

‘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

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‘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

Published by the Sentencing Advisory Council Melbourne, Victoria, Australia

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ISBN 978-1-925071-48-1 (Online)

Authorised by the Sentencing Advisory Council,
Level 3, 333 Queen Street, Melbourne VIC 3000

Copyedited by Catherine Jeffreys AE

Publications of the Sentencing Advisory Council follow the Melbourne University Law Review Association Inc *Australian Guide to Legal Citation* (3rd ed., 2010).

This report reflects the law as at 1 May 2019.

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Acknowledgments

The Council thanks all those who attended consultation meetings to share their insights and experience in relation to the findings discussed in this report.

The Council especially thanks the Children's Court of Victoria and the Department of Health and Human Services. Without their support and assistance, this project would not have been possible.

Abbreviations

CALD	Culturally and linguistically diverse
CYF Act	<i>Children, Youth and Families Act 2005</i> (Vic)

Glossary¹

Accused	A person who is charged with a criminal offence.
Average	A measure of central tendency also known as the 'mean'. The average is equal to the sum of a set of values divided by the number of values in the set. For example, in the following set of values: 1, 2, 2, 3, 3, 4, 5, 5, 6, 6, 7, the 11 values add to 44, so the mean is 4 (44 divided by 11 = 4). In this report, a reference to an average is a reference to a mean, unless otherwise specified.
Case	In this report, one or more charges against a person that are sentenced at the one hearing.
Charge	In this report, a single proven count of an offence.
Child	In this report, a person who is aged 10–17 inclusive at the time of an alleged offence and aged under 19 when proceedings for the offence commence in the Children's Court: <i>Children, Youth and Families Act 2005</i> (Vic) s 3(1).
Child and family information, referral and support teams (Child FIRST)	Referral and support teams that link vulnerable children, young people and their families to integrated family services.
Child protection	In this report, the Victorian child protection service.
Child protection order	In this report, a collective description for four categories of orders made by the Family Division of the Children's Court of Victoria under the <i>Children, Youth and Families Act</i> (Vic) ('CYF Act'): protection orders, interim accommodation orders, therapeutic treatment orders and permanent care orders.
Child protection report	In this report, a report to the child protection service raising concerns that a child is in need of protection.

1. Terms relating to child protection are primarily drawn from Department of Health and Human Services, 'DHHS.vic' (dhhs.vic.gov.au, 2019) <<https://dhhs.vic.gov.au/>> at 20 May 2019 and Early Childhood and School Education Group, Department of Education and Training, and Youth and Families Division, Department of Health and Human Services, *Out-of-Home Care Education Commitment: A Partnering Agreement Between Department of Health and Human Services, Department of Education and Training, Catholic Education Commission of Victoria, Independent Schools Victoria, Victorian Aboriginal Child Care Agency, Centre for Excellence in Child and Family Welfare* (2018) 3–5.

Child protection service (Victoria), the	A service with functions including investigating reports that a child is at risk of harm and issuing a protection application in the Children's Court if the child's safety cannot be ensured within the family. The child protection service is part of the Department of Health and Human Services.
Council, the	The Sentencing Advisory Council.
'Crossover kid'	A term that has been used (along with 'crossover child') in past research to describe children with involvement in both the criminal justice system and the child protection system. There is no uniform definition of 'crossover kids'. This project examines several different categories of child protection involvement for sentenced and diverted children.
Detention	Confinement in a youth justice centre (offenders aged 15–20) or a youth residential centre (offenders aged under 15) under the CYF Act.
Discharge	A sentence type that involves the conviction of an offender and discharge without conditions. Discharge is available under the <i>Sentencing Act 1991</i> (Vic) in adult courts (Magistrates' Court, County Court or Supreme Court), in contrast to a sentence available under the CYF Act for children in the Children's Court.
Dismissal	An order under which a child is found guilty of an offence and the court dismisses the charge without recording a conviction and without conditions (<i>Children, Youth and Families Act 2005</i> (Vic) s 360(1)(a)).
Diversion	A pre-plea option that allows a child who completes a diversion plan to have their charges discharged without a criminal record. The Children's Court grants an adjournment under the CYF Act for the child to participate in and complete a diversion program.
Diverted	In this report, a child who has been granted an adjournment by the Children's Court to participate in and complete a diversion program.
Family Services	Support and assistance services to vulnerable children, young people and their families in cases where there are concerns about the wellbeing of the child or young person (0–17 years, including an unborn child) or their family. ² Integrated family services operate alongside child and family information, referral and support teams (Child FIRST), and both are funded by the Department of Health and Human Services.

2. Better Health Channel, 'Family and Child Support Services' (betterhealth.vic.gov.au, 2018) <<https://www.betterhealth.vic.gov.au/health/ServicesAndSupport/family-and-child-support-services>> at 20 May 2019.

Fine A sentence that requires an offender to pay a sum of money to the state. For children aged under 15, the maximum fine is one penalty unit for one offence (or the statutory maximum penalty for the particular offence, whichever is the lowest) and two penalty units for more than one offence. For children aged 15 or over, the maximum fine is five penalty units for one offence (or the statutory maximum penalty for the particular offence, whichever is the lowest) and 10 penalty units for more than one offence (*Children, Youth and Families Act 2005* (Vic) s 373).³

In this report, the data relating to fines does not include data from the Children and Young Persons Infringement Notice System (CAYPINS) under Schedule 3 of the CYF Act. Only fines imposed as a sentence in the Children's Court are included in the data.

First sentence The first sentence recorded for a child in the study group on or after 1 July 2004.

Foster care Temporary care of children in a family setting with trained, assessed and accredited foster carers.⁴

Good behaviour bond An order under which the court postpones the sentencing of a child for up to one year (or up to 18 months if the child is aged 15 or over, and the circumstances are exceptional). During this period, the child must be of good behaviour and meet any special conditions imposed by the court. When making the order, the court specifies a bond amount. If the child complies with the order, the court dismisses the charge, does not record a conviction and does not require the child to pay the bond amount. If the child fails to comply with the order, the court may require payment of the bond amount or may resentence the child for the original charges (*Children, Youth and Families Act 2005* (Vic) ss 367–372).

Imprisonment A sentence available under the *Sentencing Act 1991* (Vic) for adults, in contrast to a sentence of detention available under the CYF Act for children. In this report, the term *imprisonment* describes a custodial sentence that is served immediately, as distinct from a sentence of imprisonment that is partially or wholly suspended.

Index offender In this report, a person sentenced or diverted in the Children's Court of Victoria in 2016 or 2017 for at least one charge.

Index sentence In this report, an index offender's first sentence or diversion in the Children's Court in 2016 or 2017. If an offender was sentenced once in 2016 or 2017, that sentence is the index sentence. If an offender was sentenced more than once in 2016 or 2017, the earliest sentence is the index sentence.

3. For the financial year 1 July 2018 to 30 June 2019, one penalty unit is valued at \$161.19: Treasurer, 'Notice Under Section 6, Fixing the Value of a Fee Unit and a Penalty Unit', in Victoria, *Victoria Government Gazette*, No. S 145, 29 March 2018. The value of a penalty unit is adjusted each year in line with inflation.

4. Department of Health and Human Services, 'Families & Children: Foster Care' (dhhs.vic.gov.au, 2019) <<https://services.dhhs.vic.gov.au/foster-care>> at 13 May 2019.

- Interim accommodation order** An interim (temporary) order made under section 262 of the CYF Act after a protection application has been issued and the court has decided that an interim order is needed to keep the child safe until the application is determined. When making an interim accommodation order, the court is required to consider the best interests principles under section 10 of the CYF Act, including that the child is only to be removed from their parent if there is an unacceptable risk of harm to the child (*Children, Youth and Families Act 2005* (Vic) s 10(3)(g)). These orders specify where the child must live until the next court date and usually include conditions (the court may impose conditions in the best interests of the child) (*Children, Youth and Families Act 2005* (Vic) s 263).⁵
- Investigation (by child protection service)** An investigation of a matter following an allegation that a child is at risk of harm. Every report made to the child protection service (raising concerns about a child's welfare) is assessed by a child protection practitioner in an intake service. The child protection practitioner gathers information and assesses whether the child appears to be in need of protection. If the child is assessed to be at significant risk of harm, the report is investigated. If child wellbeing concerns exist, child protection may refer the child and family to family services or other specialist supports.
- Kinship care** Out-of-home care provided by a child's relatives ('kin') or a member of the child's social network ('kith'). This definition is broader than the strict definition of 'kinship' (relating to family relationships).
- Known to child protection** In this report, a term used to describe a child who has been the subject of at least one report to the child protection service.
- Median** A measure of central tendency. The median is the middle value in an ordered set or a distribution of values. For example, in the following set of values: 1, 2, 2, 3, 3, 4, 5, 5, 6, 6, 7, the median value is 4, representing a midpoint where half of the values (1, 2, 2, 3, 3) are below the median and half of the values (5, 5, 6, 6, 7) are above the median. If a set has an even number of values, the two middle values (sometimes defined as the *lower median* and the *upper median*) are averaged to find the median.
- Mean** A measure of central tendency, also known as the *average*.
- 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 child care agreements. Children and young people living in statutory out-of-home care may be subject to a child protection investigation, protective intervention or a Children's Court order (and have oversight by the Department of Health and Human Services).⁶

5. See further Department of Health and Human Services, 'Families & Children: Child Protection Orders' (dhhs.vic.gov.au, 2017) <<https://services.dhhs.vic.gov.au/child-protection-orders>> at 13 May 2019.

6. Department of Health and Human Services, 'Children, Youth & Families – Child Protection Orders' (dhhs.vic.gov.au, 2018) <<https://providers.dhhs.vic.gov.au/out-home-care>> at 13 May 2019.

- Permanent care order** An order made by the Children's Court appointing a specified person or persons as having parental responsibility for the child, usually to the exclusion of all others. Following the granting of a permanent care order, the child protection service (Department of Health and Human Services) is no longer involved (*Children, Youth and Families Act 2005* (Vic) ss 319–327).
- Prior offence** In this report, a term used to describe a sentenced charge or case that occurred before an offender's index sentence in 2016 or 2017.
- Probation** An order requiring an offender to report to a youth justice unit, obey the instructions of a youth justice worker and refrain from offending. The order must not last for more than one year (or more than 18 months for offences with a maximum penalty of more than 10 years) and cannot extend beyond the offender's 21st birthday. The order can include special conditions, such as counselling and treatment programs (*Children, Youth and Families Act 2005* (Vic) ss 380–386).
- Protection order** A final order made under section 275 of the CYF Act where the court has found a child to be in need of protection under section 274 of the CYF Act (or there is a substantial and irreconcilable difference between the child and their carer). See also section 162 of the CYF Act for the circumstances in which a child may be found to be in need of protection. A protection order under section 275 includes an order requiring a person to give an undertaking, a family preservation order, a family reunification order, a care by Secretary order or a long-term care order. The available orders changed substantially with the introduction of the *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* (Vic); the relevant provisions commenced operation in March 2016.
- Residential care** Out-of-home care provided by paid staff, usually in a residential home accommodating up to four children. As at January 2016, there were 240 residential care homes operating in Victoria, accommodating 442 children and young people. The Department of Health and Human Services funds a variety of community service organisations to run these facilities on its behalf.⁷
- Secure welfare** Out-of-home care in a secure welfare service (a lock-up facility accommodating up to 10 young people). Secure welfare is an option of 'last resort' where there is 'a substantial and immediate risk of harm' to a child.⁸ The maximum period a child can be placed in secure welfare is 21 days with one further extension of 21 days available (*Children, Youth and Families Act 2005* (Vic) s 263(2)(b)).

7. Victoria Legal Aid, *Care Not Custody: A New Approach to Keep Kids in Residential Care out of the Criminal Justice System* (2016) 5.

8. *Children, Youth and Families Act 2005* (Vic) ss 173(2)(b), 263(1)(e). See further [2.16]; Judicial College of Victoria, '13.2.5.5 – Placement in a Secure Welfare Service', *Children's Court Bench Book* (Judicial College of Victoria, 2018) <<http://www.judicialcollege.vic.edu.au/eManuals/CHCBB/index.htm#60790.htm>> at 13 May 2019; Department of Health and Human Services, 'Secure Welfare Service', *Child Protection Manual* (Department of Health and Human Services, 2018) <<http://www.cpmanual.vic.gov.au/advice-and-protocols/service-descriptions/out-home-care/secure-welfare-service>> at 13 May 2019.

Sentenced and diverted children	Children who were sentenced or diverted in the Children's Court of Victoria in 2016 or 2017 for at least one charge.
Study group	In this report, the group of 5,063 offenders who were sentenced or diverted for at least one charge in the Children's Court in 2016 or 2017. Each child was counted only once. If a child had more than one sentence or diversion in the two-year study period, the first sentence or diversion was counted as the <i>index sentence</i> .
Study period	In this report, the period from 1 January 2016 to 31 December 2017 inclusive.
Substantiation (by the child protection service, Department of Health and Human Services)	The substantiation of a report to the child protection service. A report is substantiated if upon investigation of the report the protective intervener is satisfied based on one or more of the grounds defined in section 162 of the CYF Act that the child is in need of protection. If necessary, the child protection service will issue a protection application in the Children's Court.
Therapeutic treatment order	A court order requiring a child aged 10–14 (inclusive) who has exhibited sexually abusive behaviour to participate in an appropriate therapeutic treatment program (<i>Children, Youth and Families Act 2005</i> (Vic) ss 244–258). On 29 March 2019 (after the study period for this report), therapeutic treatment orders were extended to include children aged 15–17 (inclusive). ⁹
Unborn child report	A confidential report to the child protection service before a child is born. If a woman is pregnant and a person has a significant concern for the wellbeing of her child after that child's birth, that person may make an unborn child report. The person may also make a confidential referral to a child and family information, referral and support team (Child FIRST).
Undertaking (accountable or unaccountable)	A sentencing order for up to one year requiring agreement from the child to abide by certain conditions. At the end of the order, the court dismisses the charge that the child has been found guilty of. An accountable undertaking means the child may have to return to court if the order is breached. An unaccountable undertaking means the child does not have to return to court if the order is breached (<i>Children, Youth and Families Act 2005</i> (Vic) ss 363–366).
Voluntary child care agreement	An agreement entered into under part 3.5 of the CYF Act whereby the parent retains guardianship but places the child in out-of-home care. ¹⁰

9. *Justice Legislation Amendment (Family Violence Protection and Other Matters) Act 2018* (Vic) ss 3–13.

10. Early Childhood and School Education Group, Department of Education and Training, and Youth and Families Division, Department of Health and Human Services (2018), above n 1, 5.

- Youth attendance order** An alternative order to detention for offenders aged 15–20. The order requires an offender to report to youth justice and comply with intensive reporting and attendance requirements. The order may last for up to one year, but it cannot extend past the offender's 21st birthday. The court may attach special conditions, such as education, counselling or treatment, or may direct that the offender engage in community service. The offender must not reoffend during the order. If the order is breached, the offender may be sent into detention (*Children, Youth and Families Act 2005* (Vic) ss 397–409).
- Youth control order** A sentencing order available in the Children's Court for children who would otherwise be sentenced to detention because of the serious or ongoing nature of their offending, but who have potential to be rehabilitated with support and supervision.¹¹ The youth control order became available on 1 June 2018 (after the study period for this report).
- Youth justice centre order** An order for offenders aged 15–20 for detention in a youth justice centre for a maximum of two years for a single offence or three years for more than one offence (*Children, Youth and Families Act 2005* (Vic) ss 412–413). While detained, offenders participate in education and/or programs that address their offending behaviour. Temporary leave may be granted for specific purposes, such as work (*Children, Youth and Families Act 2005* (Vic) s 485). From 30 November 2017 (towards the end of the study period for this report), the maximum penalty increased to three years for one offence and four years for more than one offence, as part of a suite of youth justice reforms.
- Youth residential centre order** An order for offenders aged under 15 for detention in a youth residential centre for a maximum of one year for a single offence or two years for more than one offence. While detained, offenders participate in education and/or programs that address their offending behaviour (*Children, Youth and Families Act 2005* (Vic) ss 410–411). Temporary leave may be granted for specific purposes, such as work (*Children, Youth and Families Act 2005* (Vic) s 485).
- Youth supervision order** An order requiring an offender to be under a higher level of supervision than for a probation order but under a lower level of supervision than for a youth attendance order. Conditions include attending a youth justice unit, participating in programs, reporting to youth justice, obeying the instructions of a youth justice worker and refraining from offending. The order must not last for more than one year – or more than 18 months for offences with a maximum penalty of more than 10 years – and cannot extend beyond the offender's 21st birthday (*Children, Youth and Families Act 2005* (Vic) ss 387–395).

11. Victoria, 'Children and Justice Legislation Amendment (Youth Justice Reform) Bill 2017', *Parliamentary Debates*, Legislative Assembly, 25 May 2017, 1502 (Martin Pakula, Attorney-General); *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic) pt 3.

