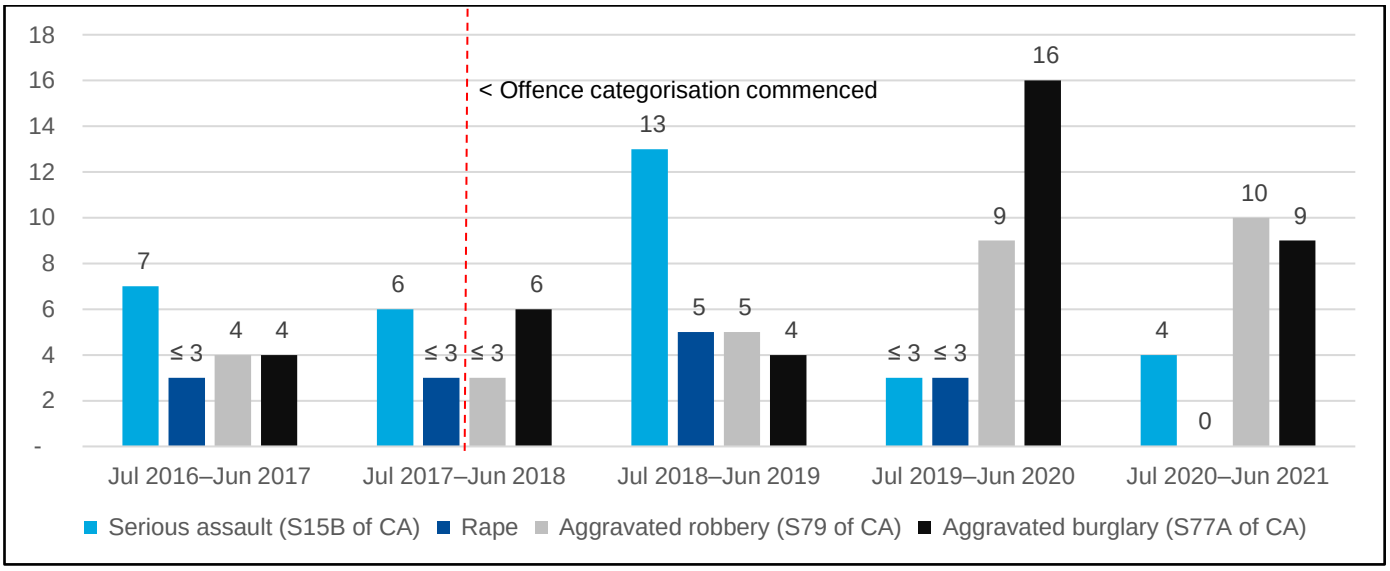


Note: Numbers between 1 and 3 are reported by the Crime Statistics Agency as ≤ 3.

Children and young people from a CALD background charged with Category B offences

Figure 26 shows the number of children and young people from a CALD background charged with Category B offences. This is broken down by offence type (and noting that the Crime Statistics Agency groups results of 1–3 as ≤ 3).

Figure 26: Number of CALD children and young people charged with Category B by offence type (2016–21 before and after reform)



Note: Numbers between 1 and 3 are reported by the Crime Statistics Agency as ≤ 3.

7.1.2 What stakeholders told the review about using serious offence categories to determine outcomes (general comments)

Several stakeholders recommended removal of the serious youth offence regime.[305] Some overarching comments are outlined here. Further below, the review considers each area influenced by the serious youth offence categorisation in more detail.

Outcomes determined by offence category

In terms of the categorisation itself, a number of stakeholders noted that the serious offence categorisation is not well-tailored for its purpose. For example, the Youth Parole Board noted that the serious youth offender regime focuses on a young person's offence category and does not consider 'their age, developmental stage, maturity and vulnerabilities'.[306]

[305] Victoria Legal Aid. *Submission to the review,* p. 5; Commission for Children and Young People. *Submission to the review,* p. 9; Victorian Aboriginal Legal Service. *Submission to the review,* p. 10.

[306] Youth Parole Board. *Submission to the review*, p. 2.

A number of justice sector stakeholders reflected that the serious youth offence categorisation does not adequately deal with the nature of most serious youth offending. They noted that serious youth offending often takes place in groups. Young people who have been more marginally engaged in an offence can still be charged with a Category A or B offence. Because of the automatic requirements that flow from the serious youth offence categorisation, courts have no ability to consider the degree of the young person's involvement. The Sentencing Advisory Council has noted that the 'serious offence category' can cover a wide range of seriousness:

> For example, home invasion is a Category B serious youth offence, while aggravated home invasion is Category A. A person can be guilty of home invasion if they enter a home in order to steal, along with another person, while someone is in the home. This is true even if they do not interact with the person, or even realise the person is in the home. If they commit the same offence with two other people instead of one, they are guilty of aggravated home invasion.[307]

The Supreme Court of Victoria also noted that homicide offences are heard in the Supreme Court not because of the new 'uplift' provisions but because the Supreme Court is the only court with jurisdiction to hear them. The Court noted that the review 'may wish to consider whether homicide offences should form a distinct category within the serious youth offence regime given they are treated differently to other Category A serious youth offences'.[308]

Victoria Police noted gaps in the categorisation and suggested that consideration be given 'to the creation of a framework for the appropriate management of children and young people who, because of their age [being under 16 years of age], do not fall within the Serious Youth Offender (SYO) regime, but continue to engage in category A and B offending'.[309]

Cohorts affected by the serious youth offender categorisation

Stakeholders also raised concerns about who is being affected by the serious youth offence categorisation. As a snapshot, the Youth Parole Board highlighted for the review that '[s]ixty per cent of young people under sentence for category A and B offences on 30 March 2022 were from culturally and linguistically diverse backgrounds, with the majority of these young people having been directly exposed to persecution or civil war or raised by parents who fled these experiences and came to Australia as refugees or asylum seekers. A further 10 per cent identified as Aboriginal and Torres Strait Islander'.[310]

The Centre for Multicultural Youth emphasised the broader picture that these figures create:

> There is a danger that the reforms have inadvertently exacerbated unjust, racialised outcomes, entrenching disadvantage and increasing longer term engagement with the justice system, amongst groups of multicultural young people who already experience significant disadvantage and exclusion. This is harmful not only to individuals, families, communities, but also to social cohesion more broadly.[311]

[307] Sentencing Advisory Council. 2019, *Rethinking Sentencing for Yong Adult Offenders*, p. 78; *Sentencing Act 1991*, s 2; *Crimes Act 1958*, s 77A, *Crimes Act 1958,* s 77B.

[308] Supreme Court of Victoria. *Submission to the review,* p. 1.

[309] Victoria Police. *Submission to the review*, p. 2.

[310] Youth Parole Board. *Submission to the review*, p. 2. There were 29 young people under sentence for category offences on 30 March 2022: 18 from culturally and linguistically diverse backgrounds (13 from African countries, 3 from South East Asia, 2 Pacific Islanders), eight who identified as Aboriginal or Torres Strait Islanders, and three non-Aboriginal Australians.

[311] Centre for Multicultural Youth. *Submission to the review*, p. 8-9.

7.2 Jurisdictional presumptions—'uplift'

As a consequence of the YJ Reform Act, the CYFA was amended to limit the summary jurisdiction of the Children's Court of Victoria with respect to serious youth offences. These amendments are commonly referred to as 'uplift' and were made to ensure that serious offences are heard in higher courts with the full range of sentencing options available for consideration. The correlation of this aim is that the reforms were designed to limit the circumstances in which the Children's Court of Victoria hears charges for serious youth offences.[312]

The YJ Reform Act introduced a presumption of uplift for Category A serious youth offences. Since those reforms commenced on 5 April 2018, a presumption of uplift to a higher court applies for young people aged 16 years or older when the offence was committed.[313]

The review notes however, that prior to these reforms the Children's Court of Victoria did not have jurisdiction to hear homicide offences (because the Supreme Court of Victoria is the only court with jurisdiction to hear them).[314] So, the operative change introduced by the YJ Reform Act was a presumption of uplift for non-fatal Category A offences.

The only circumstances where Category A offences will not be uplifted are where the young person was under 16 years old when the offence was alleged to be committed, or the prosecution requests the case be heard in the Children's Court of Victoria. Where an application for a summary hearing has been made, the Children's Court of Victoria must be satisfied that the available sentencing options will be adequate to deal with the child, and:

- it is in the interests of the victim that the matter be heard in the Children's Court, or
- the accused child is especially vulnerable because of a cognitive impairment or mental illness, or
- there is otherwise a substantial and compelling reason justifying the charge being heard in the Children's Court.

Where a young person is charged with having committed a Category B serious youth offence while aged 16 years or over, the court must consider whether exceptional circumstances apply that mean the charges are not suitable for a summary hearing.[315] The primary consideration for the exceptional circumstances test is the overall administration of justice for the community, as well as for the individual.[316] As such, exceptional circumstances may be established if the sentencing options available to the court are considered inadequate for dealing with the alleged offences. Before referring the case to a higher court for hearing and sentencing, the Court must give reasons for why the charge cannot be heard summarily.[317]

Despite the uplift provisions, proceedings for Category A and Category B serious youth offences can be transferred back to the Children's Court of Victoria. If this occurs, then the Children's Court must hear and determine those proceedings.[318]

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[312] Legislative Assembly, Parliament of Victoria. 2017, *Parliamentary Debates*, 8 June 2017, 3349 (Jaala Pulford).

[313] *Children, Youth and Families Act 2005* (Vic), s 356(6).

[314] *Children, Youth and Families Act 2005* (Vic), s 512.

[315] *Children, Youth and Families Act 2005* (Vic), s 356(8).

[316] *K v Children's Court of Victoria and Anor* [2015] VSC 645

[317] *Children, Youth and Families Act 2005* (Vic), s 356(3)(b).

[318] *Children, Youth and Families Act 2005* (Vic), s 356(9).

7.2.1 Uplift of Category A and B offences

Between June 2018 and June 2021, the Children's Court of Victoria reports that 12 Category A cases were uplifted (the review notes that 258 Category A offence charges were reported over the same period).[319] In the uplift cases, all the accused were young males between 18 and 20 years of age at the time of sentencing. Five of the cases resulted in sentences longer than the Children's Court of Victoria could have ordered. Two cases were transferred back to the Children's Court. Five resulted in a youth justice centre order. One resulted in time served and a community correction order. Of the remainder, three were sentenced to imprisonment (all of whom were co-offenders) and one case has not been finalised at the time of writing.[320]

The Children's Court noted its 'experience that while many Category A serious youth offences have not been 'uplifted' as a consequence of a successful application by the accused that they be heard and determined summarily pursuant to s.356(3) CYFA, in many other cases the prosecution have subsequently applied to withdraw the Category A offence'.[321]

Between June 2018 and June 2021, there were no Category B offences uplifted to a superior court.

Further observations from Children's Court judgments indicate a trend towards refusing applications for uplift of Category B offences.[322] Category B offences can be uplifted where exceptional circumstances exist that mean the charge should not be heard summarily. The Court has long regarded the 'exceptional circumstances' test as a particularly high threshold which requires something more than special, the circumstances must be *very* unusual.[323] In a recent case, the Children's Court refused the prosecution's application for uplift of a Category B offence which involved multiple incidents of aggravated burglary and carjacking. It held that the circumstances of the offending were of the kind routinely dealt with by the Children's Court and therefore were not unusual.[324] The Court also noted the adverse impact placed on the accused by his inability to attend pro-social programs due to COVID-19 restrictions. Overall, exceptional circumstances are considered on a case-by-case basis, but the Court has still demonstrated a high regard for the offender's age and prospects for rehabilitation in refusing applications for uplift of Category B offences.[325]

[319] Children's Court of Victoria. *Submission to the review*, p. 7.

[320] Children's Court of Victoria. *Submission to the review*, p. 7.

[321] Children's Court of Victoria. *Submission to the review*, p. 8.

[322] See *VicPol v KE* [2021].

[323] *K v Children's Court of Victoria and Anor* [2015] VSC 645, [26].

[324] *Victoria Police v KE* [2021] VChC 1, 14 [68].

[325] *CDPP v LS* [2019] VChC 7, 18 [52].

The County Court of Victoria has also shown a consideration for the relevance of a child's background and nature of offending with respect to allowing transfers of Category A offences under section 168A of the Sentencing Act. The County Court has held that the test for 'substantial and compelling reason' under section 168A is a 'relatively high' test, but one that is not overly difficult for the applicant to satisfy.[326] The accused's disadvantaged background will, however, generally not be enough to satisfy the test as the Court must consider Parliament's intention that Category A offences be heard in a higher court.[327] It seems rather that the Court will have regard for the particular vulnerability of the accused – especially in relation to their age – in allowing a transfer under section 168A.[328] While the provision makes it clear that only one reason must be given to satisfy this test, it appears that in practice that the Court is more likely to allow a transfer where multiple reasons have been established. In a recent case, the County Court approved an application for transfer based on the applicant's considerably disadvantaged background involving trauma, abuse and neglect, in addition to his extreme vulnerability if sentenced to custody.[329] This finding reflects the Courts' commitment to the overarching principle of not furthering harm, as well as a fundamental respect for the importance and distinction between the adult and children's jurisdiction.

7.2.2 What stakeholders told the review about uplift

A number of stakeholders raised concerns that uplift requirements are achieving little in practice to address serious youth offending. For example, Victoria Police reflected that more should be done to ensure uplift occurs. It told the review that 'the uplift element of the [serious youth offender] regime has had limited impact on both community safety and perceptions of community safety'. In Victoria Police's experience 'the exceptionally high threshold [for uplift] means that the community expectation that gravely serious examples of offending are heard and determined in higher courts is not being met under the current legislative framework'.[330] Other stakeholders emphasised that the process is creating barriers and causing delays in the system. These issues are discussed further below.

Access to bail

While not a legislative consequence of serious youth offence categorisation, a number of legal advocates noted that they had observed young people being refused bail because the offence is a Category A or B offence.[331] Victoria Legal Aid observed that children then spend extensive time on remand because it takes longer to resolve their matter once it is uplifted and provided the case example below.

> **Mahmud** (not his real name) is 17, he goes to high school and lives with his family in outer Melbourne.
>
> He was charged with intentionally cause injury in circumstances of gross violence, on a complicity basis for filming a fight that broke out. The circumstances of the incident were serious, but there was no evidence of any agreement, plan or understanding between Mahmud and his co-accused, the footage does not depict him intentionally assisting, encouraging or directing the commission of the offence and other people are shown to be filming as well who were not charged. Despite not being alleged to have committed or encouraged any violence, Mahmud was initially refused bail because of the seriousness of the charge. As a result, Mahmud spent 136 days in remand.
>
> Because of the uplift presumption the matter was adjourned to a committal and a summary jurisdiction application was listed. This created delay for time to prepare evidence and disclosure materials, and a complainant examination.

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[326] *PT v DPP* [2019] VCC 836, 21 [61].

[327] See *PT v DPP* [2019] VCC 836, 13 [33]; and *AH v DPP* [2019] VChC 3.

[328] *JL v DPP* [2019] VChC 2, 18 [59].

[329] *WB v DPP* [2019] VChC 1.

[330] Victoria Police. *Submission to the review*, p. 5.

[331] Victorian Aboriginal Legal Service. *Submission to review*, p. 9; Victoria Legal Aid. *Submission to the review*, p. 5.

> Ultimately a discontinuance was accepted and **all the charges were withdrawn**. While this is a just outcome for Mahmud, because of the Category A charge influence on the bail decision-maker in the first instance, Mahmud spent 136 days in remand at a young age; because of the uplift process the matter took almost a year to resolve.[332]

Delays and demand pressures

Both legal practitioners and judicial officers observed that the presumption in favour of uplift to the committal stream can significantly extend the time to resolve matters.

In its submission to the Victorian Law Reform Commission in September 2019, the Children's Court of Victoria noted that: '[t]he youth justice reforms have had two significant consequences. First, an increase in applications to determine jurisdiction … . Secondly, a significant increase in the number of matters initiated in the committal stream and in the number of committal hearings now heard and determined in the Court.[333]

The Children's Court of Victoria noted further in its submission to the review that on the amended uplift provisions:

- cases in which jurisdiction is contested and summary jurisdiction is ultimately refused have required three significant court events: (1) application regarding jurisdiction; (2) a committal hearing; (3) a jury trial or plea in a superior court, and
- those cases in which jurisdiction is contested and summary jurisdiction is ultimately granted have required two significant court events: (1) an application regarding jurisdiction; (2) a summary trial or plea in the CCV.

In contrast, the Court noted that the 'vast majority of cases prior to 5 April 2018 required only one significant court event, namely a summary trial or plea in the CCV [Children's Court of Victoria]'.[334]

The Victorian Aboriginal Legal Service observed that if the matter is uplifted, 'the VALS's solicitor will make a summary jurisdiction application for the matter to be heard in the lower court. This creates delays, on top of delays created by the COVID-19 pandemic'.[335]

Victoria Legal Aid described 'the longer committal stream timeframes (for example, for the service of the hand up brief), the need to make a summary jurisdiction application for every relevant matter, and prosecution time restraints which limits their capacity to consider the evidence and so limits early resolution of matters'.[336] VLA went on to reflect that 'in our experience police often charge with serious offences that are not reflective of the seriousness of the events or conduct'.[337] It provided the following case examples:

> **Luke** (not his real name) is 17 and works full-time in a factory. His family migrated from overseas when Luke was very young.
>
> With a group of friends he robbed the complainant's house. Although the circumstances of the matter could have been appropriately dealt with in the Children's Court, he was charged with the new offence of aggravated home invasion, which is Category A and was subject to the uplift presumption. The matter was then subject to adult jurisdiction timelines and was adjourned for months for the police to serve the brief.