Executive summary

This is the first of two reports by the Sentencing Advisory Council looking at the child protection backgrounds of children who received a sentence or diversion in the Victorian Children's Court in 2016 or 2017.

The project aims to explore the pathways that lead children as young as 10 into the criminal justice system and better understand the vulnerable backgrounds of children who are sentenced in the Children's Court.

Research questions

The report answers the following questions:

1. **Prevalence of 'crossover kids' in the youth justice system:** What proportion of children sentenced or diverted in the Children's Court in 2016 and 2017 (the 'study group') were known to the child protection service? Specifically, in the period from 18 June 1996 to 3 September 2018, what proportion of children:
 - (a) were the subject of a child protection report?
 - (b) were the subject of a child protection report that was investigated?
 - (c) were the subject of a child protection report that was substantiated?
 - (d) were the subject of a child protection order made in the Children's Court?
 - (e) experienced out-of-home care, including residential care?
2. **Over-representation of Aboriginal and Torres Strait Islander children:** What proportion of sentenced and diverted children known to the child protection service were Aboriginal and Torres Strait Islander children?
3. **Sentence type and child protection involvement:** What proportion of children sentenced to specific sentence types were known to the child protection service?
4. **Age at first sentence and child protection involvement:** Are children first sentenced at a young age more likely than older children to be known to the child protection service?

Aim

This report aims to identify the proportion of sentenced and diverted children who are known to the child protection service and the sentence types associated with higher rates of children with child protection backgrounds. The broader aim of the report is to inform sentencing practice and policy in several ways, including providing evidence that may assist in:

- identifying the principles, purposes and factors that are relevant to sentencing children and reflect their circumstances and the factors that contributed to their offending;
- evaluating and improving the effectiveness of current sentencing options and understanding why sentenced children reoffend; and
- understanding why particular aspects of the sentencing process or sentencing orders may be challenging for children who have experienced trauma, have little or no family support and/or do not have stable living circumstances.

Beyond sentencing, the findings of this report have broader implications in terms of identifying earlier (pre-sentence) opportunities for intervention, understanding the way that children cross from the child protection system into the youth justice system, examining criminal justice responses to children (such as the age of criminal capacity) and identifying initiatives for preventing or halting the criminalisation of children in care.¹² While such issues are critically important, they are beyond the scope of the analysis in this report.

‘Crossover kids’

The term *crossover kid* or *crossover child* has been used in past research to describe children with involvement in both the criminal justice system and the child protection system. There is no uniform definition of crossover kids. Instead of labelling one particular group as ‘crossover kids’ and limiting the study to those children (for example, children who have been the subject of a child protection order), this project examines several different categories of child protection involvement for sentenced and diverted children. This report focuses on children who were sentenced or diverted in the Victorian Children’s Court in the calendar years 2016 and 2017 and analyses the proportion of children who experienced the following in the 22-year period from June 1996 to September 2018:

- (a) They were the subject of at least one report to the child protection service, including unborn child reports¹³ (this count includes uninvestigated and unsubstantiated reports).
- (b) They were the subject of at least one *investigated* report, which involves contact between the child and the child protection service.
- (c) They were the subject of at least one *substantiated* report.
- (d) They were the subject of at least one child protection order made in the Children’s Court.
- (e) They experienced out-of-home care, including the proportion of children who experienced residential care.

12. Previous studies have raised concerns about children in out-of-home care being charged with offences for behaviour that would not result in criminal charges if it happened in a child’s family home. See Chapter 1.

13. *Children, Youth and Families Act 2005* (Vic) ss 29, 32. See Chapter 1, n 35.

Study group

There were 5,063 children in the study group, which comprised all children who offended between the ages of 10 and 17 (inclusive) and received a sentence or diversion in the Victorian Children's Court in the 2016 or 2017 calendar years (the 'study period').

The Council classified a child's first (or only) sentence or diversion in the study period as their 'index sentence'. Each child was counted once only.

The study group includes 3,404 sentenced children and 1,659 children dealt with under the diversion program.

Of the 5,063 children in the study group, 617 children were aged 10–14 at their index sentence (12%), and 4,446 children were aged 15 or older at their index sentence (88%). The study group included 1,273 girls (25%) and 3,790 boys (75%).

What is child protection?

Any person who has a significant concern for the wellbeing of a child may make a report to the Victorian child protection service of the Department of Health and Human Services or to a member of the police force.

The test for whether a child is 'in need of protection' is set out in section 162 of the *Children, Youth and Families Act 2005* (Vic) ('CYF Act'). A child is in need of protection if the child has been abandoned, the child's parents are dead or incapacitated (for example, admitted to hospital) or the child has suffered, or is likely to suffer, harm and the child's parents have not protected the child or are unlikely/unable to protect the child.

Every report made to the child protection service raising concerns about a child's welfare is assessed by a child protection practitioner in an intake service. The child protection practitioner gathers information and decides whether the report should be investigated by assessing whether, in their view, the child appears to be in need of protection using the test in section 162 of the CYF Act. An investigation requires contact with the child who is the subject of the report.¹⁴ After investigating, if the child protection service is satisfied on reasonable grounds that the child is in need of protection, a decision may be made to substantiate the report. If necessary, the child protection service will also issue a protection application in the Children's Court.

Five key aspects of the child protection system are examined in this study:

- (a) reports to the Victorian child protection service raising concerns about possible abuse, neglect, harm or risk to a child, including uninvestigated and unsubstantiated reports;
- (b) investigated reports;
- (c) substantiated reports;
- (d) child protection orders, which are court orders that give the Department of Health and Human Services responsibility for particular aspects of the child's welfare; and
- (e) out-of-home care, which is a temporary, medium or long-term living arrangement for children who cannot live with their families.

14. Department of Health and Human Services, 'Investigation Phase: Advice', Child Protection Manual (Department of Health and Human Services, 2017) <<http://www.cpmanual.vic.gov.au/advice-and-protocols/advice/investigation/investigation-phase>> at 4 December 2018.

Research Question 1: What proportion of children sentenced or diverted in the Children’s Court in 2016 and 2017 were known to the child protection service?

(a) How many children were the subject of a child protection report?

Over **1 in 3** sentenced and diverted children had been the subject of a report to the Victorian child protection service.

Of the 5,063 children in the study group, 38% (1,938 children) were the subject of at least one report to the Victorian child protection service at any time in the 22-year period from June 1996 to September 2018 (including uninvestigated and unsubstantiated reports).

Of the 1,938 children who were the subject of a child protection report, 89% had been the subject of multiple reports to the child protection service raising concerns about their safety and wellbeing, and 30% were the subject of 10 or more reports.

(b) How many children were the subject of an *investigated* report?

Of the 1,938 children who were the subject of a child protection report, over three-quarters (79%) had at least one report *investigated* by the child protection service (1,538 children or 30% of the study group).

(c) How many children were the subject of a *substantiated* report?

Of the 1,938 children who were the subject of a child protection report:

- around two-thirds (66%) had at least one report *substantiated* by the child protection service (1,286 children or 25% of the study group); and
- 41% were the subject of more than one *substantiated* report, and 12% had four or more substantiated reports in their lifetime.

(d) How many children were the subject of a child protection order?

In this report, the term *child protection order* is used to refer collectively to four categories of orders made by the Family Division of the Children’s Court of Victoria under the CYF Act:

1. protection orders (see [2.8]–[2.9]);
2. interim accommodation orders (see [2.10]);
3. permanent care orders (see [2.11]); and
4. therapeutic treatment orders (see [3.13]–[3.15]).

Almost one in five children in the study group (18% or 892 people) were the subject of at least one child protection order made in their lifetime. This comprised almost half of the 1,938 children who were reported to the child protection service (46% or 892 children). Almost all these children were the subject of at least one protection order, which is a final order made by the Children's Court once satisfied that the child is in need of protection based on one or more grounds in section 162 of the CYF Act) (833 children or 16% of the study group).

Around **1 in 6** sentenced and diverted children were the subject of a protection order at some point in their lifetime, after the Children's Court found them to be in need of protection.

The 892 children who were the subject of at least one child protection order had a number of key characteristics:

- 97% (866 children) were found at least once by the Children's Court to be at an *unacceptable risk of harm* (resulting in an interim accommodation order involving out-of-home care)¹⁵ and/or to be *in need of protection* (resulting in a protection order).¹⁶ These 866 children comprised 17% (over one in six) of the sentenced and diverted children in the study group. Many of these children are likely to have been immediately removed from their families by police or child protection practitioners at least once in 'the most serious of circumstances where [the] child has suffered significant harm, or is at imminent risk of significant harm'.¹⁷ Aside from indications of neglect or abuse, the risk of harm may also relate to circumstances such as the death or incapacitation of a child's parent;
- 94% were the subject of multiple child protection orders (interim and/or final), almost two-thirds (65%) had five or more child protection orders in their lifetime and one-third (33%) had 10 or more child protection orders in their lifetime, suggesting ongoing concerns for their safety and wellbeing within parental care, in many instances requiring changes to their care arrangements;
- 87% had at least one order involving out-of-home care;
- 26% had been the subject of a care by Secretary order or guardianship to Secretary order, signifying that they were unlikely to be able to return to their families; and
- less than 6% were placed on permanent orders – 5.6% were the subject of a long-term care order, long-term guardianship to Secretary order and/or permanent care order.

(e) How many children experienced out-of-home care?

Out-of-home care is a temporary, medium or long-term living arrangement for children and young people who cannot live with their parents and who are on child protection orders.

In total, 767 children (15% of the study group) had at least one recorded out-of-home care placement in their lifetime, whether before, during or after their offence and sentence. Most of these 767 children experienced more than one out-of-home care placement in their lifetime:

- around four in five children had more than one placement; and
- around one in two children had five or more placements.

15. An interim (temporary) order is made after a protection application has been issued and the court determines that an interim order is needed to keep the child safe until the child protection application is determined (see further [2.10]).

16. A protection order is a final order made after the Children's Court is satisfied that the child is in need of protection under one of the grounds in *Children, Youth and Families Act 2005* (Vic) s 162 (see further [2.8]).

17. Department of Health and Human Services, 'Immediate Removal of a Child: Advice', Child Protection Manual (Department of Health and Human Services, 2016) <<http://www.cpmanual.vic.gov.au/advice-and-protocols/advice/investigation/immediate-removal-child>> at 8 March 2019. See [5.47].

Nearly **1 in 6** sentenced or diverted children experienced out-of-home care.

1 in 10 sentenced or diverted children experienced residential care.

1 in 2 children who experienced out-of-home care had 5 or more placements.

The number of placements includes respite care placements (temporary short-term placements) that occur between other longer-term placements but does not include respite care placements that occur within, or parallel to, longer term placements (for example, where a child's primary out-of-home care placement is supported by the child being periodically looked after by a second set of carers).

Of the 767 children who had experienced out-of-home care, 525 had spent time in residential care (68%), which was the most prevalent placement type. This amounted to 10% of the study group.

When out-of-home care placement types were examined on a particular day (30 June 2017), children in care in the study group were far more likely to be in residential care than children aged 10–17 in care in the general Victorian out-of-home care population. Specifically:

- of the 4,230 children within the general population (aged 10–17) who were in out-of-home care on 30 June 2017, 10% were in residential care; and
- of the 213 children in the study group of sentenced and diverted children (aged 10–17) who were in out-of-home care on 30 June 2017, 58% were in residential care.

This is a particularly striking finding. It is consistent with previous research suggesting that children who have experienced residential care are over-represented in the youth justice system.

Research Question 2: What proportion of sentenced and diverted children known to the child protection service were Aboriginal and Torres Strait Islander children?

Sentenced and diverted children who were the subject of a child protection report were **8 times** more likely than the general population to be Aboriginal and Torres Strait Islander children.

Sentenced and diverted children who had experienced out-of-home care were **11.5 times** more likely than the general population to be Aboriginal and Torres Strait Islander children.

Aboriginal and Torres Strait Islander children comprised:

- 1.6% of Victorian people aged 10–20 on 30 June 2016;
- 13% of the 1,938 sentenced and diverted children who were the subject of a child protection report;
- 18% of the sentenced and diverted children who were the subject of at least one child protection order; and
- 19% of sentenced and diverted children who experienced out-of-home care.

These findings suggest a substantial over-representation of Aboriginal and Torres Strait Islander children at the intersection of the child protection and youth justice systems.

Of the children who experienced out-of-home care, Aboriginal and Torres Strait Islander children were more

likely than non-Aboriginal and Torres Strait Islander children to have spent time in kinship care and less likely to have spent time in residential care.

Research Question 3: What proportion of children sentenced to specific sentence types were known to the child protection service?

Children sentenced to the most severe sentence types were more likely than other sentenced and diverted children to have a child protection history. However, care must be taken in interpreting this finding. A child's experience of child protection would not be expected to *directly* lead to a more severe sentence than one imposed on children with no child protection history. On the contrary – it is likely to be a mitigating factor that a child has experienced trauma, harm, abuse, loss or removal from their family into out-of-home care. Nevertheless, child protection involvement may *indirectly* contribute towards the over-representation of children with child protection backgrounds in the more severe sentencing options.

Custodial orders

The Council found that children sentenced to custodial orders were the most likely to be known to the child protection service. Just under half (49%) were the subject of at least one child protection report. Children sentenced to custodial orders had the same rates of child protection orders (24%) and out-of-home care (23%) as children sentenced to supervised community orders. Children sentenced to custodial orders had the highest rate of residential care (20%).

Of children sentenced to a custodial order:

1 in 2 were the subject of a child protection report.

1 in 4 were the subject of a child protection order.

1 in 5 experienced residential care.

Diversion

There was little difference between the proportion of sentenced children and the proportion of diverted children who had been the subject of a report to the child protection service, which may be surprising given diversion's role to keep less serious offenders away from the youth justice system. The gap between sentenced children and diverted children widened as the level of child protection involvement increased.

Fines

The proportion of fined children who were the subject of a child protection report was noticeably lower than the proportion of diverted children and the proportion of children who received all other sentence types: 23% of fined children were the subject of at least one child protection report, 9% were the subject of a child protection order and 8% experienced out-of-home care. The lower proportion of fined children known to the child protection service is likely to reflect circumstances around:

- the offence – for example, fines are the most common disposition for transit offences, which had the lowest proportion of children known to the child protection service; and
- the offender – for example, a fine may be very difficult for a child in out-of-home care to pay and virtually impossible to enforce, rendering it meaningless as a sentence (it is unlikely that the court would impose a fine if a child clearly lacked the capacity to pay).

Over-representation of Aboriginal and Torres Strait Islander children

Aboriginal and Torres Strait Islander children were over-represented in every sentence type and child protection category. This finding is consistent with previous research (see further [4.41]–[4.46]).

Aboriginal and Torres Strait Islander children comprised about **1 in 3** of the children sentenced to a custodial order who had been the subject of a child protection order or had experienced residential care.

The greatest over-representation of Aboriginal and Torres Strait Islander children occurred at the intersection between the most severe sentence type (custodial orders) and the most serious end of the child protection system (child protection orders, out-of-home care and residential care). Aboriginal and Torres Strait Islander children comprised 1.6% of the 808,556 Victorian people aged 10–20 on 30 June 2016.¹⁸ In contrast, of the 165 children sentenced to a custodial order (a youth residential centre order or a youth justice centre order), Aboriginal and Torres Strait Islander children comprised:

- 21% of children sentenced to a custodial order who had been the subject of a report to the child protection service (17 children);
- 35% of children sentenced to a custodial order who had been the subject of a child protection order (14 children); and
- 33% of children sentenced to a custodial order who had experienced residential care (11 children).

Research Question 4: Are children first sentenced at a young age more likely than older children to be known to the child protection service?

The younger children were at first sentence, the more likely they were to be known to the child protection service. Of the 438 children who were first sentenced aged 10–13:

- 54% were the subject of at least one child protection report (238 children);
- 38% were the subject of at least one child protection order (168 children);
- 33% experienced out-of-home care (146 children); and
- 26% experienced residential care (112 children).

Of children first sentenced aged 10–13:

1 in 2 were the subject of a child protection report.

1 in 3 experienced out-of-home care.

1 in 4 experienced residential care.

These findings are particularly concerning when considered alongside the findings of the Council's 2016 youth reoffending study that the younger children are at their first sentence, the more likely they are to reoffend generally, reoffend violently and receive a sentence of adult imprisonment before their 22nd birthday.¹⁹

18. Australian Bureau of Statistics, *Estimates of Aboriginal and Torres Strait Islander Australians, June 2016*, cat. no. 3238.0.55.001 (2018) (Estimated resident Aboriginal and Torres Strait Islander and Non-Indigenous populations, states and territories, single year of age, 30 June 2016, Table 2: Estimated resident Aboriginal and Torres Strait Islander and Non-Indigenous populations, Victoria, single year of age (to 65 and over), 30 June 2016(a)).

19. Sentencing Advisory Council, *Reoffending by Children and Young People* (2016) 52.

Concluding observations

On any given day, the Criminal Division of the Children's Court is likely to sentence children who are known to the Victorian child protection service due to their experience of trauma, abuse, harm, neglect, parental death or incapacitation or the risk of harm.

Research has established that a child's experience of abuse and trauma can disrupt healthy brain development and can cause children to remain 'hyper-vigilant' and reactive to perceived threats and triggers. This can have consequences for a child's emotional and behavioural regulation.

For children removed from their families into out-of-home care, this may also include removal from the child's community, friends and school, and their experience of care can compound the trauma that they have already experienced. Previous research also suggests that children in care may be more likely to be prosecuted for behaviour that would usually be dealt with in the family home, contributing to their over-representation among sentenced and diverted children.

Childhood trauma is, therefore, clearly relevant to sentencing, particularly when there is a nexus between the trauma and a child's offending. The focus on rehabilitation in the Children's Court requires an understanding of the context of a child's offending and the role played by circumstances such as abuse, separation from family and the experience of out-of-home care.

The Court of Appeal has specified that the matters to be taken into account in sentencing a child under section 362 of the CYF Act require the sentencing court to consider 'the effect of the proposed sentence on the child ... and to impose a sentence which fits the young offender as much as – or perhaps even more than – it fits the crime'.²⁰ Section 362 includes the need to strengthen the relationship between the child and the child's family and the desirability of allowing the child to live at home.²¹ However, the section is silent in relation to a child who currently is not safe with their family and who cannot live at home. There is no requirement in section 362 for the court to take into account:

- the child's experience of abuse, trauma, neglect, parental death, loss, removal from family or experience of out-of-home care and how these circumstances relate to the child's offending;
- the need to ensure that the child has a safe, stable and secure place to live; or
- the need to protect the child from harm or the risk of harm.²²

In light of the prevalence of children with child protection backgrounds in the youth justice system, further legislative guidance on the way that a sentencing court may take into account a child's background and experience of trauma may be valuable.

20. *CNK v The Queen* [2011] 32 VR 641, [4]–[16].

21. *Children, Youth and Families Act 2005* (Vic) ss 362(a)–(b).

22. *Children, Youth and Families Act 2005* (Vic) s 362. The list of reports and other matters to be taken into account by a court in sentencing a child is set out in *Children, Youth and Families Act 2005* (Vic) pt 5.2 div 5.

1. About this project

Background

- I.1 This is the first of two reports by the Sentencing Advisory Council ('the Council') examining the child protection backgrounds of children who were sentenced or diverted²³ in the Victorian Children's Court in 2016 or 2017.
- I.2 The project builds on the Council's research report *Reoffending by Children and Young People in Victoria* (2016), which found that age at first sentence is strongly associated with future contact with the criminal justice system. The younger children were at their first sentence, the more likely they were to reoffend generally, reoffend violently and be sentenced to a term of adult imprisonment before their 22nd birthday. Children who were first sentenced at a young age proceeded to commit a disproportionate volume of all youth crime.²⁴
- I.3 One limitation of the 2016 report was the lack of data on the backgrounds of the children in the study, particularly on whether they had experienced, or were at risk of, abuse, harm or neglect or had spent time in out-of-home care. Indeed, data availability (or unavailability) has been the main limitation on the scope and development of research into children involved in both the youth justice system and the child protection system:

The pronounced lack of quality research in relation to the consequences of 'care-criminalisation' is a matter of particular concern. The studies that have been conducted into juvenile offending have seldom sought to understand why children offend while in care or to examine the criminogenic processes that propel them into the justice system at such disproportionate rates ... Australian research into the involvement of children in [out-of-home care] in the criminal justice system is particularly lacking.²⁵

Aim

- I.4 This project aims to explore the pathways that lead children as young as 10 into the criminal justice system and better understand the vulnerable backgrounds of children who are sentenced or diverted in the Children's Court. The research is intended to provide evidence to inform policy makers, the judiciary and the community about the backgrounds of children who have had contact with both the child protection system and the youth justice system.

23. Children's Court youth diversion is a pre-plea option that allows a child who completes the diversion plan to have their charges discharged without a criminal record. The court grants an adjournment under the *Children, Youth and Families Act 2005* (Vic) for the child to participate in and complete a diversion program. The diversion program started as a 12-month pilot program before becoming available in all Victorian Children's Court locations from January 2017. It was given a formal statutory basis under *Children, Youth and Families Act 2005* (Vic) ss 356B–356K, which were introduced by the *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic). See further Judicial College of Victoria, '27.2.1.1 – Youth Diversion Programs', *Children's Court Bench Book* (Judicial College of Victoria, 2017) <<http://www.judicialcollege.vic.edu.au/eManuals/CHCBB/index.htm#66518.htm>> at 1 March 2019. The youth diversion program targets children 'charged with low-level offences with little or no criminal history who would otherwise be sentenced to an outcome not requiring supervision with the youth justice service. Prior to [Children's Court youth diversion] most would leave court without an intervention to assist them to develop the knowledge, skills and attitudes to manage their lives effectively without further offending': Children's Court of Victoria, 'Youth Diversion' (childrenscourt.vic.gov.au, 2019) <<https://www.childrenscourt.vic.gov.au/jurisdictions/criminal/youth-diversion>> at 14 March 2019.

24. Sentencing Advisory Council (2016), above n 19, 27 (Table 5), 30–31 (Figure 19). See further [4.9]–[4.10].

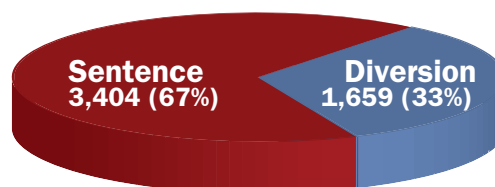
25. Kath McFarlane, 'Care-Criminalisation: The Involvement of Children in Out-of-Home Care in the New South Wales Criminal Justice System' (2018) 51(3) *Australian & New Zealand Journal of Criminology* 412, 426. See also Kath McFarlane, 'Improving Data Collection to Better Support Children in Out-of-Home Care at Risk of Offending' (aifs.gov.au, 2017) Child Family Community Australia <<https://aifs.gov.au/cfca/2017/10/18/improving-data-collection-better-support-children-out-home-care-risk-offending>> at 13 May 2019.

- 1.5 Identifying the proportion of sentenced children who have experienced abuse, harm or the risk of harm, and out-of-home care – and the sentence types associated with higher rates of children with child protection backgrounds – can inform sentencing practice and policy in several ways, including providing evidence that may assist in:
- identifying the sentencing factors relevant to children that reflect their circumstances and the factors that contributed to their offending;
 - identifying the purposes and principles relevant to sentencing children;
 - evaluating the appropriateness and effectiveness of current sentencing options and understanding why sentenced children reoffend;
 - improving the effectiveness of sentencing options as a mechanism to interrupt the progression of child offenders both through the youth justice system and into the adult criminal justice system;
 - understanding why particular sentencing orders or aspects of the sentencing process may be challenging for children who have experienced trauma, have little or no family support and/or do not have stable living circumstances; and
 - identifying more effective, evidence-based interventions that enhance rehabilitation and support the reduction of reoffending.
- 1.6 The findings of this project have broader implications beyond sentencing. They may assist with identifying earlier (pre-sentence) opportunities for intervention, understanding the way that children cross from the child protection system into the youth justice system and identifying initiatives for preventing or halting the criminalisation of children in care.²⁶ The findings may also provide evidence that is relevant to examining other aspects of the child protection system, such as managing children's behaviour in out-of-home care, and the youth justice system, such as the age of criminal capacity. While such issues are critically important, they are beyond the scope of the analysis in this report.

Study group

- 1.7 There were 5,063 children in the study group, which comprised all children who offended between the ages of 10 and 17 (inclusive) and received a sentence or diversion²⁷ in the Victorian Children's Court in the 2016 or the 2017 calendar year.
- 1.8 The Council classified a child's first (or only) sentence or diversion in 2016 or 2017 as their *index sentence*. Each child was counted once only.
- 1.9 The study group includes 3,404 sentenced children and 1,659 children dealt with under the diversion program (Figure 1). While diversion is not a sentencing order *per se*, it requires a child to take responsibility for the offence. It is therefore included in this report as a disposition used by the Children's Court to respond to alleged offending by a child.

Figure 1: Study group, by most severe court order at index sentence (diversion or sentence) 5,063 children

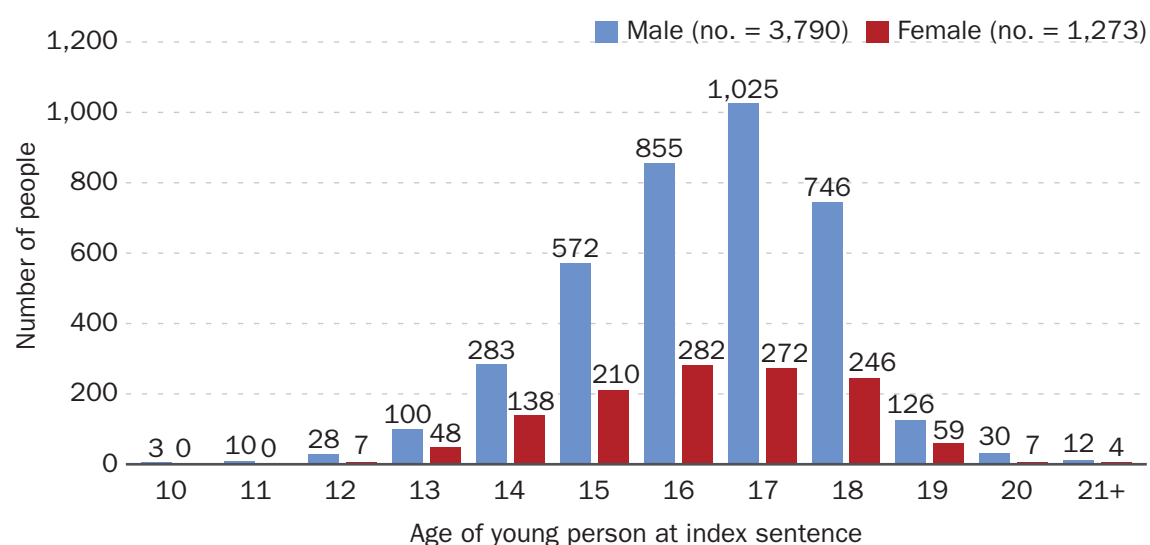


26. Previous studies have raised concerns that children in out-of-home care are being charged with offences for behaviour (often trauma-related) that would not result in criminal charges if it happened in a child's family home, for example, a child being charged with criminal damage for throwing a cup (see further [4.25]–[4.29]). Concerns about the criminalisation of the behaviour of children in care were also raised by roundtable participants (see for example, [5.106]–[5.107]).

27. Children who are 'diverted' are granted an adjournment to participate in and complete a diversion program under the CYF Act. For information about the youth diversion program, see above n 23.

- I.10 In addition to children who received diversion, the study group includes children sentenced to low-end orders such as fines and good behaviour bonds. Low-end orders and diversion make up the bulk of dispositions imposed in the Children's Court.²⁸ One hypothesis is that the inclusion of these low-end orders might result in a considerably lower proportion of children known to child protection than in other studies.²⁹
- I.11 At the same time, the child protection 'net' in the Council's project is wider than that in other studies. The Council included any report to the child protection service in a child's lifetime, rather than limiting child protection history to a few years or to child protection orders only, out-of-home care only or only cases in which the child protection involvement was contemporaneous with the criminal justice involvement (for example, in the same two-year period). This wider net was accounted for by differentiating the degree of child protection involvement that children in the study group had experienced.
- I.12 Some children in the study group were aged 18–20 by the date of their first sentence, although they were under 18 at the time of their offence. These children have been included in the study group. They are described in this report as 'children' despite their age at first sentence because they were children at the time of their offending. A small group of 30 children were excluded from the study group because their age at the time of their first sentence was unknown or could not be verified. As these 30 children accounted for only 0.6% of the original group of 5,093 children, their exclusion is unlikely to affect results.
- I.13 Of the 5,063 children in the study group, 617 children were aged 10–14 at their index sentence (12%) and 4,446 children were aged 15 or older at their index sentence (88%). The study group included 1,273 girls (25%) and 3,790 boys (75%) (Figure 2).

Figure 2: Children in the study group, by age at index sentence, 2016 and 2017



28. For example, in the Council's youth reoffending study, 80% of children sentenced in 2008–09 received low-end (unsupervised) orders (dismissal, discharges, undertakings, good behaviour bonds and fines): Sentencing Advisory Council (2016), above n 19, 15. In this report, the data relating to fines does not include data from the Children and Young Persons Infringement Notice System (CAYPINS) under *Children, Youth and Families Act 2005* (Vic) sch 3. Only fines imposed as a sentence in the Children's Court are included in the data.

29. For example, the Australian Institute of Health and Welfare found that, in the four-year period from 1 July 2013 to 30 June 2017, 47.7% of the 7,776 Australian young people under youth justice supervision (a custodial or supervised community order) also received child protection services (see Figure 8). While the Council's study group included Victorian children who received any sentence type or diversion, the Australian Institute of Health and Welfare's study included only children who received the most severe sentence types (custodial or supervised community orders): Australian Institute of Health and Welfare, *Young People in Child Protection and under Youth Justice Supervision 1 July 2013 to 30 June 2017*, Data Linkage Series no. 24 (2018) 6. In that report, child protection data 'is restricted to investigated notifications, child protection orders and out-of-home care. Excluded are notifications that were not investigated; child protection orders that were "other" or "not stated"; and living arrangements that do not constitute out-of-home care': *ibid* 3. Chapter 6 of the current report examines the prevalence of child protection backgrounds among children sentenced to different sentence types.

Research questions

1.14 This is the first report for this project ('Report 1'). In it, the Council addresses the following four research questions:

Research Question 1: Prevalence of 'crossover kids' in the youth justice system

What proportion of children sentenced or diverted in the Victorian Children's Court in 2016 and 2017 (the 'study group') were known to the child protection service? Specifically, in the period from 18 June 1996 to 3 September 2018, what proportion of children:

- (a) were the subject of a child protection report?
- (b) were the subject of a child protection report that was investigated?
- (c) were the subject of a child protection report that was investigated and substantiated?
- (d) were the subject of a child protection order made in the Family Division of the Children's Court?³⁰
- (e) experienced out-of-home care, including residential care?

Research Question 2: Over-representation of Aboriginal and Torres Strait Islander children

What proportion of the sentenced and diverted children known to the child protection service were Aboriginal and Torres Strait Islander children?

Research Question 3: Sentence type and child protection involvement

What proportion of children sentenced to specific sentence types were known to the child protection service?

Research Question 4: Age at first sentence and child protection involvement

Are children first sentenced at a young age more likely than older children to be known to the child protection service?

30. In this report, the term child protection order is used in a broad sense to refer collectively to four categories of orders made by the Family Division of the Children's Court of Victoria under the *Children, Youth and Families Act (Vic)*: (1) protection orders (see [2.8]–[2.9]), (2) interim accommodation orders (see [2.10]), (3) permanent care orders (see [2.11]) and (4) therapeutic treatment orders (see [3.12]–[3.14]).

I.15 Report 2 of the project will examine:

- age and gender differences in child protection factors (for example, are children who are younger at first sentence more likely to have also been younger at the time of their first report to the child protection service?);
- the relative timing of child protection involvement and youth justice involvement (for example, were children who experienced out-of-home care more likely to first offend before, during or after their first out-of-home care placement?);
- associations between child protection factors and youth justice factors;
- regional differences in the prevalence of sentenced children who are known to the child protection service; and
- the principles applicable to the consideration of child protection issues when sentencing children.

What is a ‘crossover kid’?

I.16 The term *crossover kid* or *crossover child* has been used in past research to describe children with involvement in both the criminal justice system and the child protection system.³¹ As Victoria Legal Aid has pointed out, however, the term ‘crossover kid’ is ‘not a term of art’ and there is no uniform definition of ‘crossover kid’.³² The term is used in different ways in different studies to describe children crossing between the criminal justice system and the child protection system. One of the most common applications of the term is as a descriptor of children who are charged with criminal offences while also the subject of a child protection application in the Family Division of the Children’s Court.³³ Another common usage of the term is to describe children in out-of-home care who face criminal charges. Victoria Legal Aid gives numerous examples of how the term *crossover kids* is used, including:

young people facing criminal charges where they:

- have a contemporaneous protection application in the Family Division of the Children’s Court
...
- are on a current protection order which is supervised by the Department of Human Services
...
- have recently been on a protection order that has expired
- have ever been on a protection order that has expired
- have never been on a protection order but their criminal issues can be considered to relate to current protective issues
- have any combination of the above in addition to being the subject of proceedings in the family law courts.³⁴

31. For information about Victoria’s child protection system, see Chapter 2.

32. Suzanne Bettink, ‘Crossover Kids in Victoria: Problems for the Children’s Court of Victoria in Taking an Integrated Approach to Young People with Multiple Issues’ (Paper presented at Doing Justice for Young People: Issues and Challenges for Judicial Administration in Australia and New Zealand, the Australasian Institute of Judicial Administration, Brisbane, 23–25 August 2012).