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[332] Case example provided by Victoria Legal Aid. *Submission to the review,* p. 5-6.

[333] Children's Court of Victoria. 2019, *Submission to the Victorian Law Reform Commission*, Committals Issues Paper, p. 10.

[334] Children's Court of Victoria. *Submission to review*, p. 9.

[335] Victorian Aboriginal Legal Service. *Submission to the review*, p. 9.

[336] Victoria Legal Aid. *Submission to the review*, p. 6.

[337] Victoria Legal Aid. *Submission to the review*, p. 6.

> By the committal mention the OPP had had [the] opportunity to review the evidence and brief and the head charge was withdrawn. The matter was then referred back to Victoria Police and negotiations started again with a new prosecutor.
>
> Ultimately Luke received a **diversion**, after a protracted period in the Children's Court where he was facing the presumption of uplift. If there were no presumption to uplift, then the matter would stay in the Children's Court and be resolved significantly faster.[338]
>
> +++
>
> **Kareem** (not his real name) is a young tradesman and lives with family. Kareem was 17 years old when he was charged with the Cat A offence of aggravated car-jacking.
>
> Because of the Category A presumption to uplift to the County Court, Kareem's summary jurisdiction application was refused; the matter went through the adult committal process. When the OPP prosecutor was able to fully consider the evidence against Kareem at the Directions Hearing, the head charge was withdrawn, with an armed robbery instead proceeding; an application to remit the matter to the Children's Court was granted. Kareem received a **supervisory order** in the Children's Court.
>
> This matter took 12 months to resolve. If the matter had not been uplifted to the Children's Court the same (appropriate) outcome would have been reached much earlier.[339]
>
> +++
>
> **Gabriel** (not his real name) lives with his grandfather. He has an intellectual disability, attends school and likes to play cricket with his friends.
>
> Gabriel has only a limited prior history, but was charged with intentionally cause serious injury in circumstances of gross violence, for offending that occurred with a group of friends. The matter was uplifted to the adult jurisdiction because it was a Category A charge. As a result it took 8 months for the matter to progress and resolve to a charge of intentionally cause serious injury, return to the Children's Court, and finalise with a **good behaviour bond with a disability justice plan.**[340]

When considering the effects of uplift, the Youth Parole Board said that it:

> has observed delays in sentencing for young people in custody and fear that the uplift provisions created by the [YJ Reform Act] may be contributing to these delays and extending a young person's time on remand. The Board is concerned that these delays severely restrict young people's opportunities to participate in treatment and other rehabilitation programs and this hiatus may leave them in a holding pattern in crucial formative years of their development.[341]

The Youth Parole Board reviewed the records of young people under sentence for category A and B offences on 30 March 2022 and found that this cohort spent on average 218 days on remand prior to being sentenced. The Board reflected that '[t]his equates to a full school year, which is significant given they are in the final year of school and consolidating life-long personality traits and moral development'.[342]

The Children's Court said that it considers that the pre-amendment form of s 356(3) of the CYFA would significantly reduce demand pressure on the Children's Court, the County Court, and youth remand facilities.[343]

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[338] Case example provided by Victoria Legal Aid. *Submission to the review*, p. 6.

[339] Case example provided by Victoria Legal Aid. *Submission to the review*, p. 7.

[340] Case example provided by Victoria Legal Aid. *Submission to the review*, p. 7.

[341] Youth Parole Board. *Submission to the review*, p. 1.

[342] Youth Parole Board. *Submission to the review*, p. 1.

[343] Children's Court of Victoria. *Submission to the review*, p. 6.

Effects on parole planning

The Youth Parole Board noted that extended time on remand does not allow for parole planning should a custodial sentence be issued and may, as a result, unnecessarily prolong the time young people spend in custody. The Board observed that frequently being on remand may delay the young person being assessed for or being able to participate in rehabilitation programs. Further, the Board said that it 'has noticed that young people appear unsettled when on remand. This uncertainty can result in acting-out and involvement in incidents … the Board expects to see a period of settled behaviour in custody to demonstrate that they are ready to return to the community and behave in a pro-social manner'.[344]

The basis for 'uplift' decision-making

The Children's Court of Victoria also noted that sentencing sufficiency should be the primary consideration for uplift saying that it:

> considers that the overwhelming primary consideration … for determination of whether or not a charge for an indictable offence (other than a 'death offence') should be 'uplifted' to a superior court is whether or not the CCV has the sentencing options available to it under the CYFA which are adequate to respond to the young person's offending.[345]

Jurisdictional issue

The Office of Public Prosecutions also raised a jurisdictional issue associated with the uplift provisions. While section 356(6) of the CYFA creates a presumption that an offender aged 16 or older who is charged with a non-fatal Category A serious youth offence will be dealt with in a higher court, the Children's Court does not have the power to uplift any related or alternate indictable offence (that is, a non-Category A offence) unless the prosecution successfully argues for an uplift on the basis of 'exceptional circumstances'. The OPP observed that '[t]his discord has led to the fragmentation of proceedings – where charges derived from the same incident are prosecuted in two different courts'.[346] A split process such as this can require victims and witnesses to give evidence about the same serious criminal offending on multiple occasions in different courts. The OPP recommended that the Children's Court be given the power to send related and/or alternative indictable offences to a superior court with a Category A or B matter, and that the current test for exceptional circumstances which focuses on the adequacy of sentencing options be broadened to include the administration of justice.

7.3 Sentencing presumptions, including eligibility for 'dual track'

The second function of serious youth offence categorisation in the YJ Reform Act was to introduce sentencing presumptions, primarily aimed at limiting access to youth justice facilities for young people charged with serious offences. This was, in part, based on the notion of fostering accountability within this cohort and an understanding in young people of the 'impact of what they have done, the gravity of the offences that they have committed and the nature of consequence as it applies to them'.[347]

[344] Youth Parole Board. *Submission to the review*, p. 1–2.

[345] Children's Court of Victoria. *Submission to the review*, p. 6.

[346] The Office of Public Prosecutions. *Submission to the review*, p. 1.

[347] Legislative Assembly, Parliament of Victoria. 2017, *Parliamentary Debates*, 8 June 2017, 3347 (Jaala Pulford).

The Sentencing Act was amended by the YJ Reform Act to include a sentencing presumption for the courts when dealing with a 'young offender' who has committed a Category A serious youth offence.[193] The insertion of section 32(2C) into the Sentencing Act means that the court cannot sentence a young offender for a Category A serious youth offence to a youth justice centre or youth residential centre unless exceptional circumstances exist. Similarly, amendments were also made in relation to Category B offences to limit access to youth justice orders for young people who have previously been convicted of a Category A or B offence.[348]

These provisions limit access to 'dual track' sentencing. Dual track is a unique sentencing scheme in Victoria that enables young people aged 18-21 years old at the time of sentencing to receive a youth justice order. These provisions were designed to ensure young adults who commit serious offences would be sentenced to adult detention.

Although the stated policy intention was to apply these limitations to 'young adults' (18–21 year olds),[349] it appears that the changes under the Sentencing Act technically apply to children as well, as 'young offender' is defined in the Sentencing Act to mean 'an offender who at the time of being sentenced is under the age of 21 years'.[350]

Additionally, the CYFA was amended to require the Children's Court to consider the need to protect the community, or any person, from the violent or other wrongful acts of a child in all cases where the sentence is for a Category A or B offence.[351] This provision was designed to ensure that young people who commit serious offences are 'properly managed and the danger they pose to the community is taken into account in sentencing.'[352]

These provisions apply to serious youth offences committed on or after 26 February 2018.

7.3.1 Use of 'dual track' sentencing

Figure 27 shows the number of young adults aged 18 to 21 years of age per year on a youth justice centre order.

[348] *Sentencing Act 1991* (Vic), s 32(2D); *Children, Youth and Families Act 2005* (Vic), s 356(6).

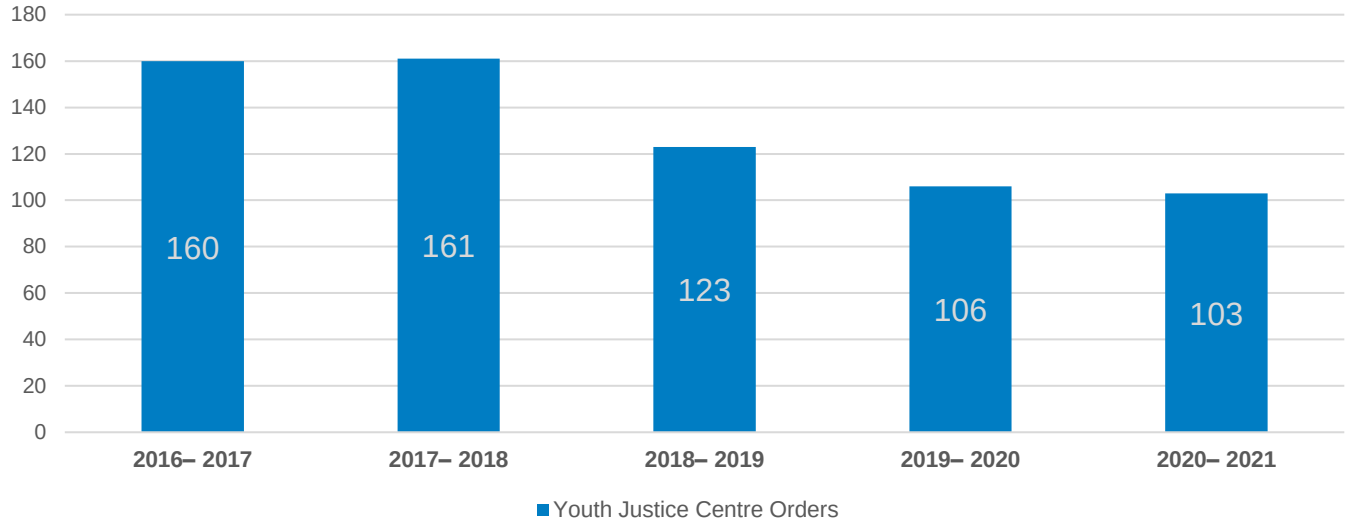
[349] Legislative Assembly, Parliament of Victoria. 2017, *Parliamentary Debates*, 8 June 2017, 3349 (Jaala Pulford).

[350] *Sentencing Act 1991*, s 3.

[351] *Children, Youth and Families Act 2005* (Vic), s 362(1)(g).

[352] Legislative Assembly, Parliament of Victoria. 2017, *Parliamentary Debates*, 8 June 2017, 3350 (Jaala Pulford).

Figure 27: Number of young adults (18–21) on a youth justice centre order



These figures show a 36 per cent reduction in the number of adults on a 'dual track' sentence from 2017–18 when the serious youth offence limitations on dual track were introduced, to 2020–21.

The downward trend in Figure 27 may be partially, but not completely, explained by changes in decision-making about dual track sentencing. The number of young adults aged 18–21 in adult custody rose by 12 per cent in 2018–19 (to 872), and then fell by 4 per cent in 2019–20 (840), and by a further 24 per cent in 2020–21 (637). So, the reduced dual track numbers in 2019–20 and 2020–21 partially reflects an overall reduction in this age group in both adult and youth custody during those years.[353]

7.3.2 What stakeholders told the review about 'dual track' sentencing

Victoria Police told the review that '[b]y removing the eligibility of some young people (aged between 18 and 21) from serving their sentence in a YJ facility, the YJ Reform Act has taken away a perceived key driver of recidivism, being older offenders in YJ facilities negatively influencing younger offenders'.[354]

However, other stakeholders noted concerns at the limitation.[355] The Centre for Multicultural Youth noted that '[s]erving time in the adult custodial system does nothing to rehabilitate a young person, who has often experienced intersecting forms of disadvantage or trauma prior to engaging in the criminal activity'.[356] Similarly, the Commission for Children and Young People said that it:

> reiterates its strong support for the dual track system, which reflects research that young adults have more in common neurobiologically, cognitively and psychologically with children than with adults. The dual track system recognises … the importance of providing them with a response based on rehabilitation rather than punishment. This is in the community's interest because once a young person enters the adult prison system, the prospect of their rehabilitation is reduced and the likelihood of them becoming entrenched in criminal activity increases.[357]

[353] Data provided by the Crime Statistics Agency. The data was extracted from LEAP on 18 January 2022 and is subject to change.

[354] Victoria Police. *Submission to the review*, p. 2.

[355] For example, Victorian Aboriginal Legal Service. *Submission to the review,* p. 10; Victoria Legal Aid. *Submission to the review,* p. 11.

[356] Centre for Multicultural Youth. *Submission to the review,* p. 8.

[357] Commission for Children and Young People. *Submission to the review,* p. 9.

The Aboriginal Justice Caucus supported young adults being able to access youth justice centres and supports that were suitable for their developmental stage.[358] The Commission for Children and Young People's *Our youth, Our way* report indicated the importance that Aboriginal young adults continued to have access to youth justice custody.[359]

Young people the review heard from welcomed the availability of dual track sentencing. One young woman who was serving a dual track sentence at Parkville Youth Justice Centre said that:

> I get good support being here. You get to interact with the workers. You get better outcomes and a chance to start again when you get out. Sometimes the programs are a bit childish. But overall, it's good. My head space has changed since I started.[360]

Another young man at Malmsbury reflected on how arbitrary the decisions on dual track could feel, but how they could lead to very different life experiences (note that in this case the decision was made on the basis of age, not serious offence category):

> My mate and I got charged with the same offence and had the same bail conditions. We worked hard to comply with them as they told us we'd be able to come to youth justice if we did.
>
> I was 19, nearly 20, when I committed the offence. I got sentenced six days before I turned 21. I got 3 years and have to be inside for at least a third of it before parole. I was able to transfer to do my time in youth justice.
>
> My mate was 6 months older and because of court delays he was over 21 by the time the court sentenced him. He got 4 years and needs to serve at least 2 of them inside. He is in adults.
>
> I feel really lucky to be here. You're treated as a person and not just a number. You get more chance to learn skills that you need when you get out. That sets you up better for success.[361]

The Youth Parole Board noted how the youth justice system 'is uniquely placed to provide an age and developmentally appropriate approach to young adults, and is able to access specialist programs, such as Orygen Health, YSAS [Youth Support + Advocacy Service], YJCSS [the Youth Justice Community Support Service] and young accommodation to meet this cohort's risks and needs'.[362]

A number of submissions supported extending the availability of dual track sentencing to young people up to 25 years of age, reflecting growing understanding of cognitive and emotional maturity in adolescents.[363]

The Supreme Court of Victoria also noted the challenges of managing longer sentences for young people. It told the review that:

> Children and young people are most commonly sentenced in the Supreme Court for homicide offences, which attract custodial terms that are longer than what is permitted under a youth justice order. The legislation does not permit a sentencing order which allows the child or young person to be sentenced to detention in a youth justice centre while under a certain age, and the for the remainder of the sentence to be served in adult prison once that age is reached. … the Court [has in a number of cases] recommended the Adult Parole board consider transferred the offenders to the youth justice system for a period of the sentence.[364]

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[358] Meeting with Aboriginal Justice Caucus, April 2022.

[359] Commission for Children and Young People. 2021, *Our Youth, out way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system*, p. 174–175.

[360] Meeting with young people, Parkville Youth Justice Centre, April 2022.

[361] Meeting with young people, Malmsbury Youth Justice Centre, April 2022.

[362] Youth Parole Board. *Submission to the review,* p. 2.

[363] Victorian Aboriginal Legal Service. *Submission to the review,* p. 10; Commission for Children and Young People. *Submission to the review,* p. 10; Victoria Legal Aid. *Submission to the review,* p. 11.

[364] Supreme Court of Victoria. *Submission to the review,* p. 2.

7.4 Mandatory parole conditions

Finally, the serious youth offence regime introduced a requirement for mandatory parole conditions to be imposed by the Youth Parole Board in particular circumstances.[365] This is in relation to cases where:

- the person was detained in a youth justice centre or a youth residential centre, or was detained for a Category A serious youth offence committed when the person was aged 16 years or over; or
- for a Category B serious youth offence committed when the person was aged 16 years or over if the person had previously been convicted of a category A or category B serious youth offence.

Under section 458A(3), the Youth Parole Board must impose all of the following conditions when granting parole for these offenders:

(a) the person must not break any law;

(b) the person must be supervised by a parole officer;

(c) the person must obey any lawful instructions of that parole officer;

(d) the person must report as and when reasonably directed by that parole officer;

(e) the person may be interviewed by that parole officer at any reasonable time and place directed by that parole officer;

(f) the person must, within 2 days of changing his or her address, advise that parole officer of the change of address;

(g) the person must not leave Victoria without the written permission of the Youth Parole Board;

(h) any other condition the Youth Parole Board considers necessary for the protection of any victim of an offence referred to in subsection (1)(b).

A new section was also inserted in the CYFA requiring the Youth Parole Board to inform Victoria Police of the release, or scheduled release on parole of a child or young person who has been detained for a Category A or Category B serious youth offence. This was introduced to assist Victoria Police in protecting the community by detecting and informing the Youth Parole Board of parole breaches. The Youth Parole Board must also inform Victoria Police of any conditions of parole. For all other children or young people detained in a youth residential centre or youth justice centre, the Youth Parole Board may, in their discretion, inform Victoria Police of the release or scheduled release on parole of the child or young person and any conditions of the parole. This provision clarifies when information about a young person's parole can be shared with Victoria Police.