33. See Chapter 3 for discussion of the Family Division and Criminal Division of the Children’s Court.

34. Bettink (2012), above n 32, 1–2.

- 1.17 Exactly which group of children is defined as *crossover kids* usually depends on the data available to a particular researcher. The Council was provided with comprehensive child protection data in relation to the children who had been the subject of at least one child protection report. Instead of labelling one group as 'crossover kids' and limiting the study to those children (for example, children who had been the subject of a child protection order), the Council identified a number of broad categories of child protection involvement and examined each category separately throughout the report. This report focuses on children who were sentenced or diverted in the Victorian Children's Court in the calendar years 2016 and 2017 and separately analyses the levels of child protection involvement experienced by the study group in the 22-year period from June 1996 to September 2018. This includes the proportion of children who:
- (a) were the subject of at least one report to the child protection service (this includes uninvestigated and unsubstantiated reports and unborn child reports³⁵);
 - (b) were the subject of at least one investigated report (this involves contact between the child and the child protection service);
 - (c) were the subject of at least one substantiated report;
 - (d) were the subject of at least one child protection order made in the Children's Court; and
 - (e) experienced out-of-home care (including the proportion of children who experienced residential care).
- 1.18 A key group of children examined in this report comprises sentenced and diverted children who had experienced out-of-home care, which is a particularly vulnerable subset of the broader study group. Previous research has identified issues in relation to the over-representation and criminalisation of children in out-of-home care, particularly residential care (see discussion at [4.21]–[4.29]). In this report, children in the study group who had experienced out-of-home care are described as the *care group*.
- 1.19 The analysis in each section of this report makes clear which aspect of child protection is under discussion.

The Council's approach

- 1.20 The project has a *retrospective* research design that examines the child protection history of a cohort of children who were sentenced in the Children's Court in 2016 or 2017.

Data

- 1.21 The 5,063 children in the study group were drawn from the Children's Court Courtlink database.³⁶ The project links 22 years of data from the child protection system in the Department of Health and Human Services: from 18 June 1996 (the date of the earliest report about a child in the study group) to 3 September 2018 (the date of the data extraction, although the most recent record was dated 1 September 2018).

35. If a woman is pregnant and a person has a significant concern for the wellbeing of her child after that child's birth, that person may make a confidential report to child protection (under the *Children, Youth and Families Act 2005* (Vic) s 29) or a confidential referral to a child and family information, referral and support team (Child FIRST) before the child is born (*Children, Youth and Families Act 2005* (Vic) s 32). The 'intent of the legislation is to prevent future harm and reduce the likelihood of child protection intervention after the child's birth by working earlier and in partnership with the mother and appropriate support services to address the need or risk factors': Department of Health and Human Services, 'Unborn Child Reports: Advice', *Child Protection Manual* (Department of Health and Human Services, 2018) <<http://www.cpmanual.vic.gov.au/advice-and-protocols/advice/intake/unborn-child-reports>> at 6 May 2019.

36. Four times a year, Court Services Victoria sends the Council extracts from the Courtlink case management system containing sentencing data from the Criminal Division of the Children's Court. The Council has sentencing data from July 2004 onwards.

This data was matched with sentencing data from the Children's Court Courtlink database and the Council's own reoffending database.

- I.22 Matching child protection and sentencing data allowed the Council to determine the prevalence (and level) of child protection involvement for sentenced and diverted children. It also allowed the Council to analyse the backgrounds of children at the nexus of the two systems, examine their offending patterns and sentences, and compare the offending profiles of children who were, or were not, known to the child protection service.
- I.23 The Council did not have data on remand,³⁷ education factors, mental health or impairment, disability, culturally and linguistically diverse (CALD) backgrounds, or the rate at which charges were withdrawn or struck out due to submissions relating to *doli incapax* (see further [3.30]). The data on gender was restricted to the categories of *male* and *female*. Data on non-binary gender categories is not currently available.
- I.24 Previous research suggests that Aboriginal and Torres Strait Islander children are over-represented among children in the child protection system, out-of-home care and the youth justice system. The Council has data on Aboriginal and Torres Strait Islander status for children who were the subject of a report to the child protection service. The Council did not have data on Aboriginal and Torres Strait Islander status for children who were not known to the child protection service.
- I.25 The methodology for this report is set out in Appendix 2.

Consultation

- I.26 The Council met separately with representatives of the Department of Health and Human Services, the Children's Court, Monash University, Victoria Legal Aid, Jesuit Social Services, Victoria Police and the Crime Statistics Agency to discuss the project. The Council again met with representatives of the Department of Health and Human Services and the Children's Court to discuss the findings. The Council also conducted two roundtable consultation meetings to discuss the report findings with key youth justice and child protection stakeholders. Roundtable participants included representatives of Charles Sturt University (Centre for Law and Justice), the Commission for Children and Young People, CREATE Foundation, the Department of Health and Human Services, the Human Rights Law Centre, Jesuit Social Services, the Law Institute of Victoria, Monash University (Social Work Department), the Children's Court Bar Association, the Justice-involved Young People Network, The University of Melbourne, Victoria Police, Victoria Legal Aid, Whitelion, Youth Justice (Department of Justice and Community Safety), Youth Law and Youth Support and Advocacy Service (YSAS).

37. The Council will be examining the use of remand for children in a separate report.

Research gaps that this project seeks to address

- 1.27 A number of important studies in Victoria and elsewhere have examined the care-to-criminalisation pathway and issues relating to crossover kids.³⁸
- 1.28 This project (including the upcoming second report) seeks to build on previous research in this area, focusing on questions that previously have been difficult to answer due to the unavailability of data. By linking the full child protection histories of all children sentenced or diverted in a two-year period, the Council has been able to analyse:
- **all sentenced children** in a given period (2016 and 2017), not just a defined subset, such as children sentenced in a particular court location or to a particular sentence type. The inclusion of children with no known child protection history provides a point of comparison with children who have a child protection history;
 - **all sentencing orders**, not just the most severe, so that children sentenced for **less serious offences**, such as criminal damage, are included. The project also includes children who received a diversion in the Children's Court;³⁹
 - children sentenced in **every Children's Court location in Victoria**;
 - each child's **full child protection history** from birth (including unborn child reports) not merely child protection involvement that was proximate to the criminal hearing;
 - the **level of child protection involvement**, including the number of reports to the child protection service, the number of reports that were substantiated, the proportion of children who were the subject of at least one child protection order and the proportion of children who experienced out-of-home care, including whether they were in out-of-home care on the date of the offence; and
 - **associations between child protection factors, criminal justice factors and personal characteristics**. Child protection factors include principal harm reported or substantiated, age at first child protection report, number of child protection reports, out-of-home care, and time from first report to first investigated or substantiated report. Criminal justice factors include offence type, prior offences, chronicity of offending and criminal justice outcome. Personal characteristics include age at first sentence and gender. For example, this project will look for associations between the type of harm or risk reported about the child and the type of offending in which the child engaged, and between a child being in out-of-home care and particular offences.

38. See for example, Victoria Legal Aid (2016), above n 7, 1; McFarlane (2018), above n 25; Anna Stewart et al., *Pathways from Child Maltreatment to Juvenile Offending*, Trends and Issues in Crime and Criminal Justice no. 241 (2002); Anna Stewart et al., 'Transitions and Turning Points: Examining the Links between Child Maltreatment and Juvenile Offending' (2008) 31(1) *Child Abuse & Neglect* 51; Malvaso et al., 'The Child Protection and Juvenile Justice Nexus in Australia: A Longitudinal Examination of the Relationship between Maltreatment and Offending' (2017) 64 *Child Abuse & Neglect* 32; Australian Institute of Health and Welfare, *Young People in Child Protection and under Youth Justice Supervision 2015–16*, Data Linkage Series no. 23 (2017); Judy Cashmore, 'The Link between Childhood Maltreatment and Adolescent Offending: Systems Neglect of Adolescents' (2011) 89 *Family Matters* 31, 35.

39. For information about diversion see above n 23.

2. What is child protection?

- 2.1 The Victorian child protection service is part of the Victorian Department of Health and Human Services and is responsible for child protection in Victoria. Its functions include:
- receiving reports regarding children in need of protection;
 - investigating allegations that a child is at risk of harm;
 - referring children and families to services that assist in providing the ongoing safety and wellbeing of children;
 - applying to the Children's Court for a child protection order if the child's safety cannot be ensured within the family;
 - supervising children on child protection orders granted by the Children's Court; and
 - providing and funding 'accommodation services, specialist support services, and adoption and permanent care to children and adolescents in need'.⁴⁰
- 2.2 Five key aspects of the child protection system examined in this report are:
- (a) **reports** to the child protection service raising concerns about possible abuse, neglect, harm or risk to a child;
 - (b) **investigation** of reports by child protection practitioners;
 - (c) **substantiation** of reports;
 - (d) **child protection orders** – court orders that give the Department of Health and Human Services responsibility for particular aspects of the child's welfare;⁴¹ and
 - (e) **out-of-home care** – a temporary, medium or long-term living arrangement for children who cannot live with their families.

Reports to the child protection service

Who may make a report to the child protection service?

- 2.3 Any person may make a report to the Victorian child protection service or to a member of the police force if the person has a significant concern for the wellbeing of a child, even if the child has not yet been born.⁴² Some professionals, including but not limited to teachers, doctors, nurses and police officers, *must* report physical and sexual abuse to the child protection service.⁴³

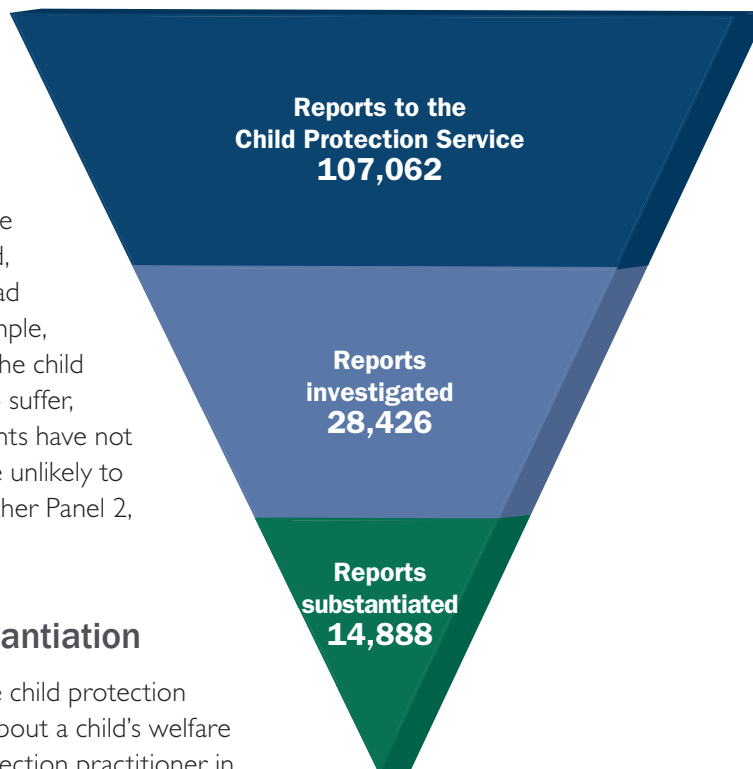
40. Department of Health and Human Services, 'Families & Children: Child Protection' (services.dhhs.vic.gov.au, 2019) <<https://services.dhhs.vic.gov.au/child-protection>> at 13 May 2019.

41. A range of interim and final orders are available for the protection of children. For the purpose of this report, they will be grouped together as 'child protection orders', consistent with the classification on the Department of Health and Human Services website: Department of Health and Human Services (2017), above n 5. In this report, the term 'child protection order' is used as a collective description for four categories of orders made by the Family Division of the Children's Court of Victoria under the *Children, Youth and Families Act* (Vic) ('CYF Act'): protection orders, interim accommodation orders, therapeutic treatment orders and permanent care orders. For a description of the key interim and final child protection orders relevant to children in the study group, see Chapter 5.

42. *Children, Youth and Families Act 2005* (Vic) ss 28–29, 181, 183. The *Children, Youth and Families Act 2005* (Vic) establishes two pathways for people to report or refer an unborn child where they have 'a significant concern for the wellbeing of the child after his or her birth': (1) confidential reports to child protection about unborn children (section 29) and (2) confidential referrals to the child and family information, referral and support teams (Child FIRST) about unborn children (section 32). The 'intent of the legislation is to prevent future harm and reduce the likelihood of child protection intervention after the child's birth by working earlier and in partnership with the mother and appropriate support services to address the need or risk factors': Department of Health and Human Services (2018), above n 35.

- 2.4 Section 162 of the *Children, Youth and Families Act 2005* (Vic) ('CYF Act') sets out the grounds for finding a child in need of protection. Grounds for protection include that the child has been abandoned, the child's parents are dead or incapacitated (for example, admitted to hospital) or the child has suffered, or is likely to suffer, harm and the child's parents have not protected the child or are unlikely to protect the child (see further Panel 2, [3.7]).

Figure 3: Reports to the Victorian child protection service, 2015–16⁴⁵



Investigation and substantiation

- 2.5 Every report made to the child protection service raising concerns about a child's welfare is assessed by a child protection practitioner in an intake service. The child protection practitioner decides whether the report should be *investigated*, after gathering information and assessing whether the child appears to be in need of protection (see further [5.18]–[5.21]). Where child wellbeing concerns exist, the child protection service may refer the child and family to family services or other specialist supports as a response.⁴⁴ After investigating, if the child protection service is satisfied on reasonable grounds that the child is in need of protection, a decision may be made to *substantiate* the report (see further [5.25]–[5.27]). If necessary, the child protection service will issue a protection application in the Children's Court.
- 2.6 In 2015–16, 107,062 reports were made to the Victorian child protection service, including reports by police, schools, social workers, medical practitioners and family. Of these reports, 27% were investigated by the child protection service and 14% of reports were substantiated (meaning that 52% of *investigated* reports were substantiated) (Figure 3).

43. Department of Health and Human Services (2019), above n 40; *Children, Youth and Families Act 2005* (Vic) 182. In response to recommendations by the Royal Commission into Institutional Responses to Child Sexual Abuse, mandatory reporting was expanded to include additional professional groups. The following reporter groups were, or will be, mandated to report a reasonable belief of child physical or sexual abuse, commencing on the following dates: out-of-home care workers (excluding voluntary foster and kinship carers) on 1 March 2019; early childhood workers on 1 March 2019; youth justice workers on 1 March 2019; registered psychologists on 1 March 2019; school counsellors on 31 January 2020.

44. Child FIRST (child and family information, referral and support teams) and integrated family services are funded by the Department of Health and Human Services to provide support and assistance to vulnerable children, young people and their families in cases where there are concerns about the wellbeing of the child or young person (0–17 years, including an unborn child) or their family: Better Health Channel (2018), above n 2.

45. Australian Institute of Health and Welfare, *Child Protection Australia 2015–16*, Child Welfare Series no. 66 (2017) 22 (table 3.1) <<https://www.aihw.gov.au/reports/child-protection/child-protection-australia-2015-16/data>> at 13 May 2019; Australian Institute of Health and Welfare, *Data Tables: Child Protection Australia 2015–16*, Child Welfare Series no. 66 (2017) Data Table S5 <<https://www.aihw.gov.au/reports/child-protection/child-protection-australia-2015-16/data>> at 13 May 2019.

Child protection order

2.7 In this report, the term *child protection order* is used to refer collectively to four categories of orders made by the Family Division of the Children's Court of Victoria under the CYF Act:

1. protection orders (see [2.8]–[2.9]);
2. interim accommodation orders (see [2.10]);
3. permanent care orders (see [2.11]); and
4. therapeutic treatment orders (see [3.13]–[3.15]).

Protection orders

2.8 Protection orders are final orders made after the Children's Court is satisfied that the child is in need of protection under one of the grounds in section 162 of the CYF Act (see further Panel 2, [3.7]). A protection order gives the Department of Health and Human Services responsibility for particular aspects of the child's welfare.

2.9 Extensive changes to child protection orders came into effect on 1 March 2016. These changes were: intended to reduce the time children spend in out-of-home care before permanent arrangements are in place for their care. Where possible, this will be achieved by children returning home safely within specified timelines. Where it is not safe for a child to return home permanently, alternative ongoing care arrangements will be found.⁴⁶

Interim accommodation orders

2.10 Interim accommodation orders are interim (temporary) orders made under section 262 of the CYF Act after a protection application has been issued by the Department of Health and Human Services and the court has decided that an interim order is needed to keep the child safe until it determines the application. When making an interim accommodation order, the court is required to consider the best interests principles under section 10 of the CYF Act, including that the child is only to be removed from their parent or parents if there is an unacceptable risk of harm to the child. These orders specify where the child must live until the next court date and usually include other conditions.⁴⁷

Panel 1: Child protection

Legally, a child or young person who has been harmed or neglected, or is at risk of harm or neglect must be protected. Child abuse includes:

- hurting or threatening to hurt a child physically, sexually or emotionally;
- exposing a child to the risk of significant physical, sexual or emotional harm, such as:
 - witnessing family violence;
 - allowing a child sex offender to be in the home;
 - having care of a child while under the influence of alcohol or drugs or whilst living with an untreated mental health issue;
- neglecting a child, for example:
 - insufficient food, clothing, shelter or necessary medical care;
 - failing to properly supervise the child.

Source: Victoria Legal Aid, 'Child Protection' ([legalaid.vic.gov.au](https://www.legalaid.vic.gov.au), 2019) <<https://www.legalaid.vic.gov.au/find-legal-answers/child-protection>> at 16 November 2018.

46. Department of Health and Human Services, *Children's Court Orders Are Going to Change: Permanency for Children Fact Sheet* (2015).

47. *Children, Youth and Families Act 2005* (Vic) s 263. The court may impose conditions in the best interests of the child under *Children, Youth and Families Act 2005* (Vic) s 263(7). See further Department of Health and Human Services (2017), above n 5.

Permanent care orders

- 2.11 Permanent care orders are made by the Children's Court when the criteria set out in section 319 of the CYF Act are satisfied. The order involves the appointment of a specified person or persons as having parental responsibility for the child, usually to the exclusion of all others.⁴⁸ *Parental responsibility* means all the duties, powers, responsibilities and authority that, by law or custom, parents have in relation to children.⁴⁹ Following the granting of a permanent care order, the Victorian child protection service is no longer involved.

Out-of-home care

- 2.12 Out-of-home care is 'a temporary, medium or long-term living arrangement for children and young people who cannot live with their parents'.⁵⁰
- 2.13 Out-of-home care can be voluntarily and informally arranged (without intervention by the courts or government), or it can be statutory (where a child protection order is in place).⁵¹ In this report, the term *out-of-home care* is used to describe *statutory* out-of-home care (where a child protection order has been made).
- 2.14 There are three broad categories of out-of-home care:
1. home-based care;
 2. care in a residential service; and
 3. independent living.

Home-based care

- 2.15 Home-based care is care provided 'in the home of a carer, who is reimbursed (or who has been offered but declined reimbursement) for the cost of care of that child'.⁵² Types of home-based care include the following:
- **Foster care** is temporary care of children in a family setting with trained, assessed and accredited foster carers⁵³ who are 'authorised and reimbursed (or [were] offered but declined reimbursement) by the state/territory for the care of the child'.⁵⁴ The Department of Health and Human Services 'fund[s] foster care agencies to recruit and support foster carers'.⁵⁵
 - **Kinship care** is out-of-home care provided by a child's relatives or friends. Kinship care is 'the preferred placement type for children who cannot live with their parents'.⁵⁶ Some kinship care arrangements are informal, for example, a grandparent looking after a child because the child is not able to live with their parents.

48. *Children, Youth and Families Act 2005* (Vic) ss 319–327.

49. *Children, Youth and Families Act 2005* (Vic) s 3 (definition of 'parental responsibility').

50. Early Childhood and School Education Group, Department of Education and Training, and Youth and Families Division, Department of Health and Human Services (2018), above n 1, 5.

51. *Ibid*; Department of Education and Training, 'What Is Out-of-Home Care?' (education.vic.gov.au, 2018) <<https://www.education.vic.gov.au/school/teachers/health/Pages/whatoohc.aspx>> at 19 December 2018.

52. Australian Institute of Health and Welfare, *Child Protection Australia 2016–17*, Child Welfare Series no. 68 (2018) 75.

53. Department of Health and Human Services (2019), above n 4.

54. Australian Institute of Health and Welfare (2018), above n 52, 74.

55. Department of Health and Human Services (2019), above n 4.

56. Department of Health and Human Services, 'Families & Children: Kinship Care' (services.dhhs.vic.gov.au, 2018) <<https://services.dhhs.vic.gov.au/kinship-care>> at 29 October 2018.

Other kinship care involves formal placements made after child protection intervention and, in some cases, a child protection order.⁵⁷ In this report, data on kinship care placements includes formal placements only.

- **Permanent care** (also referred to as a *third-party parental responsibility order*) is a permanent placement for children who cannot return home to their families. The Children's Court makes permanent care orders appointing a specified person or persons as having parental responsibility for the child (see [2.11]).⁵⁸ While a permanent care order is similar to an adoption, unlike adoption it is not a voluntary placement. Also unlike adoption orders, permanent care orders expire when the child turns 18.⁵⁹

Care in a residential service

2.16 Unlike home-based care, care in a residential service involves placement in a residential home intended for the care for children. Care is provided by paid staff.⁶⁰ In Victoria, there are two types of residential services:

- **Residential care** is out-of-home care provided by paid staff, usually in a residential home accommodating up to four children. As at January 2016, there were 240 such homes operating in Victoria, accommodating 442 children. The Department of Health and Human Services funds a variety of community service organisations to run these facilities on its behalf.⁶¹
- **Secure welfare service** is placement in a secure facility as an option of 'last resort' if there is 'a substantial and immediate risk of harm' to a child, 'containment is deemed necessary, and ... the broader protection and care network cannot manage or reduce the risks to the child'. The aim of secure welfare is to keep children safe for a brief and limited time period while a suitable plan is established 'to reduce the risk of harm and return [children] to the community as soon as possible, in a safe and planned way'.⁶² The maximum period a child can be placed in secure welfare is 21 days with one further extension of 21 days in exceptional circumstances.⁶³ Children placed in a secure welfare service are also required to have another type of out-of-home care placement.

Independent living

2.17 Independent living involves 'accommodation where the child lives independently, such as private boarding or as the lead tenant in a household'.⁶⁴ Some of the data used in this project groups independent living together with foster care. The number of children in independent living among the Council's study group was estimated to be very small (less than 1%), and grouping these children with children in foster care is unlikely to affect the findings in this report.

57. Ibid.

58. *Children, Youth and Families Act 2005* (Vic) s 3 (definition of 'parental responsibility'); Australian Institute of Health and Welfare (2018), above n 52, 74.

59. Children's Court of Victoria, 'Court Orders' (childrenscourt.vic.gov.au, 2019) <<https://www.childrenscourt.vic.gov.au/jurisdictions/child-protection/court-orders>> at 13 May 2019.

60. Australian Institute of Health and Welfare (2018), above n 52, 79.

61. Victoria Legal Aid (2016), above n 7, 5.

62. Parkville College, 'Ascot Vale Campus, Secure Welfare | Parkville College' (parkvillecollege.vic.edu.au, 2016) <http://parkvillecollege.vic.edu.au/?page_id=42> at 1 March 2019; *Children, Youth and Families Act 2005* (Vic) s 263(1)(e). See further [5.100]; Judicial College, *Children's Court Bench Book* <<http://www.judicialcollege.vic.edu.au/eManuals/CHCBB/60790.htm>> [13.2.5.5]; Department of Health and Human Services (2018), above n 6; Australian Institute of Health and Welfare (2017), above n 38, 2.

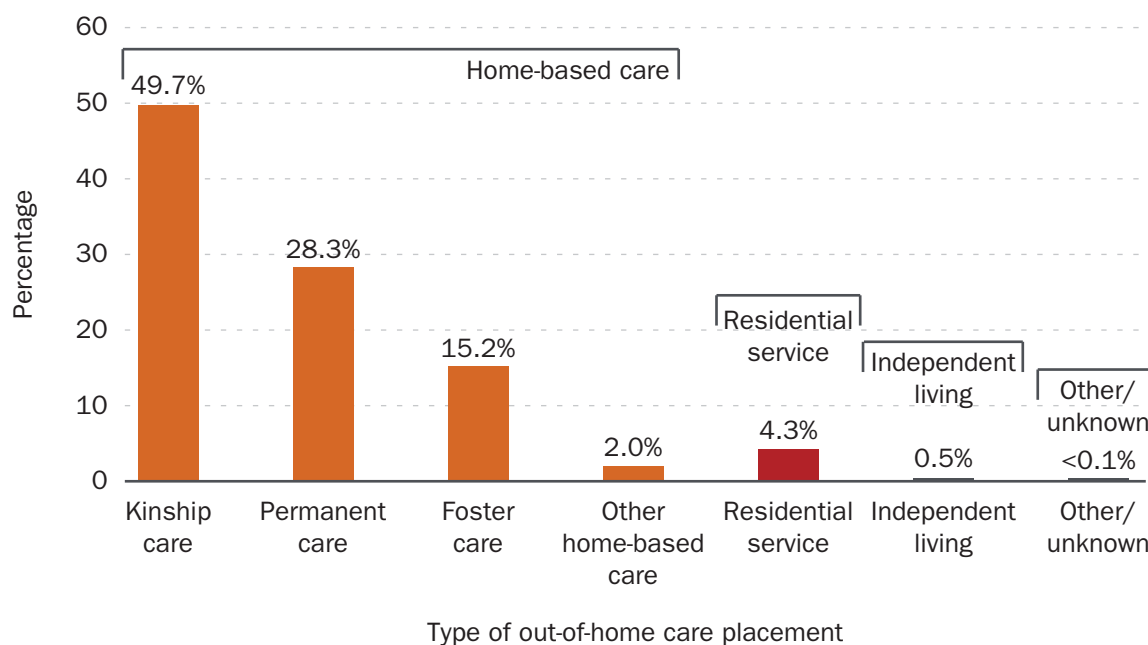
63. *Children, Youth and Families Act 2005* (Vic) ss 264(2), 267(3)(c).

64. Australian Institute of Health and Welfare (2018), above n 52, 75.

What are the most common types of out-of-home care?

2.18 Of the 10,312 children in out-of-home care in Victoria on 30 June 2017, 95.2% were in 'home-based' care, with around half of those 10,312 children in kinship care (Figure 4). A further 4.3% of children were in care in a residential service (residential care or secure welfare) and the remaining 0.5% of children in out-of-home care were in independent living (Figure 4).

Figure 4: Children in out-of-home care, by type of placement, Victoria, 30 June 2017, 10,312 children⁶⁵



2.19 The Australian Institute of Health and Welfare analysed the relationship between children and their carers for children in kinship care in Victoria, Queensland, South Australia, Tasmania and the Australian Capital Territory. The Institute found that around half (52.5%) of the children in kinship care were placed with a grandparent, 20% with an aunt or uncle and 17.2% with a non-relative, such as a neighbour or friend. A further 5.3% were placed with another relative who was not a grandparent, aunt, uncle or sibling, 1.6% were placed in the care of a sibling and 0.1% were placed with someone with whom they had another 'Indigenous kinship relationship'. The remaining 3.4% of children in kinship care were placed with 'other' kinship carers (not belonging to any of the previously mentioned relationship types).⁶⁶

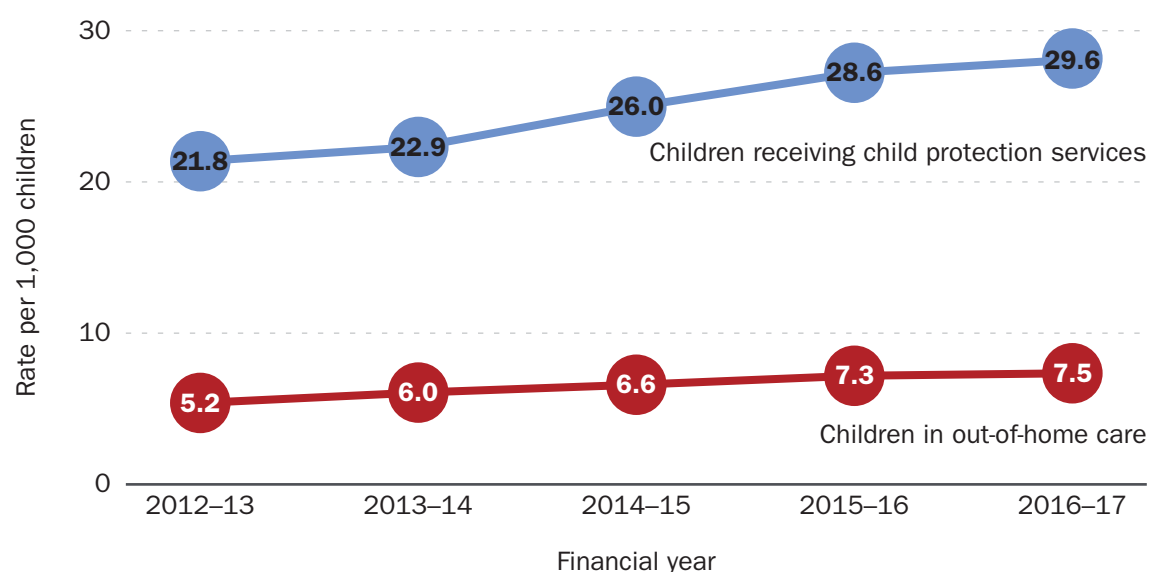
65. Australian Institute of Health and Welfare, *Data Tables: Child Protection Australia 2016–17*, Child Welfare Series no. 68 (2018) Table S36 <<https://www.aihw.gov.au/reports-data/health-welfare-services/child-protection/data>> at 1 March 2019.

66. Ibid Table S37. The carer–child relationship for the final 3.4% of children in kinship care was categorised as 'other'.

More children are receiving child protection services

- 2.20 Recent evidence suggests that the number of children receiving child protection services each year in Australia is growing, and the rate is increasing more for Aboriginal and Torres Strait Islander children.⁶⁷ The rate of reports to child protection services was recently described as a 'health crisis' in South Australia.⁶⁸
- 2.21 In Victoria, the number and rate of children receiving child protection services increased from 27,272 in 2012–13 (a rate of 21.8 per 1,000 children aged 0–17) to 40,415 in 2016–17 (29.6 per 1,000 children aged 0–17) (Figure 5).⁶⁹
- 2.22 Of the 40,415 children who received child protection services in Victoria in 2016–17:
- 27,979 were the subject of an investigated report to the child protection service (a rate of 20.5 per 1,000 children);
 - 16,264 were on care and protection orders (a rate of 11.9 per 1,000 children); and
 - 13,001 were in out-of-home care (9.5 per 1,000 children).⁷⁰

Figure 5: Rate of children in the child protection system, per 1,000 children, Victoria, 2012–13 to 2016–17⁷¹



67. Australian Institute of Health and Welfare (2018), above n 52, 16. 'Children receiving child protection services' is defined as one or more of the following occurring within the reporting period: an investigation of a notification, a child being on a child protection order or a child being in out-of-home care. It is not a total count of these three areas, but a count of unique children across the three areas: *ibid* 10.

68. Rebecca Puddy, 'Australia Facing an "Epidemic of Child Abuse and Neglect", According to Experts', ABC News (online) 16 September 2018 <<http://www.abc.net.au/news/2018-09-16/australia-facing-an-epidemic-of-child-abuse-and-neglect/10233898>> at 17 September 2018.

69. Australian Institute of Health and Welfare (2018), above n 52, 63. See above n 67 for the definition of 'children receiving child protection services'.

70. Australian Institute of Health and Welfare (2018), above n 65, Table 2.1. Children receiving child protection services and children in substantiations were measured in financial years. Children on child protection orders and in out-of-home care were measured as at 30 June each year. When a report is made to child protection services, the case is assessed to decide a) whether an investigation is required, b) whether referral to support services is more appropriate or c) whether no further protective action is necessary. A substantiation means there is sufficient reason (after an investigation) to believe the child has been, is being, or is likely to be abused, neglected or otherwise harmed: Australian Institute of Health and Welfare (2018), above n 52, 3.

71. *Ibid* 65.

The number of children in out-of-home care is increasing

2.23 The number and rate of children in out-of-home care in Victoria has also increased, from 6,542 in 2012–13 (5.2 per 1,000 children aged 0–17) to 10,312 in 2016–17 (a rate of 7.5 per 1,000 children aged 0–17) (Figure 5).⁷²

72. Australian Institute of Health and Welfare (2018), above n 52, 63. See also Victoria Legal Aid (2016), above n 7, 5, citing Philip Cummins et al., *Report of the Protecting Victoria's Vulnerable Children Inquiry* (2012) 233. For a description of out-of-home care see [2.12]–[2.19].