7.4.1 Data on the mandatory parole conditions

For this review, data was collected from Youth Justice to examine the operation of mandatory parole conditions since the commencement of the YJ Reform Act amendments.

From June 2018 to June 2021, 67 young people aged 16–18 years of age who had committed a Category A or B offence were given additional conditions whilst on parole. Of this cohort:

- 11 (16 per cent) were Aboriginal and or Torres Strait Islander young people
- 31 (46 per cent) were young people from a CALD background
- 25 (37 per cent) were non-Aboriginal/CALD Australian young people.

[365] *Children, Youth and Families Act 2005* (Vic), s 458A(1).

Of the 67 young people above, 22 went on to subsequently breach their parole conditions. It is not possible to determine from this data whether those breaches were for any of the additional conditions provided by the YJ Reform Act amendments. The data can only identify how many young people of this cohort subsequently breached their parole conditions:

- 10 young people from a CALD background (45 per cent)
- 4 Aboriginal young people (18 per cent)
- 8 Non-Aboriginal/CALD Australian young people (36 per cent).

7.4.2 What stakeholders told the review about mandatory parole conditions

The review heard little from stakeholders about the mandatory parole condition element of the serious youth offence regime. Primarily, stakeholders reflected that the mandatory conditions are 'very standard' for parole and that the Youth Parole Board often went beyond these factors as a matter of practice and its own decision-making discretion.

The Aboriginal Justice Caucus said that the Youth Parole Board should consider cultural safety when setting parole conditions and highlighted that opportunities for the young person to reconnect with family and community were critical when young people are released from custody.[366] The Aboriginal Justice Caucus further detailed this point in its earlier submission on the development of a Youth Justice principal Act stating that the Government should:

> Legislate guidance for the YPB [Youth Parole Board] in making special conditions that includes safeguards to protect against conditions that are too onerous. This guidance should also require consideration of cultural safety. ... In particular, the guide should include safeguards to ensure that the YPB, in the exercise of its discretion: does not impose conditions that are too onerous, consistent with taking the least restrictive approach; consider whether the condition will assist in supporting participation by the offender in rehabilitation program and managing re-integration into the community; properly considers whether conditions are culturally appropriate for Aboriginal children and young people having regard to the consideration of cultural safety.[367]

7.5 Findings: Serious youth offence categorisation

Overall, the review has found that the serious youth offence categorisation regime is a blunt tool and not well tailored for the policy objectives it is designed to achieve. For example, the offence category tells a court little about the role an individual young person played. Serious youth offences are often characterised by peer-group activity and multiple defendants. The offence categorisation does not distinguish between the main instigator and those in more peripheral roles.

The review agrees with the Sentencing Advisory Council's assessment that 'in situations where an offence can cover a wide range of criminality, it may be more effective to allow a judicial officer with access to all the information on the offending, the young person and the available sentencing options to decide the appropriate sentence, rather than limiting judicial discretion'.[368]

The review's findings are detailed further below, including opportunities for improvement.

[366] Meeting with Aboriginal Justice Caucus, April 2022.

[367] Aboriginal Justice Caucus, *Equality and justice for our kids, Submission on the Development of a New Youth Justice Act for Victoria (Stage 2),* pp 64-65.

[368] Sentencing Advisory Council. 2019, *Rethinking Sentencing for Yong Adult Offenders,* p. 78.

7.5.1 Effects on offending and community safety

The serious youth offence regime appears to have had little direct influence on offending rates. This is not surprising given the nature of youth offending: serious youth offences are often impulsive and take place within the context of peer influence. For this reason, deterrence is not a sentencing principle in the youth justice system as it is in the adult system.[369] There is no evidence that young people weigh up whether a matter will be uplifted to a superior court or whether they will have dual track options restricted before they commit an offence.

As noted in the Armytage and Ogloff Youth Justice Review, 'young people do not always have the maturity to fully appreciate the consequences of their conduct, either in the short or longer term'.[370] The Armytage and Ogloff Review goes on to note reflections from Charlie Taylor's 2016 review of the youth justice system in England and Wales that '[c]hildren act impulsively and often do not appreciate the consequences of their actions'.[371]

There is some indication, however, that unintended consequences of the serious youth offence regime may heighten the risk to community safety in some circumstances. As discussed further under section 7.5.3(a) below, uplift to superior courts is resulting in long periods on remand for some young people. The various consequences that flow from this are likely to increase, rather than decrease, the risk of reoffending and potentially the risk to community safety in the future. Keeping in context that uplift on the basis of serious offence categorisation is occurring in a very small number of cases.

7.5.2 Effects on the wellbeing of young people

Uplift (for the reasons highlighted above) and limitations on dual track sentencing (discussed further in section 7.5.3(c) below) can have negative consequences for the wellbeing of young people.

The review is particularly concerned by the data which indicates that serious youth offence categorisation disproportionately impacts young people from CALD diverse backgrounds and Aboriginal young people. These outcomes can further isolate and marginalise young people and their families rather than supporting rehabilitation and positive social connection, and are counter to the aims of the Government's *Youth Justice Strategic plan 2020-2030*.

Under the Charter, young people have the right to equality, including the right to equal and effective protection against discrimination.[372] The Committee on the Rights of the Child has said on the principle of non-discrimination that:

> States parties have to take all necessary measures to ensure that all children in conflict with the law are treated equally. Particular attention must be paid to de facto discrimination and disparities, which may be the result of a lack of consistent policy and involve vulnerable groups of children, such as … children belonging to racial, ethnic, religious or linguistic minorities … who are repeatedly in conflict with the law.[373]

[369] *Children, Youth and Families Act* 2005, s 362; Sentencing *Act 1991*, s 5(1)(b).

[370] Penny Armytage and James Ogloff. 2017, *Youth Justice Review and Strategy: Meeting needs and reducing offending, Part 1*, p. ii.

[371] Penny Armytage and James Ogloff. 2017, *Youth Justice Review and Strategy: Meeting needs and reducing offending, Part 1*, p. ii; Charles Taylor. 2016, *Review of the Youth Justice System in England and Wales*, [6, 9].

[372] *Charter of Human Rights and Responsibilities Act 2006*, s 8.

[373] Committee on the Rights of the Child. 2019, *General Comment No 24: Children's rights in juvenile justice*, [8].

7.5.3 Opportunities for improvement

The review has identified a number of opportunities for improvement and makes recommendations below to: maximise use of the specialist jurisdiction of the Children's Court of Victoria; ensure that criminal procedure is appropriately adapted for children and young people; align dual track sentencing to the approach envisaged by the Armytage and Ogloff Youth Justice Review; and focus parole conditions on individual needs and community safety risks rather than 'serious youth offence categorisation'.

(a) Harnessing the specialist jurisdiction of the Children's Court of Victoria as a core limb of Victoria's modern youth justice system

The policy objective for uplift as stated in the Second Reading Speech was to 'help ensure that serious offences are heard in the higher courts with a full range of sentencing options available, serving the interests of justice and community safety.[374] The review has considered these objectives and the experience of the uplift procedures in practice.

While the uplift procedures can help to ensure that a small number of serious offences are heard in the superior courts (twelve Category A matters have been subject to uplift and no Category B matters), there are very few cases where courts have found uplift necessary to access the full range of sentencing options. Fewer than three cases had a sentence longer than four years.

At the same time, the review has found that uplift procedures can result in delays in finalising a young person's matter. Such delays can arise in a number of ways, including:

- the time taken for hearings to determine jurisdiction
- the procedures and time associated with superior court proceedings
- backlogs in superior courts exacerbated by the COVID-19 pandemic,[375] and
- split proceedings where associated non-Category A or B matters are heard in the Children's Court of Victoria and evidence has to be presented separately.

The consequences of delay are discussed further below.

[374] Legislative Council, Parliament of Victoria. *Parliamentary Debates*, 8 June 2017, 3339 (Jaala Pulford).

[375] Supreme Court of Victoria. 2021, *Annual Report 2020-21*, p. 28; County Court of Victoria, 2021, *Annual Report 2020–21,* p. 2.

Potential impact of uplift on victims

While some victims, and broader community members, may welcome the uplift of matters to a superior court and interpret this as a more serious system response, the consequences of delay and split proceedings can also have an impact on the victim. Delays associated with uplift procedures mean that it can take longer for victims to get a resolution in the matter

Lengthier processes can also exacerbate communication break-down with victims while the focus is on the justice 'process'. In its report on *Improving support for victims of crime*, the Centre for Innovative Justice noted that 'for the significant proportion of victims who reported that police did not keep them informed of what was happening in their case, this was sometimes perceived as the deliberate withholding of information or made the victim feel that the way in which they were impacted by the crime did not matter'.[376] The Victorian Law Reform Commission has also noted that '[u]necessary delay can have significant adverse effects on victims. … Delays impede victims' ability to recover and get on with their lives'.[377]

Where related proceedings are split between the Children's Court and a superior court, victims and other witnesses may need to give evidence several times. The Victorian Law Reform Commission explored the trauma, intimidation and distress that victims can experience when giving evidence in its 2016 report on *The Role of Victims of Crime in the Criminal Trial Process.*[378]

Uplift can lead to long, unsettled periods for the young person

There is evidence before the review that young people who have been subject to uplift are often experiencing long periods on remand and have therefore been unsettled for an extended period and may have had fewer opportunities to access therapeutic programs.

Any young people sentenced with significant time served (whilst on remand) may be released straight into the community rather than having a supported period of supervision in the community on parole. These consequences are deleterious to the young person's rehabilitation and what evidence tells us works to reduce reoffending. Opportunities to reduce risk to the community in the medium-term are therefore being missed.

The influence of lengthy periods on remand are illustrated in Box 7 below. In this case the matter was uplifted and 'Jamal' spent a lengthy period on remand (14 months). The sentence was only four months longer than the Children's Court of Victoria could have issued, and the young person was sentenced to a youth justice centre order, which also could have been issued by the Children's Court. This process had a destabilising influence on the young person, with little practical effect on the legal outcome.

Box 7: Case example—Uplift

Jamal* is from a CALD background and had a family history of trauma. Since his initial involvement with Youth Justice at 15 years of age, he had continued to commit a high level of offending over a short period.

The uplifted offending was a Category A offence of Aggravated Carjacking. Jamal was the youngest of a group of offenders in this incident (16 years old at the time). Contributing factors to this situation was substance use and anti-social peers. A youth justice practitioner observed that:

While the offence was serious in nature, the process of being uplifted only appeared to cause delays in sentencing, with the young person spending almost 14 months on remand.

[376] Centre for Innovative Justice. 2020, *Improving support for victims of crime: Key practice insights*, p. 14.

[377] Victorian Law Reform Commission. 2016, *The Role of Victims of Crimes in the Criminal Trial Process: Report*, p. 99.

[378] Victorian Law Reform Commission. 2016, *The Role of Victims of Crimes in the Criminal Trial Process: Report*, ch 8.

On remand the young person was actively engaging with education and other services, but due to an inability to meet eligibility requirements to access forensic treatment on remand, the young person did not receive any forensic treatment from their initial entry in the system until post sentence to a YJCO [Youth Justice Centre Order]*.*

During the remand period for the uplift matter the young person was involved in custodial incidents, including assaults, staff assaults, and dangerous and disruptive behaviours. The stress of the legal processes and prolonged uncertainty could have contributed to this, as well as the inability to access forensic treatment to address behaviours. Delays in getting to a final sentence meant that the young people also had a delayed consequence for their offending.

Jamal was sentenced to a youth justice centre order of 3 years, 4 months. In this case, the length of sentence received in the County Court was just outside the range of sentencing options available if the matter was dealt with in the Children's Court jurisdiction. A youth justice practitioner observed that:

The delay that the uplift process caused to sentencing was observed to have placed stress on the young person and their family. The COVID-19 pandemic also limited capacity for the young person and their family to see each other in person.

The young person reported the sentence outcome to be as they expected but overall, their main reflection was regarding the length of time this process took before sentencing.

Jamal had accumulated a significant amount of pre-sentence detention days. Whilst this resulted in him being eligible for parole quite quickly, the planning and identification of an appropriate day services took time, further extending time in custody.

Jamal also reoffended whilst on youth parole. A youth justice practitioner observed that:

Early entrenchment into the higher end of the justice system and prolonged periods in custody are assessed to have contributed to this behaviour and to impact this young person's rehabilitative prospects.

* Name has been changed to protect personal privacy.

The specialist jurisdiction of the Children's Court of Victoria

The review notes that the policy objective of uplift is not to remove matters from the jurisdiction of the Children's Court to 'punish' the young person with an 'adult' legal procedure. Such an objective would be a misunderstanding of both the nature of the Children's Court and the role of the criminal justice process.

The Armytage and Ogloff Youth Justice Review said that '[p]reserving a separate criminal justice system for children and young people must be a priority'.[379] The development of the specialist jurisdiction of the Children's Court is something Victorians should be proud of: it forms a core limb of the dedicated youth justice system.

The Children's Court of Victoria has been an independent court with a judge as President since the commencement of the *Children and Young Persons (Appointment of President) Act 2000*. The aim of the legislation was to elevate the status and authority of the court and to demonstrate that it had a broader role than its origins as part of the Magistrates' Court. It is a specialist court catering for children and young people.

[379] Penny Armytage and James Ogloff. 2017, *Youth Justice Review and Strategy: Meeting needs and reducing offending, Part 2*, p. 80–89.

The Children's Court is a tailored option so that young people are better able to understand and engage in the criminal justice process, and it is a specialist option with judicial officers having expertise in working with children and young people and in assessing their circumstances, needs and risks. This expertise is a benefit in both managing proceedings and when it comes to applying the sentencing considerations established by the Parliament.

The complexity of the serious offending cohort is when this specialisation of the Children's Court is needed most. As the Children's Court of Victoria observed itself in its submission to the Victorian Law Reform Commission on committals in 2019:

> Children subject to uplift and committal processes, and in the Criminal Division of the Court more generally, often present with complex and multifaceted issues … children who … are likely to have been subject to child protection involvement, have a history of or are themselves victims of abuse, trauma and neglect, present with neuro-disabilities, have a history of or current drug and alcohol abuse issues and poor mental health and other characteristics that underscore the complexity of offending by children and young people.[380]

Even in their late adolescence, young people's cognitive, psychological and emotional development is still occurring, and those who commit even serious offences should be subject to processes which take account of their age and stage of development. The Children's Court of Victoria is appropriately placed to deal with serious offending while providing this tailored response. Treating young people like adults is likely to entrench them in the criminal justice system and make them more likely to offend into adulthood. The Sentencing Advisory Council identifies that '[i]t is well-established that each contact with the justice system exacerbates the risk of further contact, trapping children in the revolving door of youth justice'.[381] They advise that focusing on young people's rehabilitation and underlying needs is critical to public safety: To enhance community safety, consideration should be given to adjusting the response of the criminal justice system to assist young adult offenders to 'mature out of, rather than into, further offending'.[382]

Charter considerations

The Charter recognises the right of an accused child to be brought to trial as quickly as possible[383] and the right of a child charged with a criminal offence to a procedure that takes account of his or her age.[384] In addition, section 17(2) of the Charter sets out an overarching obligation for duty holders to act in the best interests of the child.

When considering the application of these rights under international law, the Beijing Rules emphasise that a child or young person 'may be dealt with for an offence in a manner which is different from an adult' and that 'any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence'.[385]

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[380] Children's Court of Victoria. 2019, *Submission to the Victorian Law Reform Commission, Committals Issues Paper*, p. 12.

[381] Sentencing Advisory Council. 2020, *Children on Remand in Victoria: A Report on Sentencing Outcomes*, p. xi.

[382] Sentencing Advisory Council. 2019, *Rethinking Sentencing for Yong Adult Offenders,* p. xv.

[383] *Charter of Human Rights and Responsibilities Act 2006*, s 23(2).

[384] *Rights and Responsibilities Act 2006*, s 25(3).

[385] UN General Assembly, *United Nations Standard Minimum Rules for the Administrative of Juvenile Justice ("The Beijing Rules"),* adopted by the General Assembly, 29 November 1985, A/RES/40/33, [2.2(a) and 5.1].

When commenting on Article 40(2)(b)(iii) of the Convention on the Rights of the Child,[386] the Committee on the Rights of the Child has also said that 'for children in conflict with the law, the time between the commission of the offence and the final response to this act should be as short as possible. The longer this period, the more likely it is that the response loses its desired positive, pedagogical impact, and the more the child will be stigmati[s]ed'.[387]

In practice, the uplift procedures are limiting these rights. As the Victorian Equal Opportunity and Human Rights Commission submitted to the review, '[w]hether limitations on Charter rights are necessary and proportionate must be proven by government, with an evidence based to support the assertion'.[388]

In considering whether the limitations on Charter rights are necessary and proportionate, and therefore justified under section 7(2) of the Charter, the review has considered several factors as outlined in Table 9 below.