3. The Children's Court of Victoria

3.1 The Children's Court of Victoria has two divisions dealing with children and young people.⁷³ The modern Children's Court – with separate family and criminal divisions – stems from a review by the Child Welfare Practice and Legislation Review Committee, established in 1982 by the Victorian Government and chaired by Dr Terry Carney of Monash University.⁷⁴

3.2 The Committee's final report in 1984 recommended a number of changes to the structure and jurisdiction of the Children's Court, including a clear distinction between child protection matters (heard in the family division) and the criminal division of the court. A key reason for creating two completely separate divisions was to address the previous practice of triggering a child protection response by 'charging' a child with being in need of protection.⁷⁵ At the time, there was often little physical or procedural separation between children under state protection and children in the criminal justice system:

One of the most significant issues addressed in the Carney Report was the failure of the previous system to distinguish between children in need of protection and young people who were offending against the criminal law. Not only did the Court buildings and the Court processes and outcomes not make any clear distinction between these two classes of children, the institutions in which they were placed were often the same. Babies, children and young persons before the Court were *charged* with being in need of protection and if this charge was found proved it would appear on [the child's] police criminal history sheet.⁷⁶

3.3 Consistent with the report's recommendations, the objectives of the resulting legislation included:

to maintain and strengthen the distinction between the Family Division and the Criminal Division of the Children's Court, so as to ensure that their procedures, standards of proof and dispositions reflect the fundamental difference in the nature of child protection and juvenile justice proceedings.⁷⁷

3.4 More recently, a new statement inserted in the *Children, Youth and Families Act 2005* (Vic) ('CYF Act') recognises the 'considerable and lasting harm caused by historical child welfare recording practices' and 'the significant personal and intergenerational harm caused'.⁷⁸ The statement of recognition provides that:

[h]istorically, the child welfare and criminal justice systems in Victoria were not clearly differentiated. As a result, children often experienced historical care and protection applications made by the State as criminal proceedings, and care and protection orders made by courts were recorded by the State on criminal records ...

73. The *Children, Youth and Families Act 2005* (Vic) outlines the structure and constitution of the Children's Court. For a history of the Children's Court, see Children's Court of Victoria, 'History' (childrencourt.vic.gov.au, 2019) <<https://www.childrencourt.vic.gov.au/about-us/history>> at 13 May 2019.

74. Child Welfare Practice and Legislation Review Committee (Victoria), *Child Welfare Practice and Legislation Review: Report* (1984).

75. Child Welfare Practice and Legislation Review Committee (Victoria), *Child Welfare Practice and Legislation Review: Report. Volume 2: Equity and Social Justice for Children, Families and Communities* (1984) 238.

76. Peter Power, *Children's Court Research Materials* (2016) [1.1].

77. Victoria, 'Children and Young Persons Bill', *Parliamentary Debates*, Legislative Assembly, 8 December 1988, 1150 (Peter Spyker, Minister for Community Services).

78. Victoria, 'Victims and Other Legislation Amendment Bill 2018', *Parliamentary Debates*, Legislative Assembly, 25 July 2018, 2323 (Martin Pakula, Attorney-General).

in cases where the child had not committed a crime, or been convicted or found guilty of a criminal offence, and in many instances before the child had reached the age of criminal responsibility. In many cases, crimes were committed against a child and instead of the perpetrator being held to account, the child was subject to a historical care and protection order, despite the child not having committed any crime. This has led to adverse lifelong consequences for many of those children.⁷⁹

- 3.5 The statement also recognises that Aboriginal children were disproportionately affected by these recording practices.⁸⁰

Family Division of the Children's Court

- 3.6 The **Family Division** hears:

- applications relating to the protection and care of children at risk;⁸¹ and
- applications for intervention orders.

Grounds for child protection

- 3.7 The grounds on which the Children's Court may find a child in need of protection are set out in section 162 of the CYF Act (Panel 2).
- 3.8 Antisocial or offending behaviour by a child is not a specified ground for finding a child in need of protection, although such behaviour could contribute to a finding that a child is at risk of physical or emotional harm. In the absence of other concerns about the safety or welfare of the child or other family members, offending behaviour by a child would generally be addressed through the youth justice system, not the child protection system.
- 3.9 Examples of situations where behaviour by a child may attract both a child protection response and a youth justice response include:
- a child who exhibits violent behaviour in their home, for example, towards their parent(s) or sibling;
 - alleged criminal behaviour by a child or where a child is missing from the home in the context of criminal offending and police have child protection concerns when investigating;
 - a child who exhibits sexually abusive behaviour(s); and
 - a child who has a criminal matter in the Criminal Division of the Children's Court and the court has child protection concerns and exercises its power under the CYF Act to refer a matter to the Secretary for investigation.

79. *Children, Youth and Families Act 2005* (Vic) s 592A, inserted by *Victims and Other Legislation Amendment Act 2018* (Vic) s 35. This statement was inserted after campaigning and advocacy by children who were dealt with under the previous system and who are still facing the repercussions. The Victorian Government also committed to expunging these records from people's criminal records: *Children, Youth and Families Act 2005* (Vic) ss 592E–592I, inserted by *Victims and Other Legislation Amendment Act 2018* (Vic) s 35. See Stephanie Anderson, 'Children Charged with Needing Protection Call for Apology', *ABC News* (online) 15 November 2017 <<http://www.abc.net.au/news/2017-11-15/calls-to-clear-criminal-records-of-care-leavers-records/9150384>> at 27 August 2018; Danny Tran, 'Victoria Will Address "Historical Injustice" of Criminal Records for Former Wards of the State', *ABC News* (online) 24 July 2018 <<https://www.abc.net.au/news/2018-07-24/victorians-with-criminal-history-over-welfare-get-record-wiped/10026194>> at 13 May 2019; Miki Perkins, 'Criminal Records That Branded Children and Babies as Criminals to Be Expunged', *The Age* (Melbourne) 2 December 2017 <<https://www.theage.com.au/national/victoria/criminal-records-that-branded-children-and-babies-as-criminals-to-be-expunged-20171127-gztguo.html>> at 8 October 2018.

80. *Children, Youth and Families Act 2005* (Vic) s 592A.

81. A person may make a report to the Secretary to the Department of Health and Human Services or to a member of the police force if the person has a significant concern for the wellbeing of a child, even if the child has not yet been born: *Children, Youth and Families Act 2005* (Vic) ss 28–29, 181, 183. Section 162 of the *Children, Youth and Families Act 2005* (Vic) sets out the grounds for finding a child in need of protection.

- 3.10 These examples are discussed further below. With the possible exception of children exhibiting sexually abusive behaviour, in none of these examples does child protection involvement take the place of youth justice proceedings.

Panel 2: When is a child in need of protection?

Section 162(1) A child is in need of protection if—

- (a) the child has been abandoned by their parents and after reasonable inquiries (i) the parents cannot be found, and (ii) no other suitable person can be found who is willing and able to care for the child;
 - (b) the child's parents are dead or incapacitated and there is no other suitable person willing and able to care for the child;
 - (c) the child has suffered, or is likely to suffer, significant harm as a result of physical injury and the child's parents have not protected, or are unlikely to protect, the child from such harm;
 - (d) the child has suffered, or is likely to suffer, significant harm as a result of sexual abuse and the child's parents have not protected, or are unlikely to protect, the child from such harm;
 - (e) the child has suffered, or is likely to suffer, emotional or psychological harm of such a kind that the child's emotional or intellectual development is, or is likely to be, significantly damaged and the child's parents have not protected, or are unlikely to protect, the child from such harm;
 - (f) the child's physical development or health has been, or is likely to be, significantly harmed and the child's parents have not provided, arranged or allowed the provision of, or are unlikely to provide, arrange or allow the provision of, basic care or effective medical, surgical or other remedial care.
- (2) The above harm may be constituted by a single act, omission or circumstance or accumulate through a series of continuing acts, omissions or circumstances.

Violent behaviour by a child

- 3.11 In some cases, violent behaviour by a child, or a serious conflict between a child and the child's parents or carer may trigger the involvement of the child protection service, often as a secondary response after police involvement. For example, in a case of adolescent family violence in the home, Victoria Police may charge the child with an offence or offences and/or initiate an application for a family violence intervention order under the *Family Violence Protection Act 2008* (Vic). If the intervention order excludes the child from the home or the parents feel unable to cope with their child's behaviour and relinquish the child, the child protection service may become involved to find a suitable place for the child to live. Relinquishment of the child by their parents is in itself likely to be a traumatic experience for the child, even if triggered by the child's own violence, which itself may be trauma-related or relate to a brain injury, mental impairment or mental illness.⁸²

82. Roundtable 2: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (4 April 2019).

Child protection concerns when investigating alleged criminal behaviour by a child

- 3.12 The child protection service might also be involved if police report concerns about a child's welfare when investigating offending by the child, for example, that the child appears to be neglected and/or unsupervised when police attend the child's home or the child is missing from the family home. The child may be immediately removed by police or child protection practitioners 'only in the most serious of circumstances where a child has suffered significant harm, or is at imminent risk of significant harm and the child's parents have not protected or are unlikely to protect them'.⁸³ For examples of circumstances requiring the immediate removal of a child, see Panel 10 (page 60).

Sexually abusive behaviour by a child

- 3.13 For children aged 10–17 (inclusive) who exhibit sexually abusive behaviour, a separate scheme allows their behaviour to be addressed by providing therapeutic treatment. The Secretary to the Department of Health and Human Services has the power to apply to the Children's Court for a therapeutic treatment order, which is a court order requiring the child to participate in an appropriate therapeutic treatment program.⁸⁴
- 3.14 If a court considers that there may be grounds for making a therapeutic treatment order for a child involved in a criminal matter, the court may refer the matter to the Secretary to the Department of Health and Human Services for investigation.⁸⁵ The Secretary must keep the Criminal Division of the Children's Court informed about whether the Secretary applies to the Family Division for a therapeutic treatment order, and if so, whether an order is made.⁸⁶ If the Family Division places the child on a therapeutic treatment order, the Criminal Division must adjourn the criminal proceedings to allow the child to complete the therapeutic treatment order, and if the court is satisfied that the child has attended and participated in the program, the court must discharge the child without any further hearing of the criminal proceedings.⁸⁷ Children appearing as an accused in criminal proceedings who have exhibited sexually abusive behaviours may also voluntarily participate in a therapeutic treatment program.⁸⁸
- 3.15 In the 2016–17 financial year, 11 therapeutic treatment orders were made in Victoria.⁸⁹

Criminal Division can refer a child to the child protection service

- 3.16 If a child appears as an accused in a criminal proceeding and the Criminal Division of the Children's Court considers that they may be in need of protection, the court may refer the matter to the child protection service to investigate whether there are grounds for making a protection application. The child protection service must investigate whether the child is in need of protection on one of the grounds set out in section 162 of the CYF Act.

83. Department of Health and Human Services (2016) above n 17.

84. Amendments to the *Children, Youth and Families Act 2005* (Vic) that came into effect in March 2019 extend the availability of the therapeutic treatment order regime to people aged 15–17 (during the study period for this report, the scheme applied only to children aged 10–14).

85. *Children, Youth and Families Act 2005* (Vic) s 349(2).

86. *Children, Youth and Families Act 2005* (Vic) ss 350–351.

87. *Children, Youth and Families Act 2005* (Vic) ss 353–354.

88. *Children, Youth and Families Act 2005* (Vic) s 354A. This provision was recently amended (after the end of the study period) to include children aged 15–17 (the scheme previously applied only to children aged 10–14): *Justice Legislation Amendment (Family Violence Protection and Other Matters) Act 2018* (Vic) s 13.

89. Department of Health and Human Services, unpublished data.

The child protection service must report back to the court within 21 days that it has enquired into the matter. The child protection service must also indicate whether:

- the child is subject to a protection order, a therapeutic treatment order or a therapeutic treatment (placement) order; or
- a protection application or application for a therapeutic treatment order or a therapeutic treatment (placement) order has been made; or
- it is satisfied that no protection application or application for a therapeutic treatment order or a therapeutic treatment (placement) order is required.⁹⁰

- 3.17 The referral power is intended to bridge the gap between the two divisions, providing a mechanism for protecting children in the youth justice system whom the Criminal Division views as at risk. However, there is a perception among some youth justice stakeholders that such referrals are rare and seldom result in ongoing child protection involvement with the child:

Referrals of children in the Criminal Division for protective investigation are uncommon, and the responses by the department are usually in the form of a letter indicating that the department has no protective concerns that warrant intervention. It is extremely rare for these referrals to result in child protection becoming involved with a child or a protection application being issued.

This may not represent a lack of understanding or willingness on the part of protective workers, but rather resourcing constraints within the statutory child protection services.⁹¹

Child protection matters take priority over criminal matters

- 3.18 If a child has both a child protection matter and a criminal matter, the child protection matter is prioritised and must be dealt with before charges in the Criminal Division proceed, unless the court orders otherwise.⁹² This provision has been described as a recognition that 'protective issues could have an impact on children's behavior so ... these issues should be clarified before deciding on the appropriate way to deal with the child's charges'.⁹³
- 3.19 While the outcome in the Family Division may inform the approach in the Criminal Division, these two aspects of the child's life are dealt with separately, even if they are intrinsically related. As a consequence, the Criminal Division may not be provided with sufficient information on the protective concerns about the child and the extent to which the criminal behaviour relates to those concerns.⁹⁴ There is also the potential for delays in the finalisation of the criminal matter due to the need to hear the child protection matter first.

90. *Children, Youth and Families Act 2005* (Vic) ss 349–350; Department of Health and Human Services, 'Referral from Children's Court: Criminal Division', *Child Protection Manual* (Department of Health and Human Services, 2016) <<http://www.cpmanual.vic.gov.au/policies-and-procedures/phases/intake/referral-childrens-court-criminal-division>> at 20 March 2019.

91. Bettink (2012), above n 32, 7.

92. *Children, Youth and Families Act 2005* (Vic) s 522(2).

93. Bettink (2012), above n 32, 4.

94. *Ibid* 7.

Homelessness, inadequate accommodation, bail and remand

- 3.20 The majority of children in youth justice detention in Victoria have not yet been sentenced. Of children aged 10–17 in detention in Victoria 'on an average day' in 2016–17, approximately 69% were unsentenced (86 out of 124 children in detention), compared with 68% nationally.⁹⁵ Most (98%) unsentenced children in detention in Australia at that time were on remand.⁹⁶ Previous research suggests that children who have experienced abuse, neglect and out-of-home care are significantly over-represented among children on remand.⁹⁷
- 3.21 One limitation of separate criminal and family divisions in the Children's Court is that this may hamper the court's ability to respond to crossover kids in a coordinated, holistic way, particularly for children who are homeless or in out-of-home care as a result of abuse, neglect, risk and/or extreme conflict with their parents.
- 3.22 A particular concern in numerous Australian jurisdictions is that maltreated children, especially those in out-of-home care, may inadvertently be treated more punitively in the criminal justice system; for example, they may find it more difficult to secure bail due to a lack of stable accommodation and family support.⁹⁸ In his 2008 report on the Inquiry into child protection services in New South Wales, James Wood noted that:
- one problem which was repeatedly brought to the notice of the Inquiry has been the difficulty in securing accommodation for young people who might otherwise have been released on bail, but cannot be released because they do not have stable accommodation or are unable to return home because of family breakdown or safety or neglect risks.⁹⁹
- 3.23 Concerns about the use of remand for children with child protection backgrounds were also raised by the Australian Law Reform Commission in their family violence review:
- Specialist children's courts deal with both criminal and care matters in relation to juveniles, so that there might be thought to be few gaps in the system affecting these children. However, issues often arise where a young person appears as a defendant in the court's criminal jurisdiction. While the personal circumstances of the young person may suggest that there are child protection concerns in relation to the young person, such as the fact that the young person is unable to go home, the court cannot compel the child protection agency to find suitable accommodation for a young person for whom it has no parental responsibility. The court has no other option but to remand the young person in detention, until trial—even where imprisonment is an unlikely outcome. The problem seems to lie in the bifurcation of administrative responsibility for child protection and juvenile justice.¹⁰⁰
- 3.24 The risk that children may be remanded because of the 'lack of appropriate accommodation outside the juvenile justice system' has been described as 'a central issue in juvenile justice policy'¹⁰¹ and 'one of the indicators of "systems neglect" of adolescents in need of care in the child protection and juvenile justice systems'.¹⁰²

95. Australian Institute of Health and Welfare, *Youth Justice in Australia 2016–17*, Child Welfare Series no. 68 (2018) 15 (Figure 5.1); Australian Institute of Health and Welfare, *Data Tables: Youth Justice in Australia 2016–17*, Child Welfare Series no. 68 (2018) Table S110a.

96. *Ibid* 15. As the current report examines the backgrounds of *sentenced* children, the findings do not include children who have been remanded in custody but have not yet been sentenced (unsentenced children).

97. See for example, Australian Institute of Health and Welfare (2018), above n 29, 6; Youth Parole Board, *Annual Report 2017–18* (2018) 15.

98. Cashmore (2011), above n 38, 35. See also Bettink (2012), above n 32, 6; McFarlane (2018), above n 25, 421; Julie Stubbs, 'Re-Examining Bail and Remand for Young People in NSW' (2010) 43(3) *Australian And New Zealand Journal of Criminology* 485, 494, 498; UnitingCare Burnside, *Releasing the Pressure on Remand: Bail Support Solutions for Children and Young People in New South Wales* (2009) 3; Katrina Wong et al., *Bail Me Out: NSW Young Offenders and Bail* (2009) 7.

99. James Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW: Volume 2* (2008) 558 [15.8].

100. Australian Law Reform Commission, *Family Violence: A National Legal Response* (2010) 974 [20.159].

101. *Ibid* 974 [20.157].