Table 9: Considerations to determine whether limitations on Charter rights are justified

Considerations	Review's observations
1. Have the measures resulted in the policy objective being achieved?	In small part. The measures have helped to ensure that some serious offence matters are heard in the higher courts, but in very few cases was this required to access the full range of sentencing options available. There is no evidence that these mechanisms have had a deterrent effect on offending rates (and improved community safety through that means), and in the longer-term, there is some evidence that these measures may actually be counter-productive to community safety because they have resulted in young people being held on remand in unsettled conditions for lengthy periods of time.
2. Have the measures been necessary (whether they have been used is one indication of this)?	The measures have been rarely used. Eight Category A matters have been uplifted and where the Children's Court of Victoria has discretion, in Category B matters, no cases have been uplifted. In only a small number of cases (5) sentencing has been of a level that exceeded the sentence that could have been ordered by the Children's Court of Victoria.
3. Are any less restrictive means reasonably available to achieve the policy objectives?	Yes. Firstly, matters can be heard in the Children's Court of Victoria, which, under the YJ Reform Act amendments has greater sentencing capacity. Hearing matters in the Children's Court is more supportive of the child's rights to criminal procedure that takes into account his or her age,[389] and to trial as quickly as possible.[390]

[386] Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3, Art 3 (entered into force 2 September 1990).

[387] Committee on the Rights of the Child. 2019, *General Comment No 24: Children's rights in juvenile justice*, CRC/C/GC/24, [65]; *Certain Children v Minister for Families and Children & Ors (No 2)* [2017] VSC 251 [261]: It is an accepted principle of Victorian law that the scope of the best interests right is approximately informed by the Convention on the Rights of the Child.

[388] Victorian Equal Opportunity and Human Rights Commission. *Submission to the review,* p. 2, noting *Certain Children v Minister for Families and Children & Ors (No 2)* [2017] VSC 251 [175], [200].

[389] *Charter of Human Rights and Responsibilities Act 2006*, s 25(3).

[390] Cha*rter of Human Rights and Responsibilities Act 2006*, s 23(2).

	Secondly, uplift considerations can be more tailored rather than applying automatically to categories of offences. The Children's Court of Victoria can consider whether it has sufficient scope for sentencing based on an examination of the circumstances of the matter before it. This allows a more nuanced consideration, including of the role the young person played in the offence, and the likely sentencing outcome in that case. This more tailored approach would ensure that there was a reason for uplift. Without such a rationale, the limitations on human rights, including the impact on the equality rights of young people[391] can become arbitrary.[392]
4. Are there any special considerations noting the Supreme Court's holding that a child's 'best interests' is a 'central element' of the right protected by section 17(2) of the Charter.[393]	Yes. Uplift procedures are in practice often resulting in long delays and a significant time on remand for the young person: disrupting education, reducing opportunities for rehabilitation and treatment, and providing an extended unsettled period which is often a detriment to the young person's wellbeing. This is not in the best interests of the child.
Conclusion: In cases where the Children's Court of Victoria has jurisdiction and sufficient sentencing powers to address the circumstances of the case, it is the review's opinion that the current uplift provisions are not the least restrictive means available to achieve the purpose of the rights limitation, because there is a less restrictive alternative that is reasonably available.	

The key policy driver for the 'uplift' of young people accused of serious offences from the specialist jurisdiction of the Children's Court to a superior court is where there is a question of sentencing sufficiency. This should be the focus of the legislative uplift criteria.[394]

The review recommends that the uplift criteria be amended.

Recommendation 13: That the Government revise the criteria for uplift of matters from the Children's Court of Victoria to a superior court, to:

(a) remove the application of serious youth offence categorisation to uplift decisions (noting that the Supreme Court of Victoria would retain jurisdiction for all homicide-related offences as was the case prior to the YJ Reform Act)

(b) maximise use of the specialist jurisdiction of the Children's Court of Victoria and address circumstances where the court considers that it does not have the sentencing options available to it to respond to the offences alleged, and

(c) permit the Children's Court of Victoria to transfer related offences so that matters that are founded on the same facts or form part of a related serious of offences of the same or similar character can be heard together in a superior court.

[391] *Charter of Human Rights and Responsibilities Act 2006*, s 8.

[392] *WBM v Chief Commissioner of Police* (2012) 43 VR 446; [2012] VSCA 159 [114]: When considering whether an interference with rights is arbitrary, the Victorian courts have considered it to have qualities of 'capriciousness, unpredictability, injustice and unreasonableness — in the sense of not being proportionate to the legitimate aim sought'.

[393] *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children ('Certain Children')* [2016] VSC 796, [147–155].

[394] *Children, Youth and Families Act 2005*, s 356A(2) as it existed prior to the YJ Reform Act amendments provides an example of criteria focused on sentencing sufficiency.

(b) Court procedures that account for the age of children and young people

In the section below, the review considers circumstances where a matter is heard in a superior court.

The Charter sets out the right of a child charged with a criminal offence 'to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation'.[395] Courts are not a public authority (with duties to act compatibly with human rights) when acting in a judicial capacity.[396]

The Supreme Court has published a protocol for managing children in the custody of the Court.[397] The protocol refers to the section 25(3) right in the Charter of age-appropriate procedures and acknowledges the discretionary nature of any adjustments made in the Supreme Court setting.

The Victorian Equal Opportunity and Human Rights Commission observed in its submission to the review that:

> Despite the right under s 25(3) to age appropriate procedures, there is no guarantee that children whose cases are uplifted to higher courts will be provided appropriate procedural safeguards, and even when the adjustments are made, they will always be second-best given that the higher courts are not purpose-built for child justice, unlike the Children's Court.[398]

Legal practitioners consulted during the review had mixed perspectives on the extent to which superior court processes are adjusted for children and young people. Some observed that the main difference was a focus on the timely progress of the matter and the court holding the parties accountable for timeframes. Others observed greater flexibility in how the court process was managed and things were communicated.

While the courts are not bound by the Charter in this respect, and procedure is a matter for the individual courts, the review notes that it is best practice and a requirement for Australia under international law that criminal justice processes will be appropriately adapted to the needs of a child accused of a crime.[399]

The review encourages the Supreme Court of Victoria and the County Court of Victoria to consider whether any further steps can be taken to adapt their procedures to the needs of children.

Recommendation 14: That the Supreme Court of Victoria and the County Court of Victoria consider whether any further steps can be taken to adapt their procedures to the needs and developmental differences of children (compared to adults) when they are hearing matters where the accused person is under 18 years of age.

(c) Aligning dual track sentencing to the approach envisaged by the Armytage and Ogloff Youth Justice Review

The changes to dual track sentencing introduced by the YJ Reform Act meant that offenders convicted of certain offences could no longer be sentenced to a youth justice centre order or a youth residential order unless they can show 'exceptional circumstances' beyond immaturity and vulnerability.

[395] *Charter of Human Rights and Responsibilities Act 2006*, s 25(3).

[396] *Charter of Human Rights and Responsibilities Act 2006*, s 4(1)(j).

[397] Supreme Court of Victoria. 2019, *Protocol: Principles for Managing Children in the Custody of the Supreme Court.*

[398] Victorian Equal Opportunity and Human Rights Commission. *Submission to the review,* p. 4.

[399] Committee on the Rights of the Child. 2019, *General Comment No 24: Children's rights in juvenile justice*, [57].

The influence of serious offence categorisation

While the overall numbers of young adults on a dual track sentence have dropped since the amendments were introduced in 2018, several justice sector practitioners have reflected that this categorisation has made little difference in practice. Youth Justice must still provide an individualised report to the court to support sentencing considerations and under pre-existing criteria the court was required to have consideration to the nature of the offence and the young person's history. Category A and B offences are very serious in nature and the court would have taken this into account without the YJ Reform Act amendments.

Other challenges for dual track sentencing in 2017

Conditions in 2017 that contributed to concerns about dual track sentencing went beyond the legislative criteria. Those conditions have changed through system-wide reforms that have positively impacted on safety within the community and within youth justice centres.

Despite the relatively small numbers, the Armytage and Ogloff Youth Justice Review recognised in 2017 that dual track sentencing 'significantly affects how our custodial centres operate'.[400] The Armytage and Ogloff Youth Justice Review noted that at that time the operating model of youth justice custodial precincts at the time had:

> undermined the benefits and destabilised dual track. Dual track young offenders were previously housed in open units, with freedom of movement between facilities and services. During the review period, dual track young offenders were progressively restricted in their movement and subject to restrictive treatment inconsistent with the original intention of a dual track regime.[401]

The Armytage and Ogloff Youth Justice Review went on to recommend that the dual track system be 'restored to its original form and preserved as a non-secure residential precinct that provides a genuine alternative to adult prison'.[402] The original program included a focus on education, training and readiness for work.

As these comments reflect, the challenges experienced with dual track in 2017 were as much about the Youth Justice operating model as any legislative criteria. Much has changed in that regard since 2017 as outlined elsewhere in this report.

Individualised consideration based on appropriate legislative criteria

It is important for the wellbeing of young people and the management of youth justice facilities that the court consider the appropriateness of a dual track sentence, however, the review has not seen evidence that serious offence categorisation is the most useful determinative criteria. Instead, it would be more effective to give the court access to all relevant information and for it to decide whether a dual track sentence is appropriate.

To order dual track sentencing in other circumstances (outside of the serious offence limitations), the court must be satisfied that there are reasonable prospects for rehabilitation of the offender, or that the offender is particularly impressionable, immature or likely to be subjected to undesirable influences in an adult prison. The court must have regard to the nature of the offence, as well as the young offender's age, character and history.[403]

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[400] Penny Armytage and James Ogloff. 2017, *Youth Justice Review and Strategy: Meeting needs and reducing offending, Part 1*, p. 19.

[401] Penny Armytage and James Ogloff. 2017, *Youth Justice Review and Strategy: Meeting needs and reducing offending, Part 2*, p. 87.

[402] Penny Armytage and James Ogloff. 2017, *Youth Justice Review and Strategy: Meeting needs and reducing offending, Part 2*, p. 88.

[403] *Sentencing Act 1991*, s 32.

In practice, assessment processes used by Youth Justice when completing pre-sentence suitability assessments for dual track, which are ordered by the court, have been improved. A Classification and Placement Unit has been established which, among other functions, assists in assessment of young people's suitability for a dual track sentence in line with the above legislative criteria. In addition, revised practice guidance has been issued to Youth Justice case managers to ensure that a robust and consistent assessment process is applied in these cases.

The Armytage and Ogloff Youth Justice Review recommended that, in addition, section 32(1) of the Sentencing Act be amended to add criteria requiring that courts consider the 'extent to which a young person will pose a risk of harm to others or will be disruptive to the good order of the youth justice centre while serving their sentence'. Further, it recommended that there should be clear provisions to transfer the young person to a prison if they engage in behaviour that poses an unacceptable risk of serious harm to others or repeatedly disrupt the good order of the centre.[404] This recommendation was not implemented due to the commencement of the YJ Reform Act limitations on dual track sentencing.

The review recommends that the legislative criteria for dual track sentencing be reviewed and any updates should allow the court to consider the individual circumstances of the young person.

If the serious offence categorisation is nevertheless retained, the legislative drafting oversight described at section 7.3 should be rectified so that the dual track restrictions under the Sentencing Act only apply to people aged 18 and over. Currently, the sentencing presumption applies to the courts when dealing with a 'young offender' who has committed a Category A offence. 'Young offender' is defined in the Sentencing Act to mean 'an offender who at the time of being sentenced is under the age of 21 years'.[405] The stated policy intention was to apply these limitations to 'young adults' (18–21 year olds) not children under 18 years of age (who are technically included in the Sentencing Act definition of 'young offender').[406]

Extending dual track sentencing to people under 25 requires broader policy examination

Finally on the question of dual track sentencing, the review notes that a few stakeholders advocated for dual track sentencing to be made available to young people up to 25 years of age, following the Sentencing Advisory Council's recommendation in its report *Rethinking Sentencing for Young Adult Offenders*.

The Sentencing Advisory Council noted that there is evidence that some offenders aged 21 to 25 who receive sentences of imprisonment are noted by the sentencing court to be 'immature', 'naïve', 'vulnerable' or 'easily led' and that the dual track system has the advantages of the provision of 'specialised, supportive and rehabilitative interventions'.[407]

The review considers that there is merit in further considering the assessment, placement and supports available to young adults sentenced in the criminal justice system (including access to tailored approaches for young people with mental health, cognitive impairment and other disability support needs), and the various roles of Corrections Victoria and Youth Justice in that picture. This includes consideration of when young offenders in the adult system may benefit from access to the therapeutic and rehabilitative programs and services currently available through Youth Justice. This is a bigger question than dual track sentencing and has significant operational implications for Corrections and Youth Justice. This question would need to be considered more holistically beyond this review.

[404] Penny Armytage and James Ogloff. 2017, *Youth Justice Review and Strategy: Meeting needs and reducing offending, Part 2,* p. 89.

[405] *Sentencing Act 1991*, s 3.

[406] *Sentencing Act 1991*, s 3.

[407] Sentencing Advisory Council. 2019, *Rethinking Sentencing for Yong Adult* Offenders, p. 77.

Recommendation 15: That the Government revise the legislative criteria for dual track sentencing to remove the application of serious youth offence categorisation. The legislative criteria should allow courts to consider the individual circumstances of the person, or look at the overall circumstances including the seriousness of the offending (as is the case with bail decisions).

If the serious offence categorisation is nevertheless retained, the legislative drafting oversight should be rectified so that the dual track restrictions under the *Sentencing Act 1991* only apply to people aged 18 and over.

(d) Focusing parole conditions on individual needs and community safety risks rather than 'serious offence categorisation'

The review has found the mandatory parole conditions imposed by the YJ Reform Act to have had little effect in practice as the Youth Parole Board: (1) generally imposes conditions beyond these legislative requirements, and (2) in any case does not have to impose the conditions if it 'considers that the person has demonstrated a history of good behaviour and positive engagement with rehabilitation programs throughout the period of detention for the offence'.[408]

However, as a matter of policy, the review has also concluded that 'serious offence categorisation' is not the most effective way to address potential risk to the community when making parole decisions/setting parole conditions. As outlined in section 7.1.2 above, offence categorisation tells the Board little about the role of the young person in the offence, or their likelihood of future offending.

The review believes that it is more consistent with policy objectives for the Youth Parole Board to consider impact on victim safety and community safety in an individual case. The Board already makes decisions within a framework that balances the needs of the young person with community safety considerations.

The Board receives and considers case histories, client service plans, parole review reports, psychiatric and psychological reports and progress reports on young people in custody and on parole to assist in their decision-making. The Board is chaired by a judge of the County Court and should have discretion to determine parole eligibility and the appropriate conditions taking each case on its merits.

Recommendation 16: That the Government remove the mandatory parole conditions associated with serious youth offence categorisation. Any updates to the legislative considerations should allow the Youth Parole Board to consider the individual circumstances of the person, or look at the overall circumstances including the seriousness of the offending and any risks to community safety (as is the case with bail decisions).

8. Other provisions

Although not a statutory requirement of the review under section 492B of the CYFA, the review briefly considers other provisions of the YJ Reform Act in this section. Subsection 8.1 outlines miscellaneous provisions and subsection 8.2 outlines increased consequences for youth offending.

8.1 Miscellaneous provisions

The YJ Reform Act amended the CYFA to improve decision-making and operations of the youth justice system more broadly. Some of these reforms amended the Crimes Act whilst a majority of these additional changes amended the CYFA to enable mechanisms that enhance child wellbeing, custodial operations and procedural safeguards. The miscellaneous amendments are summarised in Table 10 below.

[408] *Children, Youth and Families Act 2005*, s 458A(2).

Table 10: List of miscellaneous subject matters included in the YJ Reform Act

Reform	Legislation amended	Details
Placement accommodations/transfers	CYFA	Reforms to improve decision-making as to how courts place detainees in youth justice facilities, and how they are transferred by the Secretary of DJCS between youth justice facilities.[409] Such as: a) the availability and appropriateness of accommodation across the system b) the safety, security and good order of the facility c) the safety, security and needs of any detainee, and the safety of staff and others
Non-communication instructions with a child in out-of-home care (OOHC) or detention	CYFA	Strengthens provisions that allow the relevant Secretary to issue an instruction to a person directing them not to communicate with or attempt to communicate with a person in out-of-home care or in detention.[410]
Improving information sharing	CYFA	Improve information sharing between the Secretary, the Youth Parole Board and Victoria Police. In particular, requiring the Secretary to inform the Youth Parole Board within 48 hours of becoming aware of a young person's involvement: a) in an incident that has threatened the safety or security of a youth justice facility, or b) any conduct that has threatened the safety of any other person, or c) damaged property in a youth justice facility.[411] Allowing the Secretary to grant permission of the publication of any identifying particular of any person who has escaped from a remand centre, a youth residential centre or a youth justice centre.[412]
Various criminal justice reforms (sentences)	Crimes Act and CYFA	There are various criminal justice reforms including: • New offence where an adult recruits a child to engage in criminal activity (adult is defined as 21 years and over).[413]

[409] *Children, Youth and Families Act 2005*, s 484(6), as inserted by *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017,* s 33.

[410] *Children, Youth and Families Act 2005,* s 501(5), as inserted by *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017,* s 61.

[411] *Children, Youth and Families Act 2005,* s 454-455, as inserted by *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017,* s 39.

[412] *Children, Youth and Families Act 2005*, s 534(3A), as inserted by *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017*, s 40(1).

[413] *Crimes Act 1958,* pt I div 11A, as inserted by *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017,* s 4.

		• Aggregate sentences of detention in relation to multiple charges founded on the same facts or of similar character (aligned to be consistent with sentencing principles for adults).[414]

As part of this review, data from Youth Justice demonstrated that from 2016 to 2021, there have been a total of 429 transfer decisions made in relation to a young person in a youth justice facility.[415] This number includes all transfer and accommodation decisions made about a young person under various sections of the CYFA. Of the 429 transfers, a total of six transfer decisions related to a removal of a young person under section 484(6) of the CYFA.

Section 51 of the YJ Reform Act inserted new section 501(5) of the CYFA to strengthen existing offences, and support prosecutions to protect children at risk of sexual and criminal exploitation. Data from Youth Justice and Crime Statistics Agency indicated that from 1 June 2018, there were no charges or convictions made against any individual in contravention of section 501(1)(a) of the CYFA.[416]

8.2 Increased consequence provisions

The YJ Reform Act also increased consequences for offending in youth justice facilities to 'ensure public confidence in the youth justice system and to address any behaviour which undermines the rehabilitation and wellbeing of the children and young people detained there'.[417]

The YJ Reform Act contained several measures to respond to increasing violence and other criminal acts, including those committed within youth justice facilities. These measures include:

- increasing the maximum period of a youth justice centre order including:
    - if sentenced under the CYFA, increased from two years to three years for a single offence, and from three years to four years for multiple offences[418]
    - if sentenced under the *Sentencing Act 1991* by the County or Supreme Courts, increased from three to four years[419]
- increased the penalties for escape and related offences[420]
- increased consequences for assaulting a youth justice custodial worker on duty[421]
- inclusion of specific deterrence as a sentencing consideration to deter a child from committing offences in youth justice facilities.[422]

As part of this review, data collected from 1 June 2018 to 30 June 2021 show that there have been:

[414] *Children, Youth and Families Act 2005*, s 362B, as inserted by *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017*, s 7.

[415] DJCS Youth Justice internal data.

[416] DJCS Youth Justice internal data.

[417] Legislative Council, Parliament of Victoria. *Parliamentary Debates,* 8 June 2017, 3339 (Jaala Pulford).

[418] *Children, Youth and Families Act 2005*, s 413(2); s 413(3)(b), as inserted by *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017*, s 52.

[419] *Sentencing Act 1991*, s 32(3)(b), as inserted by *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017*, s 58.

[420] *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017*, s 53-57.

[421] *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017*, pt 8 div 1.

[422] *Children, Youth and Families Act 2005*, s 362(h), as inserted by Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017, s 42b.

- between two and six children and young people who have received a maximum sentence of three years for a single offence (lower numbers are not reported), and
- no child or young person has received a maximum sentence of four years for multiple offences.[423]

As these numbers are inherently very small, the Crime Statistics Agency could not identify exact values, so as to maintain confidentiality and privacy for children and young people.

These values indicate that even though maximum detention periods were increased in the CYFA to bring consistency with higher courts, a very small cohort of children and young people are sentenced to these maximum periods.

As part of this Review, data collected from the Crime Statistics Agency indicated that from 2016 to 2021, there have been between 13 and 17 children and young people who have been charged with escape or attempt to escape under section 498 of the CYFA. Over the course of this period, as shown in Table 11, the number of charges for children and young people in contravention of section 498 of the CYFA predominantly concentrate around the 2016–17 period. There were a small number of charges laid between July 2018 and June 2020 and none made in the financial years 2017–18 and 2020–21.

This data suggests that overall, the number of young people charged under section 498 of the CYFA is decreasing and on the whole, the number of young people charged with escape or attempt to escape is quite low. This is particularly the case given that the total unique number of children and young people in youth justice custodial residence per year ranges from 942 young people in 2016–17 to 768 young people in 2020–21. This suggests that very few young people contravene section 498 of the CYFA, and escape or attempt to escape youth justice whilst under custodial detention.

Table 11: Number of children and young people (10–17 year olds) charged with escape or attempt to escape and or related offences from 2016–21 under section 498–500 of the CYFA and youth justice custodial population from 2016–21

	2016–17	2017–18	2018–19	2019–20	2020–21
Number of young people aged 10–17yo charged under s 498 of CYFA	11	0	≤ 3*	≤ 3*	0
Number of children and young people charged with harbouring or concealing a person who has escaped (section 499 CYFA)	0				
Number of children and young people charged with counselling or inducing a person to escape (section 500 CYFA)	6	0			
Total unique number of children and young people in a Youth Justice centre or residence per year (custodial facilities)	942	851	857	813	768

*Please note that values between 1 to 3 are not identified as the Crime Statistics Agency must de-identify for privacy and confidentiality reasons to protect young people.

[423] Crime Statistics Agency, custom request.

In addition, very few children or young people were found in contravention of section 501(1) of the CYFA over the period of 2016 to 2021. Out of all the offences related to persons held in youth justice centres, only four children over the period of 2017–18 were charged with delivering/attempting to deliver firearm, weapon, or alcohol or other drug (AOD) into a facility. For all other offences related to persons held in youth justice centres there were no children or young people found in contravention of any other offences under section 501(1) of the CYFA.

8.3 What stakeholders told the review

Stakeholders generally supported the miscellaneous provisions where they clearly had the policy objectives of safeguarding and protecting the child or young person's safety and wellbeing, such as:

- the new offence of recruiting a child to engage in a criminal activity
- non-communication instructions to a child or young person under youth justice supervision or living in out of home care
- aggregate sentences for multiple similar offences, and
- placement accommodations/transfer decisions.

As part of the review's consultation (and previous consultation on the development of a new youth justice legislative framework), key stakeholders noted the new offence of recruiting a child to engage in criminal activity and the Secretary's powers to instruct an individual not to communicate with a child or young person in youth justice provide important safeguards and protections for young people who were particularly vulnerable to sexual and criminal exploitation. This was welcomed since the amendment supported and complemented the objectives and aims of other important reforms across government including the work following from the Royal Commission into the Management of Police Informants (established in 2018)[424] and the review of Victorian Criminal Organisation Laws.[425]

In addition, key stakeholders supported enabling aggregate sentences for young people who commit multiple similar offences (in alignment with aggregate sentences available for adults). This recognises the benefits of streamlining sentencing for the courts and subsequently timely outcomes for young people.

The review notes the Commission for Children and Young People's objections to the Secretary's power to grant permission for the publication of identifying particulars of a person who has escaped from custody. The policy intention of moving the function from the Children's Court to the Secretary was to enable a response in emergency circumstance. The Act includes protections that the Secretary must have regard to the desirability of minimising the stigma to the person and the child's family, and grant permission for publication only to the extent necessary to apprehend the person.[426] There has been no submission to the review of the inappropriate exercise of this power in practice.

The consequences for assaulting a youth justice custodial worker were also raised by several stakeholders.

Both Victoria Legal Aid and the Victorian Aboriginal Legal Services objected to children being subject to mandatory sentencing requirements.[427] The Victorian Aboriginal Legal Service noted that it opposes mandatory sentencing schemes because:

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[424] Victorian Government. 2021, *Royal Commission into the Management of Police Informants – Victorian Government Response and annual reporting,* viewed 28 April 2022, < https://www.vic.gov.au/royal-commission-management-police-informants-victorian-government-response-and-implementation-plan>.

[425] Department of Justice and Community Safety. 2020, *Review of Victorian Criminal Organisation Laws – Stage One*, viewed 28 April 2022, <https://www.parliament.vic.gov.au/file_uploads/Criminal_Organisation_Laws_Review_-_Stage_One_Report_gF98wpdb.pdf>.

[426] *Children, Youth and Families Act 2005*, s 534(3A)-(3B).

[427] Victoria Legal Aid. *Submission to the review*, p. 7; Victorian Aboriginal Legal Service. *Submission to the review*, p. 10.

- They erode the fundamental principle of an independent judiciary and discretion in sentencing;
- Mandatory sentencing is not an effective deterrent;
- They contradict the principle of proportionality and imprisonment as a last resort;
- Mandatory sentencing schemes have proven to be an ongoing driver of the over-incarceration of Aboriginal and Torres Strait Islander peoples;
- They increase incarceration rates, and are therefore more costly.[428]

A justice sector practitioner also told the review that they were concerned that these provisions may have a particular impact on young people who have poor impulse control due to experiences of trauma and discrimination and/or developmental disabilities.

During consultations on the development of a new youth justice legislative framework, a number of stakeholders observed that inclusion of specific deterrence as a sentencing consideration sits somewhat at odds with other established common law sentencing principles applicable to children, which underline the importance of rehabilitation recognising that children have a unique capacity for positive change. The Children's Court of Victoria also did not consider it necessary or appropriate that general sentencing principles in a new principal Act should reference specific offence types.

The review considers the operation of this provision in more detail below.

8.4 Increased consequences for assaulting a youth justice custodial worker

The YJ Reform Act amended the CYFA, the Crimes Act and the Sentencing Act, to expand on the scope of workers covered under section 31(1)(b)-(ba) of the Crimes Act to include youth justice custodial workers (that is, assaults relating to emergency workers)[429] and increase the consequences for assaulting a youth justice custodial worker on duty.[430] Parliament's intention for these amendments was to respond to the increasing violence and other criminal acts committed within youth justice facilities.

For children and young people (aged under 18 years) the YJ Reform Act:

- created a presumption of sentence cumulation—detention imposed for an assault on a youth justice custodial worker must be served cumulatively on any other sentence(s) of detention currently being served by the individual at the youth justice facility.[431] This made it so that children and young people who commit an assault cannot serve the resulting sentence concurrently.
- added a consideration to the list of sentencing factors, that is, when setting a sentence, the Children's Court 'may take into account, if appropriate, the need to deter young people from committing offences within youth justice centres and youth residential centres'.[432]

For young adults 18 and over, a statutory minimum sentence for assaults against youth justice custodial workers on duty[433] was established, except where a special reason exists, such as impaired mental functioning. In circumstances of gross violence, the sentence will not be able to be served in a youth justice centre unless a special reason exists.

[428] Victorian Aboriginal Legal Service. *Submission to the review*, p. 10.

[429] *Crimes Act 1958*, s 31(1)(b)–(ba), as inserted by *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017*, s 48(1)-(2).

[430] *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017*, pt 8 div 1.

[431] *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017*, s 43, s 44.

[432] *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017*, s 42.

[433] *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017*, s 49.

As part of this review, data obtained from Youth Justice indicated that the number of assault incidents that occur from a youth justice client, that is, a child or young person directed to youth justice staff in custody has been steadily decreasing since 2017–18 (refer to Table 12).

The table depicts a percentage increase of 330 per cent in the number of assaults, from a young person to youth justice staff member of 60 (2016–17) to 258 (2017–18). Although this is a markedly large increase, it is also important to note that due to legislative and machinery of government changes to youth justice[434] during that period, record keeping and data on assault incidents were under improvement. Thus, the steep increase in the number of assaults from a young person to youth justice staff member may not necessarily be attributable to actual number of assault incidents increasing but potentially more incidents being recorded.

In the last two years, there is a significant downward trend in the number of incidents.

Table 12: Number of physical assault incidents recorded from 2016–21 involving a client to youth justice staff

	2016–17	2017–18	2018–19	2019–20	2020–21
Physical assault from client to youth justice staff	60	258	351	170	116

While the review was able to obtain data about charges under section 31(1)(b)-(ba) of the Crimes Act (see Table 13), the data is for assaults on all categories of workers, including assaults on emergency services workers in the community. The data cannot be further disaggregated to identify the percentage of young people charged specifically for assaulting a youth justice custodial worker and is therefore not informative about the impact of the YJ Reform Amendments.

Table 13: Number of young people aged 10–17 who have been charged under section 31(1) of the Crimes Act 1958

Crimes Act 1958, s 31(1)	2016–17	2017–18	2018–19	2019–20	2020–21
(a) assaults or threatens to assault another person with intent to commit an indictable offence	0	≤ 3	≤ 3	0	≤ 3
(b) assaults or threatens to assault, resists or intentionally obstructs an emergency worker on duty or a youth justice custodial worker on duty, or a custodial officer on duty, knowing or being reckless as to whether the person was an emergency worker or a youth justice custodial worker or a custodial officer	133	162	202	197	162

[434] Premier of Victoria. 2017, Building a Stronger and More Secure Youth Justice System, viewed 28 April 2022, <https://www.premier.vic.gov.au/building-stronger-and-more-secure-youth-justice-system>.

(ba) assaults or threatens to assault, resists or intentionally obstructs a person lawfully assisting an emergency worker on duty or a youth justice custodial worker on duty, or a custodial officer on duty, knowing or being reckless as to whether the person was assisting an emergency worker or a youth justice custodial worker or a custodial officer	0	0	≤ 3	0	0
(c) assaults or threatens to assault a person with intent to resist or prevent the lawful apprehension or detention of a person	≤ 3	0	≤ 3	≤ 3	0

*Note: age calculated was based on the young person's age at charge date.

8.5 Findings: Other provisions

The review notes the operation of the miscellaneous and increased consequence provisions. In particular, the increase in the maximum period for which a youth justice centre order can be given has increased the capacity of the Children's Court of Victoria to deal with serious offending within its specialist jurisdiction. This is a welcome outcome. However, the review recommends that there be further assessment of the cumulative and mandatory minimum sentencing requirements. This is discussed further below.

Further assessment of cumulative and mandatory minimum sentencing, including the specific deterrence sentencing consideration is required

Assaults on youth justice workers are a significant challenge and must be taken extremely seriously within the youth justice system. It is important that staff are both safe and that they feel supported in the workplace.

The review notes that the YJ Reform Act imposes cumulative sentencing on young people aged under 18 years, not a mandatory minimum sentence.

From a human rights perspective, mandatory sentencing requirements can limit an individual's right to a fair trial by preventing judicial officers from imposing an appropriate penalty based on the circumstances of each offence and the offender.

As outlined earlier this report, international law provides guidance on the 'best interests of the child' requirements under section 17(2) of the Charter. Article 37(b) of the Convention on the Rights of the Child states that '[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time'. Mandatory cumulative sentencing limits a court's ability to consider the appropriate period of time for a period of detention. The commentary to Rule 17 of the Beijing Rules further states that 'strictly punitive approaches are not appropriate'. In sentencing a juvenile offence, 'just desert and retributive sanctions … should always be outweighed by the interest of safeguarding the well-being and the future of the young person'.

There is a lack of evidence before the review about the use of these YJ Reform Act provisions in practice.

It is important, and very welcome, that there has been a downwards trend in assaults against youth justice staff in the last two years. However, this trend also coincides with significant changes in the operational environment for youth justice, including:

- the new case management framework
- the use of new security rating tools by the Classification and Placement Unit

- a greater number of placement options within custody that allow for differentiated operating models
- the introduction of the Intensive Intervention Unit
- increased capacity for the Safety and Emergency Response Team
- the expansion of mental health services, and
- increased security at custodial centres.

The reduction in client to staff assaults are difficult to attribute to one factor. However, noting the reduced number of young people in custody, the impulsive nature of many assaults by young people, and the extent of change to the youth justice operating environment, the review considers it more likely that changes to the practical and operating environment have had a greater impact on this downward trend, than legislative change through the YJ Reform Act.

This leads to a question about whether the provisions are necessary and appropriately adapted to achieving the policy aim of deterring assaults on youth justice staff.

At the same time, the review was unable to access disaggregated information about the number or circumstances of young people charged with assaulting a youth justice worker or the number who received a cumulative or (for those over 18) a statutory minimum sentence for such an offence. It has therefore been unable to determine the impact of the sentencing requirements on young people, nor consider any impact on particular groups.

Given the seriousness of these issues and the implications for both youth justice staff and young people, the review recommends that such data be collected to allow a full analysis of the operation of these provisions in the future.

Recommendation 17: That DJCS, in consultation with Victoria police and the courts, collect data for the 2022–23 financial year on the:

- number of client to youth justice staff physical assaults and the nature of the incident
- number of young people charged with assaulting a youth justice worker
- sentencing outcomes where a young person is convicted, including extent to which courts apply the sentencing consideration in section 362(h) (‘specific deterrence’), and
- key demographic information about the young person involved.

DJCS should then report to the Minister for Youth Justice and the Attorney-General by 30 September 2023 with further advice about the effects of cumulative and mandatory minimum sentencing requirements and specific deterrence consideration introduced by the YJ Reform Act have had on policy objectives (the safety of youth justice workers) and on young people.

9. Additional opportunities for improvement

The review has identified three additional, overarching opportunities for improving the operation of the YJ Reform Act in practice: the first is in relation to the engagement of victims of crime; the second is in relation to the system’s response to children aged 10 to 13 years; and the third is to establish regular and transparent data reporting. These three opportunities are outlined briefly below.

9.1 Strengthening opportunities for victims of crime to engage in youth justice processes in a supported way

Evidence suggests that where a victim experiences procedural justice, they are more likely to perceive an outcome as valid and fair, even if it is not the outcome they wanted. Further, procedural justice is critical to achieving therapeutic outcomes for victims of crime. Victim satisfaction with criminal justice processes is positively correlated with post-trauma improvement, particularly for those who have experienced violent crime.[435] This is significant, as processes that allow victims to be informed and included during a criminal matter can improve a victim's experience and support their recovery.[436]

Victim experience of the youth justice system as valid and fair also contributes to community confidence in the system.

Consistently with the Victim's Charter, victims should be informed about the court process and the victim's entitlement to attend any relevant court proceedings.[437] The review considers that this notification should extend to any potential diversion as well. In addition, there is an opportunity to give further consideration to how a victim's interest in further contact is documented and supported in practice.