102. Cashmore (2011), above n 38, 35.

- 3.25 In Victoria, if a child is charged with a criminal offence, bail must not be refused to the child on the sole ground that they do not have adequate accommodation.¹⁰³ However, in practice, a child's accommodation arrangements and family support (or lack of family support) may be highly relevant to the assessment of a child's risk when deciding whether to grant bail.¹⁰⁴ It may be problematic for a court to release a child on bail before arrangements for the child's safe and supervised accommodation have been made. As one participant at Roundtable 2 pointed out, this effect can be self-perpetuating, particularly for children in temporary out-of-home care where a high demand for placements means that if a child is remanded that child may lose their placement, which may then increase the difficulty of securing bail for that child.¹⁰⁵ Options available to the court include making enquiries through bail support services (such as Youth Justice or Jesuit Social Services), standing the matter down to arrange a placement through the child protection service or making enquiries through the Court Support Coordinator; however, options for young people outside the child protection placement service are limited. The court must take into account any information or recommendation provided to it by a bail support service.¹⁰⁶
- 3.26 Another safeguard is that a child *must* be legally represented in certain proceedings, including a bail proceeding that is opposed by the police or prosecution.¹⁰⁷ A child's lawyer may liaise with youth justice workers and bail support services to put a plan in place to facilitate the granting of bail for the child, for example, by arranging accommodation.¹⁰⁸ A participant at Roundtable 1 commented that secure welfare was often used as a mechanism for obtaining bail for a child in care 'because it's certainly a better option, if they're looking for containment, than custody, because it's therapeutic', and when there is a risk of remand, it is the 'least worst option' for the child.¹⁰⁹ Another roundtable participant commented that police who initially oppose bail may drop their opposition when assured that a child will be placed in secure welfare.¹¹⁰

Criminal Division of the Children's Court

- 3.27 Recognition that children and young people share particular developmental characteristics that affect impulsivity and cognition underpins Victoria's specialist youth justice system. This system emphasises principles of rehabilitation over punishment. It is informed by the different and distinct nature of offending by children, compared with offending by adults. The moral culpability of children and young people is treated as markedly reduced because they are:

less mature – less able to form moral judgments, less capable of controlling impulses, less aware of the consequences of acts ... less responsible and therefore less blameworthy than adults.¹¹¹

103. *Bail Act 1977* (Vic) s 3B(3).

104. Bettink (2012), above n 32, 6; Cashmore (2011), above n 38, 35; McFarlane (2018), above n 25, 421; Stubbs (2010), above n 485, 494, 498; UnitingCare Burnside (2009), above n 98, 3; Katrina Wong et al. (2009), above n 98, 7.

105. Participant at Roundtable 2: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (4 April 2019).

106. *Bail Act* s 3B(2).

107. *Children, Youth and Families Act 2005* (Vic) s 525(2).

108. In some cases, the child's lawyer may view this as a preferable course of action to involving the child protection service: Roundtable 2: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (4 April 2019).

109. Roundtable 2: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (4 April 2019).

110. Roundtable 1: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (2 April 2019).

111. Lloyd Kingsley Newman, 'Juvenile Justice in South Australia', in Children's Court Advisory Committee (South Australia), *Annual Report 1983* (1983) 6–7. See also Power (2016), above n 76, [11.1]; Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (3rd ed., 2014) 925–933; Laurence Steinberg, 'Adolescent Development and Juvenile Justice' (2009) 5 *Annual Review of Clinical Psychology* 459; Chi Meng Chu and James Ogloff, 'Sentencing of Adolescent Offenders in Victoria: A Review of Empirical Evidence and Practice' (2012) 19(3) *Psychiatry, Psychology and Law* 325; *CNK v The Queen* [2011] 32 VR 641, 662 [77].

3.28 Victoria's youth justice system under the CYF Act reflects many of the rights enshrined in the Victorian *Charter of Human Rights and Responsibilities*, including children's rights when they are remanded in custody and their treatment if found guilty.¹¹² A key protection is the right of a child charged with a criminal offence to a procedure that takes account of their age and the desirability of promoting their rehabilitation. Another is the right, without discrimination, to such protection as is in the child's best interests and is needed by them by reason of being a child.¹¹³ These rights reflect the rights enshrined in the *United Nations Convention on the Rights of the Child*.¹¹⁴

Age of criminal responsibility

3.29 The Criminal Division of the Children's Court hears and determines charges against children and young people if the alleged offence was committed on or after the person's 10th birthday but before their 18th birthday. Children who are:

- aged under 10 are, at law, not criminally responsible and cannot be prosecuted for their behaviour;¹¹⁵
- aged 10–13 (inclusive) are considered to be *doli incapax* (see [3.30]); and
- aged 19 by the time the case commences in the Children's Court have their case transferred to the Magistrates' Court.¹¹⁶

Doli incapax

3.30 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 to be 'incapable of crime', unless the prosecution successfully rebuts the presumption and proves that the child knew that their conduct was morally wrong, as opposed to childish naughtiness or mischief.¹¹⁷ Crucially:

[t]he prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she knew that it was morally wrong to engage in the conduct. This directs attention to the child's education and the environment in which the child has been raised.

112. *Charter of Human Rights and Responsibilities Act 2006* (Vic). For example, the *Charter* requires an accused child who is detained (with or without charge) to be segregated from detained adults: *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 23(1). Accordingly, children who are remanded in custody by a court or bail justice must be placed in a remand centre that has been established for the detention of children: *Children, Youth and Families Act 2005* (Vic) ss 347(1), 478(a). The *Children, Youth and Families Act 2005* (Vic) sets out strict requirements for remanded children, such as that younger children are kept separate from older children (15 years or older) and that remanded children must be kept separate from children serving a period of detention except for certain circumstances. Remanded children are also entitled to have their developmental, medical, religious and cultural needs met. See further *Children, Youth and Families Act 2005* (Vic) s 482. In the *Charter*, a 'child' is defined simply as a person who is aged under 18: *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 3. See also *Baker (A Pseudonym) v DPP* [2017] VSCA 58 (22 March 2017) [96]–[99].

113. *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 17(2); *Baker (A Pseudonym) v DPP* [2017] VSCA 58 (22 March 2017).

114. *United Nations Convention on the Rights of the Child*, GA Res 44/25 (20 November 1989, adopted 2 September 1990) art 37(c).

115. *Children, Youth and Families Act 2005* (Vic) ss 3(1) (definition of 'child'), 344, 516. A minimum age of criminal capacity is a key protection in the *United Nations Convention on the Rights of the Child* (although the *United Nations Committee* has advised that international standards require a minimum age of 12). In all Australian states, the age of capacity is 10 years. In its 1982–84 child welfare review, the Child Welfare Practice and Legislation Review Committee originally proposed increasing the age of capacity from eight to 12 but were persuaded to set it at 10 for reasons that included ensuring parity between Australian states: Child Welfare Practice and Legislation Review Committee (Victoria) (1984), above n 75, 409–410. More recently, proponents of a 'change the age' movement are advocating the age of capacity be increased across Australian jurisdictions. See for example, Human Rights Law Centre, 'Explainer: Raising the Age' (hrlc.org.au, 2018) <<https://www.hrlc.org.au/factsheets/2018/2/8/explainer-raising-the-age>> at 12 February 2019; Jesuit Social Services, *Thinking Outside: Alternatives to Remand for Children: Research Report* (2013) 38–41.

116. *Children, Youth and Families Act 2005* (Vic) ss 3(1) (definition of 'child'), 516(4)–(5).

117. *R (A Child) v Whitty* (1993) 66 A Crim R 462; *RP v The Queen* (2016) 259 CLR 641 [8]–[9]; *R v ALH* [2003] 6 VR 276, 281. See further *Power* (2016), above n 76, [10.4].

No matter how obviously wrong the act or acts constituting the offence may be, the presumption [of *doli incapax*] cannot be rebutted merely as an inference from the doing of that act or those acts ... What suffices to rebut the presumption that a child is *doli incapax* will vary according to the nature of the allegation and the child. A child will more readily understand the seriousness of an act if it concerns values of which he or she has direct personal experience ... Answers given in the course of a police interview may serve to prove the child possessed the requisite knowledge. In other cases, evidence of the child's progress at school and of the child's home life will be required ... Rebutting [the] presumption directs attention to the intellectual and moral development of the particular child. Some 10-year-old children will possess the capacity to understand the serious wrongness of their acts while other children aged very nearly 14 years old will not.¹¹⁸

- 3.31 Therefore, as a matter of law, if a child who offended before the age of 14 was raised in an environment that included violence, dishonesty, sexual abuse or other forms of criminal behaviour, this environment is directly relevant to whether the child was aware that their offending conduct was morally wrong. Caution is needed in drawing inferences from the seriousness of the child's behaviour about whether the child knew the behaviour was morally wrong:

Even extreme sexual violence will not be enough, by itself, to show that the presumption is rebutted, as there may be other reasonable inferences besides a conclusion that the child knows the conduct is morally wrong. Such inferences might include the possibility that the child has been subjected to such conduct, or that the child does not realise it is seriously wrong to cause hurt or distress to another.¹¹⁹

Offences heard in the Criminal Division of the Children's Court

- 3.32 The Criminal Division of the Children's Court must hear and determine:

- all summary (less serious) offences alleged to have been committed by children and young people; and
- indictable (more serious) offences alleged to have been committed by children and young people, unless:
 - the offence is one of several homicide-related offences;¹²⁰
 - the child objects to the matter being heard summarily;¹²¹ or
 - the court considers at any stage that the charge is unsuitable to be heard and determined summarily due to exceptional circumstances, usually relating to the seriousness of the offence (this provision is to be used 'reluctantly');¹²² or

118. *RP v The Queen* (2016) 259 CLR 641 [8]–[9], [12].

119. Judicial College of Victoria, '9.4 – Child Accused', *Victorian Criminal Proceedings Manual* (Judicial College of Victoria, 2019) <<http://www.judicialcollege.vic.edu.au/eManuals/VCPM/27581.htm>> at 6 August 2018, citing *RP v The Queen* (2016) 259 CLR 641 [32]–[36].

120. The offences of murder, attempted murder, manslaughter, child homicide, arson causing death and culpable driving causing death must be dealt with in the Supreme Court or the County Court, although the Children's Court may conduct committal proceedings for these offences: *Children, Youth and Families Act 2005* (Vic) ss 516(1)(b)–(c), 356.

121. *Children, Youth and Families Act 2005* (Vic) s 356(3)(a).

122. *Children, Youth and Families Act 2005* (Vic) s 356(3)(b). Exceptional circumstances exist if the court considers that the sentencing options available to it under the CYF Act are inadequate to respond to the child's offending: *Children, Youth and Families Act 2005* (Vic) s 356A. See also *D (A Child) v White* [1988] VR 87, 93; *A Child v A Magistrate of the Children's Court & Others* (Unreported, Supreme Court of Victoria, Cummins J, 24 February 1992); *Victoria Police v CB* [2010] VChC 3 (24 June 2010); *C v Children's Court of Victoria & Anor* [2015] VSC 40 (19 February 2015); *DL (A Minor by His Litigation Guardian) v A Magistrate of the Children's Court and Others* (Unreported, Supreme Court of Victoria, 9 August 1994) 4; *Power* (2016), above n 76, [10.1]. A combination of factors may amount to exceptional circumstances: *Victoria Police v CB* [2010] VChC 3 (24 June 2010) [11], [14].

- the offence is a Category A serious youth offence that was committed when the child was aged 16 or over. The Children's Court may only hear and determine a Category A offence for a child aged 16 or over if all the following criteria are met:
 - » the prosecution or the child requests the charge be heard and determined summarily;
 - » the court is satisfied that the sentencing options available to it under the CYF Act are adequate to the child's offending; and
 - » it is in the interest of the victim that the charge be heard and determined summarily, or the accused is particularly vulnerable because of cognitive impairment or mental illness or there is a substantial and compelling reason why the charge should be heard and determined summarily.¹²³

Specialist responses for Aboriginal and Torres Strait Islander children

Panel 3: Koori court locations

The Children's Koori Court sits at:

- Melbourne
- Heidelberg
- Dandenong
- Mildura
- Latrobe Valley (Morwell)
- Bairnsdale
- Warrnambool
- Portland
- Hamilton
- Geelong
- Swan Hill
- Shepparton.

Source: www.childrenscourt.vic.gov.au

Children's Koori Court

- 3.33 The Children's Koori Court hears charges (other than sexual offences) within the jurisdiction of the Criminal Division where Aboriginal and Torres Strait Islander children plead guilty, intend to plead guilty or are found guilty.¹²⁴ Youth justice diversion is available in the Children's Koori Court.¹²⁵
- 3.34 The Children's Koori Court was established to provide a more inclusive and culturally relevant sentencing process for young Aboriginal and Torres Strait Islander children charged with offences, by involving Aboriginal Elders and other members of the Indigenous community in the court hearing (among other measures).¹²⁶ Like the Koori Divisions of the Magistrates' Court and the County Court, one of the aims of the Children's Koori Court is to reduce the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system, including in custody.¹²⁷ The same sentencing laws apply in the Children's Koori Court as in the Children's Court.¹²⁸

123. *Children, Youth and Families Act 2005* (Vic) s 356(6). This provision was inserted by the *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic). In determining whether there is a substantial and compelling reason why the charge should be heard and determined summarily, the court must have regard to the intention of parliament that a charge for a Category A serious youth offence should not normally be heard and determined summarily: *Children, Youth and Families Act 2005* (Vic) s 356(7).

124. *Children, Youth and Families Act 2005* (Vic) s 519. See further Jennifer Bowles, *Sentencing in the Children's Court of Victoria* (2013).

125. *Children, Youth and Families Act 2005* (Vic) s 518A(c)(iv).

126. *Children and Young Persons (Koori Court) Act 2004* (Vic) s 1; Victoria, 'Children and Young Persons (Koori Court) Bill', *Parliamentary Debates*, Legislative Assembly, 3 November 2004, 1196–1199 (Sherryl Garbutt, Minister for Community Services).

127. Victoria, *Parliamentary Debates*, Legislative Assembly, 3 November 2004, 1196 (Sherryl Garbutt, Minister for Community Services).

128. *Children, Youth and Families Act 2005* (Vic) s 517.

Other specialised responses

3.35 A number of programs aim to reduce the rate at which young Aboriginal people are involved in the criminal justice system. For example, the Koori Youth Justice Program employs Koori youth justice workers to support young Aboriginal people who are at risk of offending as well as those on community-based and custodial orders,¹²⁹ and the Koori Intensive Support Program provides 'intensive outreach support to assist young people to comply with bail conditions or conditions placed on deferred sentences'.¹³⁰ In addition, the Family Division of the Children's Court at Broadmeadows operates a 'Koori Hearing Day', providing culturally responsive hearings for Aboriginal and Torres Strait Islander families involved in child protection cases and improving adherence with the Aboriginal Child Placement Principle in the CYF Act.¹³¹

Recent youth justice changes

3.36 The last few years have seen the establishment or conclusion of a number of major reviews and inquiries relating to the youth justice system in Victoria,¹³² and elsewhere in Australia.¹³³ Recent changes to the youth justice system include:

- the statewide roll-out of the youth diversion program in Victoria;¹³⁴
- the introduction, and subsequent removal, of the offence of contravening a conduct condition of bail for children;¹³⁵
- changes to the power of the Children's Court to hear Category A offences committed by children aged 16 or over¹³⁶ (it is the intention of parliament that a charge of a Category A serious youth offence should not normally be heard and determined summarily in the Children's Court);¹³⁷

129. See further Department of Justice and Community Safety, 'Koori Youth Justice Programs' (justice.vic.gov.au, 2019) <<https://www.justice.vic.gov.au/justice-system/youth-justice/koori-youth-justice-programs>> at 13 May 2019.

130. Ibid.

131. Children's Court of Victoria 'Children's Court Family Division at Broadmeadows' <<https://www.childrenscourt.vic.gov.au/about-us/court-locations/childrens-court-family-division-broadmeadows>> at 8 May 2019. See further Judicial College of Victoria, '21.1 - "Marram-Ngala Ganbu" ("Koori Family Hearing Day")', *Children's Court Bench Book* (Judicial College of Victoria, 2017) <<http://www.judicialcollege.vic.edu.au/eManuals/CHCBB/index.htm#60821.htm>> at 28 May 2019.

132. For example, the government has established an Aboriginal Youth Justice Taskforce led by the independent Commission for Children and Young People to 'examine the current care of Aboriginal young people within youth justice' and 'address the overrepresentation of Aboriginal young people in the criminal justice system': Minister for Families and Children, 'Creating A New Aboriginal Youth Justice Taskforce', Media Release (8 August 2018) <<https://www.premier.vic.gov.au/creating-a-new-aboriginal-youth-justice-taskforce/>> at 9 October 2018. Recent reports into youth justice issues include Victorian Auditor-General, *Managing Rehabilitation Services in Youth Detention* (2018); Victorian Equal Opportunity and Human rights Commission, *Aboriginal Cultural Rights in Youth Justice Centres* (2018); Penny Armytage and James Ogloff, *Youth Justice Review and Strategy: Meeting Needs and Reducing Offending* (2017); Commission for Children and Young People, '...as a good parent would...': *Inquiry into the Adequacy of the Provision of Residential Care Services to Victorian Children and Young People Who Have Been Subject to Sexual Abuse or Sexual Exploitation whilst Residing in Residential Care* (2015).