In addition, making use of restorative justice options (which diversion, for example, makes possible in appropriate cases), can provide a unique opportunity for victims to access justice in ways that are not available through traditional court processes. It is important to acknowledge that while victims may want offenders to be punished, research indicates that many others seek recognition, validation and support.[438] Restorative justice processes are designed to achieve these outcomes as the case example in Box 8 illustrates. However, without engagement and the avenues to participate, victims are unable to have access to the potential benefits of restorative outcomes.

Box 8: Case example: Youth justice group conferencing

The Youth Justice Group Conferencing (YJGC) Victim Support Worker (VSW) attended a conference to directly support a young victim of a serious crime against the person and his mother.

The victim had been at school walking through the courtyard when he was approached by another young person who attempted to start a fight. As the victim was walking away, the other young person approached him from behind and struck him with a closed fist to his jaw, he then struck him twice more until he was restrained. As a result of the offence the victim suffered a broken nose and fractured jaw. The victim underwent surgery that required metal plates and screws to be inserted into his jaw. The victim was unable to open his mouth for six weeks and was only able to consume a liquid diet through a straw for this period.

After an initial meeting with YJGC Convenor (Convenor), the VSW met with the victim and his mother and conducted intensive preparation in the lead up to the conference, this included discussions about their participation options, what to expect on the day, including logistics upon arrival, what the room would look like, different stages of the conference and the role of each participant. The VSW and victims explored their interest in participating, what they were hoping to achieve from the process and explained the limitations of the process to manage the expectations of the outcome.

[435] Centre for Innovative Justice. 2019, *Communicating with victims about Resolution Decisions: A Study of Victims' Experiences and Communication Needs*.

[436] Centre for Innovative Justice. 2019, *Communicating with victims about Resolution Decisions: A Study of Victims' Experiences and Communication Needs.*

[437] *Victims' Charter Act 2006*, s 11.

[438] Centre for Innovative Justice. 2019, *Communicating with victims about Resolution Decisions: A Study of Victims' Experiences and Communication Needs.*

As agreed during the preparation phase, on the day of the conference, the VSW met the victim and his mother outside the entrance of the venue 30 minutes before the young person was scheduled to arrive. They were shown around the venue, the conference room and were familiarised with the seating and given another run down of the participants to make them feel as comfortable as possible. The VSW also briefly went through the process again and included how they may expect to feel in certain parts of the conference to manage expectations and normalise feelings and emotions that may arise.

During the conference, the victim spoke about the impacts the offence had on him and the ripple effect on his life. The victim's mother became very distressed when she was explaining how she found out about the incident, and the fear and shock she experienced. She was given the time to continue and was able talk about further impacts on herself and her son. The young person and his mother both listened respectfully and were visibly impacted what the victim and his mother had said. They both apologised to the victim and his mother which was received as sincere and genuine. The young person's (offender's) mother was able to speak about positive changes made by the young person since this offence which left the victim and his mother feeling hopeful in relation to him not committing further offences.

When the conference concluded the young person apologised again to the victim and his mother and thanked them for attending, acknowledging that it would have been difficult.

The VSW walked the victim and his mother out of the venue and the victim's mother took a big deep breath and said, 'I feel so much better after that', and thanked VSW for her support. The victim said that he was glad he participated in the conference and thanked VSW for her support.

As pre-arranged the VSW contacted the victim's mother the following day to de-brief, she was still very happy with the experience and said, 'it's been really hard not being updated or included in anything before the conference, so to be involved in this process and have support has been really good for us'.

As pre-arranged, the VSW called the victim's mother to provide her with the young offenders sentencing outcome, along with an explanation about what it meant. The victim's mother was happy with the sentence and thanked VSW for her of the support and information, she further stated:

- *I feel so relieved after the conference, I was worrying about retribution but after meeting with Steven* and his mum I don't think there will be.*
- *I was so proud of how my son conducted himself in the conference, he made eye contact with Steven and spoke well, I really saw his strength of character. I think it was a really good learning experience for him and I think he is proud of himself for doing it which is good for him.*
- *It was a really good experience for me I just feel so much better.*
- *Thank you for supporting us, it was really comforting knowing that we had someone there just for us and even just having you meet us outside the door was really good.*

* Name changed to protect individual privacy.

Where a victim participates in the youth justice system through restorative justice or a court process, they should be offered trauma-informed support. Victims talk about wanting to feel that the system cares about them and their wellbeing.[439] Without support, a victim is more likely to perceive a process as lacking fairness and legitimacy, to feel that their needs are not recognised, and that they are not being 'heard' in the process.

[439] Centre for Innovative Justice. 2020, *Strengthening Victoria's Victim Support System: Victim Services Review*, p. 196.

To meet victim needs and to ensure safe engagement, victims of crime require specialised, trauma-informed support that anticipates the risk of re-traumatisation and ensures that all victims of crime feel that their experience has been recognised and validated.[440] Victim support workers are able to work closely with individual victims to understand their diverse needs and provide tailored case management support to assist with recovery.[441]

The review recommends below that the Government further consider how to strengthen the engagement of victims in the youth justice system.

Recommendation 18: That the Government further consider how to strengthen opportunities for victims of crime to engage in youth justice processes, including the support required to do so. Further consultation should explore options including, but not limited to:

(a) a potential legislative requirement that victims (if any) be notified of potential diversion and key court events (what is involved, what are the potential outcomes and what opportunities there are to be involved), with further consideration of:

(i) who should be responsible for informing victims (e.g. prosecution, Victoria Police, or a victim support worker), and

(ii) how a victim's interest in further contact would be recorded, who would have access to this information and by what mechanism

(b) opportunities for victim participation, including in restorative justice and court processes, and

(c) further opportunities to support victims of crime who participate in youth justice, including through enhanced services and/or additional funding for support roles.

9.2 A tailored approach to addressing the complex criminogenic needs of children aged 10 to 13 years

Children who are aged 10–13 (inclusive) at the time of an alleged offence are considered to be *doli incapax*. This means that they are presumed at law to lack the capacity to be criminally responsible for their conduct. This rebuttable presumption reflects the underlying rationale that a child under 14 years of age is generally not sufficiently intellectually and morally developed to appreciate the difference between right and wrong.[442]

The minimum age of criminal responsibility is noted in section 10 of this report as an issue raised by several stakeholders. While beyond the focus of this review, consideration of the appropriate minimum age of criminal responsibility is being considered at the national level through the Meeting of Attorneys-General (formerly known as the Council of Attorneys-General) process which established the Age of Criminal Responsibility Working Group.[443] The review notes that this process is still ongoing and the Attorneys-General agreed on 31 March 2021, that the item on raising the age of criminal responsibility would be 'further considered out-of-session'.[444]

[440] Centre for Innovative Justice. 2020, *Strengthening Victoria's Victim Support System: Victim Services Review,* p. 196.

[441] Centre for Innovative Justice. 2020, *Strengthening Victoria's Victim Support System: Victim Services Review*, p. 196.

[442] *R v ALH* (2003) 6 VR 276, [2003] VSCA 129.

[443] Council of Attorneys-General. 2020, *Council of Attorneys-General communique – July 2020*, p. 2.

[444] Meeting of Attorneys-General. 2021, *Meeting of Attorneys-General communique – 31 March 2021*, p. 2.

Within the focus of this review, it is evident from an examination of the YJ Reform Act provisions that many of the approaches established by the Act to respond to youth offending have primarily applied to young people in their teenage years (largely because of their greater numbers in the youth justice system). There is a risk of a missed opportunity to tailor approaches, particularly early intervention for the younger cohort.

While the number of young people aged 10 to 13 years who become formally engaged with the youth justice system is relatively small, early intervention can make a significant difference for children in this cohort.

Research identifies some key characteristics associated strongly with early offending behaviours (that is, children under 14), including 'personality or temperament and early environmental conditions, such as harsh and erratic parenting, early behavioural problems or trauma, history of parental offending and the role of adverse childhood experiences'.[445]

9.2.1 What the data indicates about this age group in the youth justice system

Data from the Crime Statistics Agency and DJCS indicates that 188 children aged 10–13 were charged with an offence between 2017 and 2020.[446] The three most commonly charged offences were assault, aggravated robbery and theft. Nine children during this period were charged with Category A or B serious youth offences.

Of the 188 children aged 10–13 charged with an offence between 2017 and 2020:

- 35 had their charges dismissed
- 84 were given a diversionary non-supervised sentence
- 60 were given a community sentence
- 2 were given a custody-based sentence
- 7 cases were ongoing at the time of reporting.

In 2020–21 there were 39 young people in Victoria aged 10–13 who were under youth justice supervision during the year.[447] This is a 44 per cent reduction compared to numbers in 2016–17.[448]

The Sentencing Advisory Council has found that the younger children are at their first sentence, the more likely they are to reoffend. In its 2016 report, it found that children who were first sentenced aged 10–13 had a particularly high reoffending rates, with over 80 per cent reoffending and over 60 per cent reoffending with an offence against the person. Three-quarters of the children who were first sentenced aged 10–12 continued offending into the adult criminal jurisdiction, and 36 per cent were sentenced to an immediate term of adult imprisonment before the age of 22.[449]

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[445] Morag McArthur, Aino Suomi and Belinda Kendall. 2021, *Review of the service system and implementation requirements for raising the minimum age of criminal responsibility in the Australian Capital Territory: Final Report,* p. 17.

[446] Data is based on the child's age at the time they offended.

[447] Australian Institute of Health and Welfare. 2022, *Youth justice in Australia 2020-21*, viewed 27 April 2022, <Youth justice in Australia 2020–21, Data - Australian Institute of Health and Welfare (aihw.gov.au)>, Table S1b: Young people under supervision during the year by age, states and territories, 2020-21.

[448] Australian Institute of Health and Welfare. 2022, *Youth justice in Australia 2020-21*, viewed 27 April 2022, <Youth justice in Australia 2020–21, Data - Australian Institute of Health and Welfare (aihw.gov.au)>, Table S1b: Young people under supervision during the year by age, states and territories, 2016-17.

[449] Sentencing Advisory Council. 2016, *Reoffending by Children and Young people*, pp. 30–31.

In 2020–21 there were 156 children in Victoria under youth justice supervision whose age at first supervision was between 10–13 years (52 Indigenous and 104 non-Indigenous).[450]

The Sentencing Advisory Council has also highlighted the particular vulnerabilities of many children in this cohort. In its 2019 report it found that the younger children were at first sentence, the more likely they were to be known to Child Protection. Of the 438 children in the study group who were first sentenced aged 10–13, one in two were the subject of a child protection report, one in three experienced out-of-home care, and one in four experienced residential care.[451]

Young people who have interactions with both Child Protection and the criminal justice system often have multiple and complex needs and have experienced traumatic life events such as child abuse, neglect and domestic violence. Presentations often include undiagnosed or emerging disabilities such as Autism, intellectual/cognitive impairment, severe language, behaviour and conduct disorders.

The *Youth Justice Strategic Plan 2020–2030* notes that children aged 10 to 14 years are often the most vulnerable end disadvantage group in the youth justice system:

> They often have complex and intersecting issues at much higher rates than found in the general community, and at higher rates than young people who first come into contact with Youth Justice at an older age.
>
> These issues can include higher rates of socioeconomic disadvantage, disrupted education, unstable housing, disengagement from the community, alcohol and drug misuse, violent or abusive family environments, physical or intellectual impairment, poor health and mental health, or a history of contact with child protection and out-of-home care. Aboriginal children are also overrepresented at a higher rated in the 10 to 14-year-old age group (almost 25 per cent of that group) than for older groups in Youth Justice.[452]

9.2.2 The need for a tailored approach in the youth justice system for children aged 10 to 13 years

While few in number, this cohort of the very youngest offenders presents a significant challenge for the youth justice system—a challenge that the measures in the YJ Reform Act did not address. There are, in a small number of cases, very serious charges being laid against children in this age group. When children in this age group offend, they will offend with greater frequency and consistency and are significantly more likely to transition to the adult system later in life. Children in this cohort will often have complex needs that require a multi-agency response. This cohort also has a capacity for genuine change and opportunity for improved life course trajectories.

The review recognises the important role of prevention strategies for this age group, many of the levers for which sit beyond the youth justice system and are beyond the scope of this review. There is nevertheless a need for the youth justice system to be better equipped to respond to children in this young age group (noting that Victorian law currently applies criminal justice responses to offending for children from 10 years of age).

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[450] Australian Institute of Health and Welfare. 2022, *Youth justice in Australia 2020-21*, viewed 27 April 2022, <Youth justice in Australia 2020–21, Data - Australian Institute of Health and Welfare (aihw.gov.au)>, Table S19: Young people under supervision during the year by Indigenous status and age at first supervision, states and territories, 2020-21.

[451] Sentencing Advisory Council. 2019, *'Crossover Kids': Vulnerable Children in the Youth Justice System, Report 1: Children Who Are Known to Child Protection among Sentenced and Diverted Children in the Children's Court*, 2019, p. xxiv. The study group comprised of all children who offended between the ages of 10 and 17 and received a sentence or diversion in the Victorian Children's Court in the 2016 or 2017 calendar years.

[452] Victorian Government. 2022, *Youth Justice Strategic Plan 2020–2030*, p. 24.

Victoria Police submitted to the review that there was a need to further develop the system response for children in the early stage of offending.[453] It supported work to deliver 'a more tailored response to 10–13 year old children who come into contact with the criminal justice system, particularly those who present with serious behaviours and require intensive supervision'. Victoria Police noted that initiatives such as a '24/7 crisis entry point [for] rapid assessment, more intensive and immediate support services for children at higher risk and the tailored response for different vulnerable cohorts would assist in addressing current gaps and contribute to achieving [the policy objectives of the YJ Reform Act'.[454]

An observation made by a justice sector stakeholder to Deakin University in 2017 reflects some of the practical challenges when there are limited alternatives to a police response:

> [I am aware of] kids as young as eight … coming to [police attention] and it was usually because of welfare reasons rather than anything else. But obviously they couldn't do a lot with them when they were eight, but when they were 10 they would often take them into the police watch house for their 'own protection' because of a lack of alternatives, and because of a lack of resources, and perhaps because they haven't understood the family dynamics and worked out that there is someone else they can turn to.[455]

While advocating for a change to the age of criminal responsibility, Victoria Legal Aid noted in its submission to the review that '[f]or the very few children who pose considerable risk, restorative conferencing should be combined with intensive wrap-around therapeutic support and supervision, provided by trauma-informed and multi-disciplinary staff'.[456]

A tailored approach to children aged 10 to 13 promotes consideration of their best interests, consistently with the Charter.[457] The Convention on the Rights of the Child further identified that children require special safeguards by virtue of their 'physical and mental immaturity' (preamble), and that children in conflict with the law should be treated in a manner that takes a child's age into consideration (Article 40(1)).

A tailored approach in the youth justice system for children aged 10 to 13 would still recognise the importance of an individualised assessment of the needs and risks of each child. However, in addition, it would aim to build capacity in the system for more age-appropriate early intervention and service responses, including where more effective referral pathways are needed, where coordinated responses are required from multiple services systems, and where service gaps need to be addressed.

The *Youth Justice Strategic Plan 2020–2030* recognises that the 'unique developmental state of children aged 10 to 14 years necessitates a differentiated and age-appropriate response by the criminal justice system'.[458] It notes that the diversionary focus is even more important for children aged 10 to 14 years and that the 'government is committed to developing new and safe approaches that keep them out of the Youth Justice system'.[459] A new Budget Paper 3 performance measure was introduced in 2022–23 to reflect the focus on reducing the number of young people aged under 14 in custody.[460]

The review notes that there are various initiatives currently underway in Victoria that contribute to the needs of children in this cohort, including:

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[453] Victoria Police. *Submission to the review*, p. 6.

[454] Victoria Police. *Submission to the review*, p. 2.

[455] Wendy O'Brien and Kate Fitz-Gibbon. 2017, *The minimum age of criminal responsibility in Victoria (Australia); examining stakeholders' view and the need for principled reform, Youth Justice*, 17(2), p. 139.

[456] Victoria Legal Aid. *Submission to the review*, p. 13.

[457] *Charter of Human Rights and Responsibilities Act 2006,* s 17(2).

[458] Victorian Government. 2022, *Youth Justice Strategic Plan 2020–2030*, p. 24.

[459] Victorian Government. 2022, *Youth Justice Strategic Plan 2020–2030*, pp. 18, 25.

[460] Victorian Government. 2022, *Service Delivery: Budget Paper No. 3*, p. 295. The measure is the average daily number of young people in custody – males (under 15 years) and female.

- CCYD (discussed in section 5 of this report), in addition to the range of evidence-based early intervention and diversionary initiatives, and interventions that address offending-related needs in place to support children and young people involved with the criminal justice system
- the 'Framework to reduce criminalisation of young people in residential care' which aims to reduce the unnecessary and inappropriate contact of young people in residential care arising from behaviours manifested from childhood traumatic experiences and resultant involvement with the criminal justice system,[461] and
- the implementation of 'Keeping Aboriginal children and young people aged 10–13 years out of the youth justice project' under *Wirkara Kulpa – Aboriginal Youth Justice Strategy 2022–2032.*[462] Through this project, DJCS has been working with Aboriginal Justice Caucus, Aboriginal Community Controlled Organisations and key partners to strengthen diversion opportunities and develop alternative models of service for Aboriginal children aged 10-13 years. This has been supported by $5.95 million funding provided in the 2021–22 State Budget.

There is an opportunity to further strengthen and support existing initiatives by developing a tailored youth justice service model for children aged 10 to 13 years, building on the experience in Aboriginal Youth Justice.

Recommendation 19: That the Government develop a tailored youth justice service model for children aged 10 to 13 years. The model should include a focus on early intervention that addresses the criminogenic needs of children, as well as effectively connecting children (and coordinating service responses) with other systems such as health, mental health, community services, Child Protection, and education.

9.3 Establishing regular and transparent data reporting

The review observes that there is a further opportunity to establish regular and transparent data reporting so that the operation of significant legislative amendments can be considered as part of the regular management of the youth justice system, and not only through statutory reviews or medium-term evaluations.

The review recommends that DJCS develop a framework that would assist in the public reporting and monitoring of legislative provisions.

This approach is consistent with the goals of building up, tracking and sharing key data sets as outlined by the Youth Justice Strategic Plan[463] and *Wirkara Kulpa.*[464]

Recommendation 20: That DJCS develop a framework that would assist in the reporting and monitoring of legislative provisions. Initial priorities for monitoring and public reporting should be identified in consultation with stakeholders. Consultation should consider the legislative provisions to prioritise reporting on, and the types of demographic and health characteristics (such as disability status) that would support analysis of the operation of those provisions.

[461] Victorian Government. 2020, '*A Framework to reduce criminalisation of young people in residential care'*, p. 8.

[462] Victorian Government. 2022, *Wirkara Kulpa – Aboriginal Youth Justice Strategy 2022-2032*, p.46.

[463] Victorian Government. 2020, *Youth Justice Strategic Plan 2020–2030,* p. 52.

[464] Victorian Government. 2022, *Wirkara Kulpa: Aboriginal Youth Justice Strategy 2022–2032,* p. 50.

10. Other issues raised by stakeholders

The review provided stakeholders with the opportunity to comment on any other legislative, administrative or policy reform that could improve the operation of the youth justice system. Issues raised included:

- increasing emphasis on early intervention and addressing the drivers of offending behaviour in young people before they have contact with the youth justice system[465]
- committing to the self-determination of First Nations peoples in relation to the youth justice system[466]
- addressing the over-representation of Aboriginal young people in the youth justice system[467]
- addressing the over-representation of young people from CALD backgrounds in the youth justice system, including by developing a CALD-specific young justice strategy[468]
- further bail reforms, particularly removing the application of the reverse onus test to young people, and noting the large number of young people being held on remand[469]
- raising the minimum age of criminal responsibility[470]
- the need for further work with the Commonwealth on health funding and the availability of Medicare-funded services to young people in custody, in addition to services provided through the justice system.[471]

These issues are beyond the scope and timeframes of this review to address. DJCS will support their further consideration by the Government, noting that in many of these areas significant work is underway as outlined in the *Youth Justice Strategic Plan 2020-2030*, *Wirkara Kulpa – Aboriginal Youth Justice Strategy 2022-2032, Diversion: keeping young people out of youth justice to lead successful* lives (the Youth Justice Diversion Statement), and the *Crime Prevention Strategy.*

11. Conclusion

The review has focused on the operation of the YJ Reform Act, consistent with the review's statutory requirements. However, as many parts of this review highlight, legislation forms just one part of an effective youth justice system.

[465] Commission for Children and Young People. *Submission to the review*, p. 2; Victorian Aboriginal Legal Service. *Submission to the review*, p. 7; Centre for Multicultural Youth. Submission to the review, p. 2.

[466] First Peoples' Assembly of Victoria. *Submission to the review*, p. 2; Victorian Aboriginal Legal Service. *Submission to the review*, p. 3, p. 7, p. 14.

[467] First Peoples' Assembly of Victoria. *Submission to the review*, p. 2; Victorian Aboriginal Legal Service. *Submission to the review*, p. 3, p. 7, p. 14; Victoria Legal Aid. *Submission to the review*, p. 2; Commission for Children and Young People. *Submission to the review*, p. 7.

[468] Centre for Multicultural Youth. *Submission to the review*, p. 1, p. 9; Victoria Legal Aid. *Submission to the review*, p. 2; Commission for Children and Young People. *Submission to the review*, p. 7.

[469] First Peoples' Assembly of Victoria. *Submission to the review*, p. 2; Victorian Aboriginal Legal Service. *Submission to the review*, p. 9, p. 14; Victoria Legal Aid. *Submission to the review*, p. 12; Centre for Multicultural Youth. *Submission to the review*, p. 10.

[470] First Peoples' Assembly of Victoria. *Submission to the review*, p. 2; Victorian Aboriginal Legal Service. *Submission to the review*, p. 11, p. 14; Victoria Legal Aid. *Submission to the review*, p. 12; Centre for Multicultural Youth. *Submission to the review*, p. 10; Commission for Children and Young People. *Submission to the review*, p. 11; Commission for Children and Young People. *Submission to the review*, p. 7.

[471] Meeting with Expert Advisory Group, April 2022.

This review has examined a period of extraordinary change to the system in Victoria. Since early 2017, the system has been realigned according to the road map set out in the Armytage and Ogloff Youth Justice Review. The operating environment is now quite different. The legislative settings also need to adapt to this new context.

The review has also recognised that community experiences and justice system operations have been severely affected by the COVID-19 pandemic for the last two years of this review period. Trends in offending, and the application of the YJ Reform Act amendments during this period, do not reflect 'business as usual' activities. The data presented in this report should be read with that in mind.

The review has identified 20 key opportunities for improvement. These opportunities range from addressing procedural issues, to improving access and communication, to realigning the amendments with current policy settings and maximising use of the specialist youth justice system.

Given the condensed timeframes for this review, further consultation has been recommended to shape next steps.

Going forwards, the review's recommendations will dovetail into the broader work underway to establish a new, stand-alone, legislative framework for youth justice in Victoria.

Appendix A. Statutory requirements for the review

CYFA Part 5.9 —Review of Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017

Section 492B Review of Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017

1. The Minister must undertake a review of the amendments made to this Act and other Acts by the Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017 to determine whether the policy objectives of the Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017 remain valid and whether the amendments made by that Act remain appropriate to achieve those objectives.
2. The review is to be undertaken as soon as possible after the third anniversary of the first day on which all the provisions of the Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017 have commenced.
3. Without limiting the matters that the review may consider, the review must cover the following matters—
    a. the effects of the amendments made by the Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017, whether adverse or otherwise, on the following—
        i. rates of offending and re-offending;
        ii. incarceration of young people;
        iii. community safety;
        iv. the long-term well-being of children and young people in contact with the justice system
    b. the operation of youth control orders;
    c. the operation of youth diversion strategies and programs;
    d. the operation of the system known as the dual track system;
    e. the categorisation of certain offences as serious youth offences, and the effect of this categorisation on decisions about bail, noncustodial sentences and the placement of young adults in youth justice centres;
    f. whether the incarceration of Aboriginal or Torres Strait Islander children and young people has increased or decreased as a proportion of the total incarcerated population of young people in Victoria since the Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017 received the Royal Assent;
    g. whether any additional legislative, administrative or policy reform is necessary to improve the operation of Victoria's youth justice system.
4. The Minister must cause a report on the review to be laid before each House of the Parliament not later than 12 months after the third anniversary of the first day on which all the provisions of the Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017 have commenced.

Appendix B. List of tables, figures and boxes

Appendix C. List of stakeholder meetings and submissions

The review undertook targeted engagement to support its work within the statutory timeframes. In addition to policy and operational staff within DJCS, the review met with:

- Aboriginal Justice Caucus
- Centre for Multicultural Youth (staff
- Centre for Multicultural Youth (young people)
- Children's Court of Victoria
- Department of Education and Training
- Department of Families, Fairness and Housing
- Office of Public Prosecutions
- Victoria Legal Aid
- Young people at the Malmsbury Youth Justice Centre
- Young people at the Parkville Youth Justice Centre
- Youth justice representatives from New South Wales and New Zealand

The review received submissions from:

- Centre for Multicultural Youth
- Children's Court of Victoria
- Commission for Children and Young People
- First Peoples' Assembly of Victoria
- Office of Public Prosecutions
- Supreme Court of Victoria
- Victoria Legal Aid
- Victoria Police
- Victorian Aboriginal Legal Service
- Victorian Equal Opportunity and Human Rights Commission
- Youth Parole Board

The review also received correspondence from:

- County Court of Victoria
- Department of Health
- Department of Premier and Cabinet
- Sentencing Advisory Council
- Victims of Crime Commissioner

Appendix D. Additional data notes

CCYD Evaluation notes: Comparing CCYD reoffending outcomes to alternative lower-tier sentences[472]

Control group participants had to have received one of the following court outcomes:

- good behaviour bond
- probation
- accountable undertaking
- non-accountable undertaking.
- probation
- accountable undertaking
- non-accountable undertaking.

The control group was filtered to ensure none of the control subjects had received CCYD during that same period.

There were a total of 2,051 individuals from the control group matched to young people who had completed CCYD.

The following outcomes were used to determine the impact of CCYD on reoffending among young people compared to the control group:

- whether an individual young person reoffended in the follow-up period
- whether the most serious offence committed by an individual young person during the follow-up period was of high, medium or low seriousness
- whether an individual young person was a frequent (six or more offences) reoffender.

Each of these reoffending outcomes was assessed over a six-month window from the date of completing a diversion (for the CCYD participant group) or the date after a court hearing (control group).

Odds ratios were used to measure the strength of the CCYD effect on reoffending and are presented in Table 14. Results were similar, with odds ratios less than one for all outcome models.

Table 14: Average treatment effects on matched individuals for reoffending

Outcome	No covariate adjustment		Covariate adjustment
	Odds ratio (C.I.)	p-value	Odds ratio (BCa C.I.)*
Reoffended	0.545 (0.479, 0.619)	<0.001	0.564 (0.499, 0.639)
High seriousness	0.613 (0.525, 0.716)	<0.001	0.641 (0.550, 0.747)
Medium seriousness	0.677 (0.562, 0.817)	<0.001	0.680 (0.564, 0.819)
Low seriousness	0.456 (0.299, 0.696)	<0.001	0.448 (0.284, 0.694)
Frequent reoffending (>=6)	0.487 (0.408, 0.582)	<0.001	0.503 (0.421, 0.603)

*Odds ratios and 95% confidence intervals shown
Source: CCYD Evaluation

[472] Department of Justice and Community Safety. Information from the evaluation of the Children's Court Youth Diversion Service, provided to the review, April 2022.

Appendix E. Glossary

Abbreviations and acronyms

Acronyms	Description
ACT	Australian Capital Territory
CALD	Culturally and linguistically diverse
CCYD	Children's Court Youth Diversion
CCYP	Commission for Children and Young People
CRIS	Youth Justice Client Relationship Information System
CSA	Crime Statistics Agency
CYFA	*Children's Youth and Families Act 2005*
DJCS	Department of Justice and Community Safety
E&I	Evidence and Insights
EJI	Education Justice Initiative
ISSP	Intensive Supervision and Surveillance Program
JDL	Justice Data Linkage
KECCLO	Koori Education Children's Court Liaison Officers
LEAP	Law Enforcement Assistance Program (database)
NSW	New South Wales
NT	Northern Territory
RECCLO	Regional Education Children's Court Liaison Officers
RNR	Risk-needs-responsivity
SA	South Australia
SAC	Sentencing Advisory Council
SPCCU	Specialist Prosecution Children's Court Unit
SYO	Serious Youth Offence
VALS	Victorian Aboriginal Legal Service
VEOHRC	Victorian Equal Opportunity and Human Rights Commission
VLA	Victoria Legal Aid
VSIIDR	Victorian Social Investment Integrated Data Resource
YCO	Youth Control Order
YJ	Youth Justice
YRO	Youth Resource Officer
YSS	Youth Support Service
WA	Western Australia

Terms

Terms	Description
The Act **YJ Reform Act**	*Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017*
Adolescent Violence Intervention Program	The Adolescent Violence Intervention Program (AVIP) is a Youth Offending Program delivered by Caraniche Youth Forensic Services (CYFS) to help young people on Youth Justice community or custodial orders stop their violent offending. AVIP is delivered to young people who have pleaded guilty to committing a violent offence and have been assessed as moderate or medium to high risk of violent re-offending. AVIP is usually facilitated as a group program and consists of six modules delivered over 26 sessions (39 hours).
Armytage and Ogloff Youth Justice Review and Strategy	The Youth Justice Review and Strategy: Meeting needs and reducing offending was an independent review of Victoria's youth justice system conducted by Penny Armytage and Professor James Ogloff AM.
Beijing Rules	United Nations Standard Minimum Rules for the Administration of Juvenile Justice.
Children's Court	The Children's Court of Victoria.
Commission for Children and Young People (CCYP)	The CCYP has a range of functions, including providing independent scrutiny and oversight of services for children and young people, particularly those in the out-of-home care, child protection and youth justice systems.
Dismissal	The lightest sentence available through the Children's Court. The Court dismisses the charge though records a finding of guilt.
Expert Advisory Group	An advisory group of four experts, Paul Grant, Professor Susan Sawyer AM, Mr Tim Goodwin and Mr Tim Cartwright, convened to advise the review of this Act.
Fine	The child must pay some money at the Court. The highest possible fine is more for children who are over 15 than for children who are under 15.
Functional Family Therapy	Functional Family Therapy is a short-term, evidence-based intervention program that works intensively with families for an average of three to five months. FFT works primarily with young people aged 11 to 18 years who are referred by Youth Justice.
Good behaviour bond	The child must promise to not do any more crime, and follow any conditions set by the Court. The Court decides the amount of the bond. If the child keeps these promises, the Court will dismiss the charges when the bond ends (for example, after 12 or 18 months), the child will not have to pay the bond, and no further action will be taken. If the child breaks any of these promises, they may have to return to court and pay the bond.
Multisystemic Family Therapy	An intensive home-based program that delivers support to families to address young people's behaviours and issues. This program equips families to become more cohesive, develop stronger parenting skills, and decrease the likelihood that young people will offend or re-offend.
Out-of-home care	A temporary, medium- or long-term living arrangement for children and young people who cannot live with one or both parents and who are on statutory care orders or voluntary childcare agreements.

Probation order	The child must be supervised by a Youth Justice worker, and not commit any crime. Probation can include special conditions, such as going to counselling or attending a day program.
Propensity score/ propensity score matching	Propensity score matching (PSM) is a quasi-experimental method which uses statistical techniques to construct an artificial control group by matching each treated unit (in this case CCYD participants) with a non-treated unit of similar characteristics (young people who received a different court outcome to CCYD). Using these matches, the researcher can estimate the impact of an intervention.
Proven charges	Proven charges refer to instances where a magistrate has found the young person guilty of committing the offence(s) they were charged with.
SEIFA	Socio-Economic Indexes for Areas (SEIFA) provide summary measures derived from the Census and can help users understand the relative level of social and economic wellbeing of a region. SEIFA uses a broad definition of relative socio-economic disadvantage in terms of people's access to material and social resources and their ability to participate in society.
Serious youth offence regime	A sentencing scheme that introduced different consequences depending on the categorisation of certain types of serious youth offences as either Category A or B.
Services	Refers to government and non-government services.
Undertaking	The Court dismisses the charge but records a finding of guilt. The child must promise to not do any more crime, and sometimes must also promise to do other things (like going to school) for the period of the undertaking (6 or 12 months). If the child breaks any of these promises, they may have to return to court.
Victoria Police	Victoria's primary law enforcement agency.
Wirkara Kulpa	*Wirkara Kulpa – Aboriginal Youth Justice Strategy 2022-2032,* Victoria's first Aboriginal youth justice strategy. *Wirkara Kulpa* identifies the actions and efforts required to close the gap by 2031. It continues the progress made to date through the Aboriginal Justice Forum by building on culturally strengthening programs, initiatives, and system improvements that are demonstrating impact. Its vision is that Aboriginal children and young people are not in the youth justice system.
Young person	Refers to a person aged between 10 and 17 years.
Youth attendance order	For young people aged 15 to 20 as an alternative to a youth justice centre order (detention). Under a youth attendance order, the child will be supervised by a Youth Justice worker and must follow strict reporting and attendance conditions. This sentence can also include conditions such as education, counselling, treatment, or unpaid community work. The child must not commit any crime during the sentence. If the child does not follow the conditions, they may have to go into detention.
Youth control order	For children aged 10 to 18. This sentence is served in the community and has strict conditions. Conditions could be going to school or work, getting health treatment or counselling, staying at home at night, not using social media, or not being allowed to go to certain places. The child must not commit any crime during the sentence. A youth control order can last up to 12 months. If the child does not follow the conditions, they will go into detention, unless there are special reasons.

Youth control order planning meeting	A planning meeting to develop, through discussion, a youth control order plan for the child or young person. A planning meeting may also be held to vary a youth control order already in place.
Youth justice centre order	Detention in a youth justice centre. This sentence can only be given to a child or young person aged 15 to 20 at the time of sentencing. While in a youth justice centre, the child must go to education classes. The child might also have to do programs (like anger management courses) to improve their behaviour.
Youth Justice Strategic Plan 2020-2030	A ten-year roadmap to reshape the youth justice system to boost community safety, reduce reoffending and provide support for children and young people to turn their lives around. The Plan focuses on actions targeting diversion and early interventions, reducing offending, workforce investment and safety, strong partnerships, and creating opportunities for children and young people to live positive and productive lives.
Youth residential centre order	Detention in a youth residential centre. This sentence can only be given to a child aged under 15 at the time of sentencing. While in a youth residential centre, the child must go to education classes. The child might also do programs (like anger management courses) to improve their behaviour.
Youth supervision order	Like a probation order, but it has more supervision. Under this sentence, the child must follow the instructions of a Youth Justice worker, and not commit any crime. Like probation, this sentence can include special conditions.
Youth Support Service	A voluntary, short-term, community based early intervention program for young people at risk of becoming involved in the justice system. The Youth Support Service is funded by the department and is delivered by 10 community service organisations across Metropolitan Melbourne and in the regional cities of Geelong, Ballarat, Bendigo, Shepparton, Mildura, and the Latrobe Valley.
Youth Through Care	The Youth Through Care (YTC) Program is an intensive, client centred, holistic, culturally appropriate, trauma-informed program, with a solid connection to country and family that supports Aboriginal and Torres Strait Islander young peoples aged 10 to 17 years while in custody and exiting detention.

Appendix F. Second Reading Speech

Ordered that second-reading speech be incorporated into *Hansard* on motion of Ms PULFORD (Minister for Agriculture).

Ms PULFORD (Minister for Agriculture) — I move:

That the bill be now read a second time.

Incorporated speech as follows:

The Children and Youth Legislation Amendment (Youth Justice Reform) Bill 2017 contains measures to address community concerns about crimes committed by children and young people, and to improve safety and security in youth justice facilities.

Despite an overall reduction in the number of crimes committed by young people in recent years, small numbers of young people are entering the criminal justice system early and reoffending more often and in an alarmingly serious manner. Members of our community deserve to be safe from crime and protected from children and young people who commit aggravated home invasions, aggravated carjacking and other serious offences. The bill makes clear that this kind of serious violent offending will not be tolerated. It includes a presumption that certain serious youth offences will no longer be heard in the Children's Court and a requirement that
18–21-year-olds who commit certain serious youth offences are sent to adult prison, not youth detention. For adults who encourage young people to commit crimes on their behalf, the bill creates a tough new offence punishable by up to 10 years imprisonment.

This government understands that suitable young people should be given the opportunity to rehabilitate, which will protect the community from further offending. The youth control order is a new sentencing option targeted at children who would otherwise be sentenced to detention because of the seriousness or ongoing nature of their offending, but who do have potential to be rehabilitated with the support and supervision of the court. The order will require intense supervision by youth justice and regular court monitoring. The order requires the child to engage in education, training or work, and failure to comply with the order will result in a sentence of detention unless exceptional circumstances exist. The youth control order will not be an easy way out.

The maximum period of detention in a youth justice facility that can be imposed by the Children's Court and higher courts will be increased, and higher penalties will apply to various offences committed within youth justice centres. Young offenders involved in violence and property damage in our youth justice facilities will be subject to tough new sentencing requirements, including statutory minimum sentences for attacks on youth justice custodial officers for offenders aged 18 and over. Youth justice staff should be safe at work and the public should not have to continue to bear the cost of damage to these facilities.

Preventing a life of crime before it starts is critical in protecting the community. The bill creates a legislative scheme allowing children who have committed low-level offences to be diverted from the criminal justice system and address their offending behaviour before it escalates into persistent offending. For the first time, diversion will be available statewide and will not discriminate by postcode.

1. Criminal justice reforms

The bill creates a new offence of recruiting a child to engage in criminal activity. Many young people involved in property crimes have been performing these crimes at the request of older, more experienced criminals. In many cases, these older persons do not participate in the crimes at all — but enrich themselves from the proceeds of these crimes. For example, Victoria Police have advised that cars are stolen by children who pass them on to adults in return for cash payments.

The new offence will target adults who recruit children to engage in criminal activity, knowing that it is likely that the child will engage in the intended criminal activity. The offence will apply to an adult aged 21 or over who recruits a child aged under 18, and will have a maximum penalty of 10 years imprisonment.

The bill will set out the matters that the Children's Court must have regard to when considering whether a child who has been charged with offences should be tried in the higher courts. The bill makes clear that trial in the higher courts is appropriate where the sentencing options available to the Children's Court are inadequate to deal with the child's offending. The court will be required to consider the seriousness of the conduct, including the impact on any victims, and the role of the accused, the nature of the offence, the child's personal circumstances and offending history, whether the offence was committed while the child was subject to other orders and any other relevant matter.

When a child is charged with offences in the Children's Court, the same magistrate will be required to oversee the proceedings relating to that child, where practicable. This will ensure that the court takes a consistent approach when dealing with the child, particularly in monitoring sentencing outcomes.

The bill will also permit the Children's Court to impose an aggregate sentence of detention in relation to multiple charges founded on the same facts or of a similar character. This provides consistency with the powers of other courts when sentencing adults.

The bill will increase the maximum period of youth detention that can be imposed for a single offence from two years to three years. It also increases the maximum period of youth detention that can be imposed on a single occasion for multiple offences from three years to four years.

2. Youth control orders

Youth control orders are a new sentencing option that will operate as an alternative to detention by imposing intense requirements for supervision, support and court monitoring for up to 12 months. Breach of a youth control order will result in detention unless exceptional circumstances apply. Youth control orders will include strict mandatory requirements, including participation in education, training or work, and may also include requirements for community service, treatment, counselling, curfews, social media bans or geographic exclusion.

A youth control order plan will be developed at a meeting involving the child, their family, youth justice officers, education providers and other services. The plan is designed to assist the child to take responsibility for their actions, reduce the likelihood of reoffending, provide the child with rehabilitative opportunities, and inform the court about which requirements should be imposed under the youth control order. Youth control order planning meetings must be held before an order is imposed and can also be held during the course of an order to review the youth control order plan.

A child on a youth control order must attend the Children's Court at least once per month during the first half of the order for a monitoring or reporting hearing. The court can vary the requirements of the order depending on compliance by the child by either making the order more or less restrictive.

The youth control order will be supported by additional youth justice staff and funding for agencies to ensure that children are monitored and supported to comply with the order.

The youth control order will provide a more intensive and targeted form of community-based order for young offenders that garners relevant expertise from the community, support from government agencies, all monitored by the court.

3. Strengthening consequences for young offenders who commit serious offences

The bill will increase the consequences for young offenders aged 16 years or older who commit serious offences. The bill creates two new categories of serious youth offences, with particular outcomes attached to those offences that are designed to reflect their relative seriousness.

'Category A' offences will be murder, attempted murder, manslaughter, child homicide, intentionally causing serious injury in circumstances of gross violence, aggravated home invasion, aggravated carjacking, arson causing death, culpable driving causing death and commonwealth terrorism offences.

'Category B' offences will be recklessly causing injury in circumstances of gross violence, rape, rape by compelling sexual penetration, home invasion and carjacking.

Uplift of charges to the higher courts

As a result of the changes, more serious offences will be taken out of the Children's Court and heard in the higher courts. This change will help ensure that serious offences are heard in the higher courts with a full range of sentencing options available, serving the interests of justice and community safety.

There will be a presumption that category A offences be heard in the higher courts, alongside the continuing requirement that homicide offences continue to be heard in the Supreme Court. The only circumstances where category A offences will not be uplifted will be where the child or prosecution requests the case be heard in the Children's Court, the Children's Court is satisfied that the available sentencing options will be adequate to deal with the child, and:

a) it is in the interests of the victim that the matter be heard in the Children's Court, or

b) the accused child is especially vulnerable because of a cognitive impairment or mental illness, or

c) there is otherwise a substantial and compelling reason justifying the charge being heard in the Children's Court.

In determining whether there is a 'substantial and compelling reason', the court must have regard to Parliament's intention that a charge for a serious youth offence as described should ordinarily be heard and determined in a higher court. This is similar to the 'special reasons' exception available under the statutory minimum sentence provisions in the Sentencing Act 1991.

A higher court may remit a case back to the Children's Court if it considers that a summary hearing is more appropriate, having regard to the same criteria considered by the Children's Court. To avoid a case moving repeatedly between jurisdictions, if a case is remitted to the Children's Court that court must then hear and determine the case summarily, unless there has been a significant change in the charges or case against the accused.

For category B offences the bill requires the Children's Court to consider uplift to the higher courts, without any requirement for an application by the prosecution. The Children's Court will be required to consider whether the category B offence is unsuitable by reason of exceptional circumstances to be determined summarily.

Limiting dual-track sentencing

The bill will limit the ability for serious young offenders aged 18–21 years to be sentenced to a period of detention in a youth justice facility. These offenders will no longer be able to be sentenced to youth justice detention, except in exceptional circumstances, if they are convicted of:

- a category A offence, or
- a category B offence, having previously been convicted of a category A or B offence.

This amendment will result in young adult offenders who commit serious offences being sentenced to prison.

Requiring consideration of community safety in sentencing

A concern arising from recent incidents of criminal offending and the sentencing of children is whether the protection of the community is given sufficient weight in the sentencing process.

The serious youth offence provisions will require the Children's Court to have regard to protection of the community when sentencing a child for a serious youth offence. At present, consideration of community protection is only relevant if the court considers it appropriate. This amendment will require the court to consider the need to protect the community, or any person, from the violent or other wrongful acts of a child in all cases where the sentence is for a category A or B offence. This will help ensure that young offenders who commit serious offences are properly managed and the danger they pose to the community is taken into account in sentencing.

Mandatory parole conditions

The bill will require the Youth Parole Board to impose certain parole conditions when granting parole to an offender serving detention for a serious youth offence. The requirements will apply to a person detained in relation to a category A offence, or a category B offence if the person had previously been convicted of a category A or B offence.

The conditions include requirements to undergo rehabilitation and treatment, curfews, non-association and conditions considered necessary for the protection of victim of the person's offending. The Youth Parole Board must impose the conditions unless satisfied it is not necessary due to the person demonstrating a history of good behaviour and positive engagement with rehabilitation programs.

4. Detainee accommodation

The bill contains reforms to improve decision-making as to how detainees are placed in and transferred between youth justice facilities.

To improve clarity and transparency of transfer decisions the bill sets out the factors that the Secretary to the Department of Justice and Regulation is to consider when deciding whether to transfer a person between youth justice facilities. The factors include: the availability and appropriateness of accommodation across the system; the safety, security and good order of the facility; the safety, security and needs of any detainee; and the safety of staff and others. The amendment also makes clear that the secretary is not required to afford procedural fairness in making transfer decisions, meaning the secretary is not required to hear from the child before making the decision. This does not affect the requirement that the secretary consider the child's needs.

The bill permits the co-location of people on remand with people who are serving a period of detention. Co-location may occur without the consent of the person on remand if the person on remand has previously been in youth justice detention, if it is in their best interests to be accommodated with persons serving a period of detention and co-location is reasonably necessary.

Finally, the bill clarifies the powers of the court when a young person who is remanded in a youth remand centre but has subsequently turned 18 comes before the court on charges committed after they turned 18. It will also set out criteria that the court must consider when deciding whether it is appropriate for those young people to return to a youth justice facility.

5. Increasing consequences for offending in youth justice facilities

The government does not tolerate riots and other incidents within youth justice centres. The government is determined to ensure public confidence in the youth justice system and to address any behaviour which undermines the rehabilitation and wellbeing of the children and young people detained there.

The bill contains a number of measures to respond to increasing violence and other criminal acts committed within youth justice facilities.

The bill will extend current statutory minimum sentences that apply to prison officers and emergency workers to youth justice custodial workers. As a result, minimum sentences will apply to people aged 18 and over who are sentenced for serious assaults on youth justice custodial workers while they are on duty in a youth justice facility.

For assaults committed by children under 18, the bill creates a presumption that sentences of detention imposed for those assaults will be served cumulatively on any other sentence of detention. This increases the consequences for children, as the statutory minimums do not apply to children.

Whatever the age of the person, there will be a presumption that a sentence of detention for property damage in a youth justice facility or for escaping or attempting to escape are to be served cumulatively on any other period of detention.

In relation to children, the bill will require the Children's Court in sentencing a child to take into account the need to deter the child from committing offences committed in youth justice facilities, where relevant.

Finally, the bill will increase the maximum penalties that apply to certain offences committed in youth justice facilities, including the offence of escape.

6. Youth diversion

The final part of this bill establishes a tailored pre-plea youth diversion scheme in both the criminal division of the Children's Court and the Children's Koori Court. Currently, youth diversion operates under section 59 of the Criminal Procedure Act 2009 (CPA), which enables diversion for adult offenders in the Magistrates Court. This bill allows for a scheme more tailored to the particular needs of children.

The diversion amendments in the bill complement the existing suite of available diversion options throughout the continuum of the youth justice system. The provisions are intended to address the underlying reasons for low-level offending, assist rehabilitation and prevent children from becoming entrenched in the criminal justice system.

The provisions recognise that most children mature out of criminal behaviour. Supporting children to complete diversion avoids the stigma of a criminal conviction, and the potential negative impact this has on future life opportunities.

The bill enables the court to adjourn a matter to enable a child to undertake specific diversion activities. Youth diversion enables timely intervention in a child's life that can set them on a more constructive and positive path. The youth diversion amendments to the CYFA largely mirror the provisions of the adult scheme contained in the CPA, however, they also provide for greater flexibility, recognising the particular vulnerability of children. Protective elements, and specific principles and factors, have been included to guide the court when deciding whether to adjourn the matter for diversion.

The government announced on 24 April 2016 that $5.6 million would be provided over two years for a statewide youth diversion scheme. The amendments give effect to recommendation 127 of the Royal Commission into Family Violence and enshrine in legislation the scheme that has been operating as a pilot in select locations since 2015, with statewide operation commencing on 1 January 2017.

The purposes of diversion

The bill includes provisions which explain the purposes of diversion. These provisions clearly state Parliament's intent for the youth diversion scheme and also provide guidance to decision-makers as to what outcomes youth diversion should endeavour to achieve.

Availability of diversion for certain offences

The bill does not exclude any offences or types of offences from eligibility for diversion. Rather, it sets out a list of factors to be considered by the court when deciding whether to adjourn the matter for diversion. This allows the necessary flexibility to the court to identify firstly whether diversion is appropriate for an individual and secondly, what kind of diversion activities would be most suitable.

As with the adult diversion scheme, youth diversion is not available in relation to offences with minimum or fixed penalties. This is to ensure that Parliament's intention regarding these penalties is not undermined.

Diversion available pre-plea

The bill provides for youth diversion to be available after charges have been laid and before any plea has been entered by a child. Diversion is to be considered by the court on the initiative of the prosecution or the defence, or on the court's own initiative. The provisions are intended to complement, rather than replace, other pre-court police processes, such as police warnings or cautioning. These practices remain important options for Victoria Police when dealing with children.

In situations where a child has entered a plea before the question of diversion has been considered, and the court considers that diversion should be considered, the bill provides additional, protective provisions. The provisions allow the court to refuse to accept a guilty plea or grant leave to the child to withdraw their guilty plea to allow diversion to be considered, where appropriate.

Extension of the jurisdiction of the Children's Koori Court

As with the adult scheme, the bill extends the jurisdiction of the criminal division of the Children's Koori Court so that it can hear diversion matters for young Koori people. The Koori court provides important insight and support through the participation of Koori elders and respected persons, which will assist in achieving better outcomes for Victoria's Koori children.

The child's consent and acknowledgement of responsibility

The bill requires a child to acknowledge their responsibility for the offence and also consent to diversion. The requirement that a child acknowledge responsibility is intended to reduce recidivism and ensure that the child is referred to appropriate support services. Upon successful completion of diversion, no plea is to be taken and the court must discharge the child without any finding of guilt.

Prosecutor's consent to diversion

As with the adult system for diversion, the bill provides that the prosecutor must consent to diversion. To ensure greater transparency and consistency, the bill prescribes a number of factors, which the prosecutor must have regard to when considering whether to consent to diversion. These factors include the child's prior history of offending, the seriousness of the offence, and the impact on the victim.

Factors to consider

The bill also prescribes factors to be considered by the court, both in deciding whether to adjourn the matter for diversion for a particular child and in deciding appropriate diversion activities. These factors are intended to assist the parties in reaching agreement and also provide guidance as to the intent of the youth diversion scheme.

Diversion achieved by way of adjournment

The bill allows for diversion to be completed by way of adjournment for a period of no more than six months. In the adult diversion scheme, the adjournment period is up to 12 months. A shorter time frame has been prescribed in recognition of the vulnerabilities of children in the youth justice system. There is a greater need to provide a swift response to offending that engages the child with their family, community, and specialist support services.

The effect of diversion

Upon successful completion of the diversion activities included in the diversion plan, the bill allows for the child to be discharged without any finding of guilt. If the child does not complete diversion, they will be required to return to court, enter a plea and be dealt with through the normal court process. In these circumstances, the child's acknowledgement of responsibility will be inadmissible, but the court will be able to take the partial completion of any diversion activities into account during any sentencing.

7. Instructions not to communicate with a child in out-of-home care or detention

The bill also strengthens provisions that allow the relevant secretary to issue an instruction to a person directing them not to communicate with or attempt to communicate with a child in out-of-home care or in detention. These provisions will strengthen existing offences, and support prosecutions to protect children at risk of sexual exploitation. Currently, while it is an offence to attempt to have contact with a child in out-of-home care or in detention, there is no express provision empowering the secretary to issue such instructions and no provision specifying how instructions should be issued. The provisions of this bill make these powers clear.

I commend the bill to the house.

Debate adjourned for Ms CROZIER (Southern Metropolitan) on motion of Mr Ondarchie.

Debate adjourned until Thursday, 15 June.