133. For example, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017) (tabled in the Northern Territory Parliament on 17 November 2017). See also Kathryn McMillan and Megan Davis, *Independent Review of Youth Detention: Report* (2016); Noetic Solutions, *Review of Effective Practice in Juvenile Justice: Report for the Minister for Juvenile Justice (NSW)* (2010); Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997).

134. For information about the youth diversion program, see above n 23.

135. Changes to the *Bail Act 1977* (Vic) in 2016 removed for children the offence of contravening any conduct condition of bail: *Bail Act 1977* (Vic) s 30A(3), inserted by *Bail Amendment Act 2016* (Vic) s 16(2). It remains an offence for a child to fail without reasonable cause to attend in accordance with their undertaking of bail or to commit an indictable offence while on bail: *Bail Act 1977* (Vic) ss 30(1), 30B. A raft of changes to the *Bail Act 1977* (Vic) commenced on 1 July 2018 after a 2017 review of the state's bail system. However, children were exempted from many of these changes.

136. Ordinarily, the Children's Court must hear and determine indictable (more serious) offences alleged to have been committed by children and young people, although there are exceptions to this rule: *Children, Youth and Families Act 2005* (Vic) s 356(6). In 2017, an exception relating to Category A offences committed by children aged 16 or over was added to section 356(6) by *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic) s 23(2). The Children's Court may now hear Category A offences involving children aged 16 or over if certain criteria are met (see further [3.32]).

137. *Children, Youth and Families Act 2005* (Vic) s 356(7). If a child is charged before the Children's Court with a Category B serious youth offence committed when aged 16 or over, the court must consider whether section 356(3) has the effect that the offence should not be heard and determined summarily: *Children, Youth and Families Act 2005* (Vic) s 356(8).

- responsibility for the youth justice system moving from the Department of Health and Human Services, which also has responsibility for child protection, to the Department of Justice and Community Safety, effective 3 April 2017; and¹³⁸
- a new youth control order that became available on 1 June 2018 as a sentencing order in the Children's Court. The order is for children who would otherwise be sentenced to detention because of the serious or ongoing nature of their offending, but who have potential to be rehabilitated with support and supervision.¹³⁹

Sentencing principles

- 3.37 Section 362(1) of the CYF Act sets out the matters that the Children's Court must take into account in sentencing a child (Panel 4). These are quite different from the sentencing factors and purposes that apply to adult offenders.¹⁴⁰
- 3.38 The sentencing court must have regard to each of the specified matters to the maximum extent possible. The Court of Appeal has specified that these matters require the sentencing court to consider 'the effect of the proposed sentence on the child ... and to impose a sentence which fits the young offender as much as – or perhaps even more than – it fits the crime'.¹⁴¹
- 3.39 Although not specifically mentioned, the principle of rehabilitation underpins the first four matters set out in section 362(1), which include the preservation of family and home, the continuation of the child's education and employment, and the need to minimise stigma to the child.¹⁴² The focus on rehabilitation reflects the benefit to both the child and the community in directing the young person away from a potentially life-long pathway of antisocial conduct and criminal offending.¹⁴³
- First, the young offender's immaturity is seen as markedly reducing his/her moral culpability; secondly, custody can be particularly criminogenic for a young person, whose brain is still developing; and, thirdly, the very process of development and maturation which is under way is seen as providing a unique opportunity for rehabilitation and — hence — for minimising the risk of re-offending.¹⁴⁴
- 3.40 The last three matters in section 362 of the CYF Act are more focused on justice.¹⁴⁵ Applying only 'if appropriate', they require the court to have regard to the need to:
- ensure that the child is aware that they must bear a responsibility for any action by them against the law;
 - protect the community from the violent or wrongful acts of the child; and
 - deter children from committing offences in custody.¹⁴⁶

138. Youth Parole Board, *Annual Report 2016–17* (2017) viii.

139. Victoria, 'Children and Justice Legislation Amendment (Youth Justice Reform) Bill 2017, *Parliamentary Debates*, Legislative Assembly, 25 May 2017, 1502 (Martin Pakula, Attorney-General); *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic) pt 3.

140. The sentencing factors and purposes that apply to sentencing adults are set out in *Sentencing Act 1991* (Vic) s 5.

141. *CNK v The Queen* [2011] 32 VR 641, 643–645 [4]–[16].

142. *Children, Youth and Families Act 2005* (Vic) ss 362(1)(a)–(d). For further discussion of the Children's Court jurisdiction and the principles that govern the sentencing of children and young people, see Sentencing Advisory Council, *Sentencing Children in Victoria: Data Update Report* (2016).

143. *R v Evans* [2003] VSCA 223 (19 December 2003) [44] (Vincent JA).

144. *Webster (A Pseudonym) v The Queen* [2016] VSCA 66 (11 April 2016) [8].

145. Freiberg (2014), above n 111, 926–928.

146. *Children, Youth and Families Act 2005* (Vic) ss 362(f)–(h). The *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic) inserted section 362(1)(h) and amended section 362(1)(g) to require the court to consider the need to protect the community when sentencing Category A and Category B offences: *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic) ss 24, 42(b).

Panel 4: Matters to be taken into account when sentencing a child (section 362)

- (1) In determining which sentence to impose on a child, the court must, as far as practicable, have regard to—
- (a) the need to strengthen and preserve the relationship between the child and the child's family; and
 - (b) the desirability of allowing the child to live at home; and
 - (c) the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance; and
 - (d) the need to minimise the stigma to the child resulting from a court determination; and
 - (e) the suitability of the sentence to the child; and
 - (f) if appropriate, the need to ensure that the child is aware that they must bear a responsibility for any action by them against the law; and
 - (g) the need to protect the community, or any person, from the violent or other wrongful acts of the child—
 - (i) in all cases where the sentence is for a Category A serious youth offence or a Category B serious youth offence; or
 - (ii) in any other case—if it is appropriate to do so;
 - (h) if appropriate, the need to deter the child from committing offences in remand centres, youth residential centres or youth justice centres.

3.41 The CYF Act also permits the court to have regard to 'any report, submission or evidence ... on behalf of the child who is to be sentenced',¹⁴⁷ allowing the court to consider submissions about the context of the offending and aggravating and mitigating factors.

3.42 The list of matters to be taken into account under section 362 of the CYF Act includes the need to strengthen the relationship between the child and the child's family and the desirability of allowing the child to live at home.¹⁴⁸ However, section 362 does not expressly require a sentencing court to take into account a child's experience of abuse, neglect, trauma, removal from family, loss or out-of-home care as context for that child's offending. Although the common law provides that childhood abuse may be relevant as a mitigating factor in sentencing,¹⁴⁹ the limited case law on the subject is generally in the context of adult offenders who were abused as children or offenders in their late teens facing sentencing for serious offences in the higher courts.¹⁵⁰

147. *Children, Youth and Families Act 2005* (Vic) s 358(c).

148. *Children, Youth and Families Act 2005* (Vic) ss 362(a)–(b).

149. *R v AWF* [2000] 2 VR 1; *DPP v Walsh (A Pseudonym)* [2018] VSCA 172 (17 July 2018), [26]–[34]; *R v McKee & Brooks* (2003) 138 A Crim R 88, 92, 94; *R v Maschoe* [2000] VSCA 193 (11 October 2000) [4]; *DPP v Wilson* [2002] VSC 299 (24 July 2002) [23]–[24]; Freiberg (2014), above n 111, 310 [4.105].

150. *Bugmy v The Queen* (2013) 249 CLR 571; *R v AWF* [2000] 2 VR 1; *DPP v Walsh (A Pseudonym)* [2018] VSCA 172 (17 July 2018) [26]–[34]; *R v McKee & Brooks* (2003) 138 A Crim R 88, 92, 94; *R v Maschoe* [2000] VSCA 193 (11 October 2000) [4]; *DPP v Wilson* [2002] VSC 299 (24 July 2002) [23]–[24]; *R v Fuller-Cust* [2002] 6 VR 496, 515, 531–533; *AH v The State of Western Australia* [2014] WASCA 228 (10 December 2014) [125]; *R v 'DP' (A Child)* [2003] WASCA 92 (6 May 2003) [56], [61]; *DPP v Tewksbury (A Pseudonym)* [2018] VSCA 38 (27 February 2018), [37]; *DBW (A Child) v The State of Western Australia* [2011] WASCA 206 (30 September 2011) [57], [60]–[61]; *DPP v Anderson* [2013] VSCA 45 (7 March 2013) [3], [59], citing *Hogarth v The Queen* [2012] 37 VR 658, 666 [30]–[31]; Freiberg (2014), above n 111, 310 [4.105].

- 3.43 There is a scarcity of written authority on, or academic consideration of, the approach to a child's experience of abuse, neglect, trauma, loss or out-of-home care in sentencing children, particularly in cases where the offending was committed contemporaneously to the child's abuse, neglect or experience of out-of-home care. There is also no express requirement for the sentencing court to have regard to the need to ensure that the child has a safe, stable and secure place to live. Nor is the court required to consider the impact of a decision on the stability of a child's out-of-home care placement or the need to strengthen and preserve the relationship between the child and the child's non-parental carer.
- 3.44 In fact, the CYF Act provides that a child's appearance in the Family Division of the Children's Court, including as a child in need of protection, should not be an *aggravating* factor in sentencing that child: the Criminal Division must not impose a more severe sentence than it would have imposed had the child not had a matter in the Family Division.¹⁵¹
- 3.45 A child's experience of abuse, neglect, trauma, removal from family, loss, out-of-home care or other vulnerability may be relevant to sentencing in the Children's Court in a number of ways, including:
- the consideration of the need to strengthen and preserve the relationship between the child and the child's family and the desirability of allowing the child to live at home under section 362 of the CYF Act;
 - the assessment of the child's moral culpability for the offence, including the degree to which it is appropriate to ensure that the child is aware that they must bear a responsibility for any action by them against the law;
 - the appropriateness of the need to deter the child from committing offences in remand centres, youth residential centres or youth justice centres;
 - the assessment of the child's risk in the context of an assessment of whether there is a need to protect the community from the child; and
 - as a general mitigating factor (at common law).

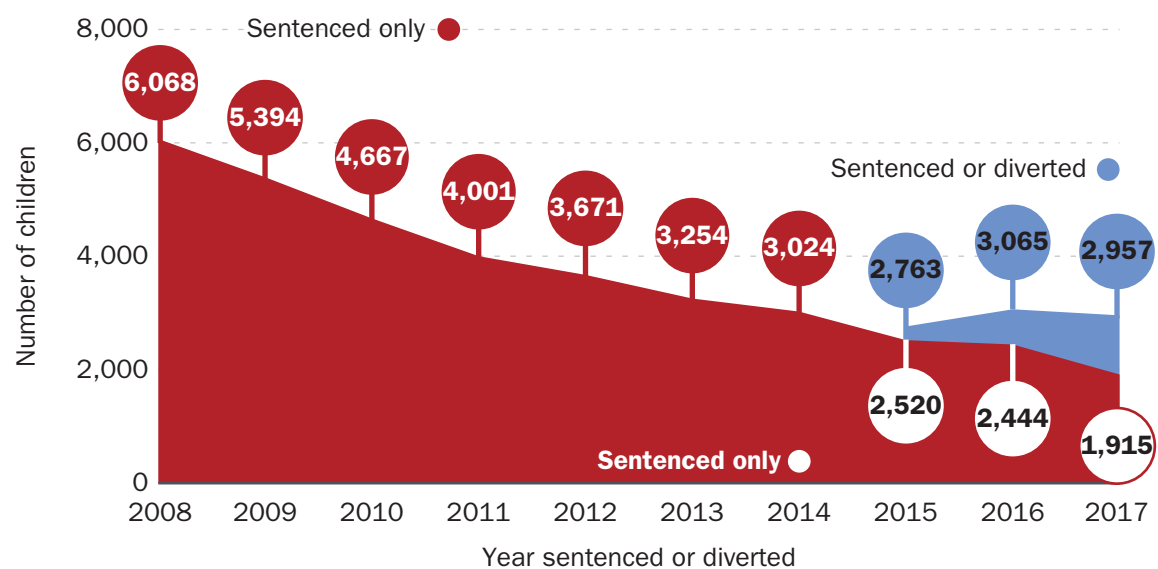
151. *Children, Youth and Families Act 2005* (Vic) s 362(2).

4. What do we know about offending by children in Victoria?

The number of children sentenced each year has decreased

- 4.1 The vast majority of children and young people do not commit crime,¹⁵² and many of those who do cease offending as they mature. In recent years, there has been a dramatic reduction in the number of children attending the Victorian Children's Court each year for sentencing. The annual number of sentenced children fell by over two-thirds between 2008 (6,068 children) and 2017 (1,915 children) (Figure 6).

Figure 6: People sentenced and diverted in the Children's Court, by year, 2008 to 2017



- 4.2 The youth diversion program is an alternative to a formal determination of guilt and sentence. The diversion program was run as a pilot program across seven Children's Court sites from 1 June 2015 to the end of December 2016,¹⁵³ before becoming available in all Victorian Children's Court locations on 1 January 2017 (halfway through the study period of this report).
- 4.3 Figure 6 includes diverted children in the total of children who faced 'consequences' in the Children's Court for their offences. There was a steady decline from 2008 to 2015. However, after the introduction of diversion, the number of children who faced consequences in the Children's Court for offending increased from 2,763 children in 2015 to 3,065 children in 2016 and 2,957 children in 2017. When diverted children are combined with sentenced children, the number of children dealt with by the Children's Court appears to have plateaued since 2015.

152. Only 1.4% of people aged 10–17 in Victoria were alleged by police to have committed a crime in 2015. This means that over 98% of young persons did not offend or were not detected by police. Once pre-court resolutions (for instance, acquittals, pre-charge diversion such as cautions and pre-sentence diversion) are filtered out, the percentage of people aged 10–17 who had an offence proven by a court in 2015 drops to just 0.6%: Sentencing Advisory Council (2016), above n 19, 2.

153. The pilot program incorporated four metropolitan Children's Court sites (Broadmeadows, Dandenong, Sunshine and Werribee) and three regional Children's Court sites (Ararat, Stawell and Ballarat): Stuart Thomas, Marg Liddell and Diana Johns, *Evaluation of the Youth Diversion Pilot Program (YDPP: Stage 3): Executive Summary* (2016) 3. See further above n 23.

- 4.4 A participant at Roundtable 1 queried whether some of the children who now receive diversion (requiring them to consent and to accept responsibility for the offence) might previously have had their charges discharged, for example, on the basis of *doli incapax*. The participant explained that agreeing to diversion sometimes reflected a child's wish to end the court process quickly by whatever means necessary, particularly when the child did not have family support at court to help them consider their options:
- From a practice perspective, we have a concern that a number of kids who were actually diverted and/or sentenced actually were *doli incapax* at the time, and they shouldn't have actually been diverted and/or sentenced, so there's that compounding effect on a young person's criminal history.¹⁵⁴
- 4.5 One participant queried 'how much of the offending that those 10–12 year olds are doing is care-related offending, as opposed to offending that ought to be responded to', with another adding 'yes that's the pathway into youth justice'.¹⁵⁵ Representatives of the Children's Court suggested that a choice to use diversion might facilitate access to supports not available if the *doli incapax* route were taken, and in this context, people steering children into the diversion program are usually well-intentioned. However, 'whilst you could understand that, children also have a right to the protection afforded by the *doli incapax* presumption, so you wouldn't want the availability of diversion to infringe on their fundamental rights'.¹⁵⁶
- 4.6 If the introduction of youth diversion has widened the net of children facing consequences for offences in the Children's Court, this may explain to some extent the plateauing from 2015 of children facing consequences for offences in the Children's Court as shown in Figure 6.

Children are less likely than adults to offend but more likely than adults to reoffend

- 4.7 While children generally have lower *offending* rates than adults,¹⁵⁷ once they are in the criminal justice system, young offenders have higher *reoffending* rates than their older counterparts.¹⁵⁸

The younger children are when first sentenced, the more likely they are to reoffend

- 4.8 The age at which a child is first sentenced in the criminal justice system is associated with the likelihood of that child reoffending.¹⁵⁹
- 4.9 The Council's 2016 report on reoffending by children found that the younger children are at their first sentence, the more likely they are to reoffend generally (Figure 7), to reoffend violently and to receive a sentence of adult imprisonment before their 22nd birthday.

154. Participant at Roundtable 1: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (2 April 2019).

155. Participants at Roundtable 1: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (2 April 2019).

156. Meeting with representatives of the Children's Court of Victoria (3 April 2019).

157. Sentencing Advisory Council (2016), above n 19, 2.

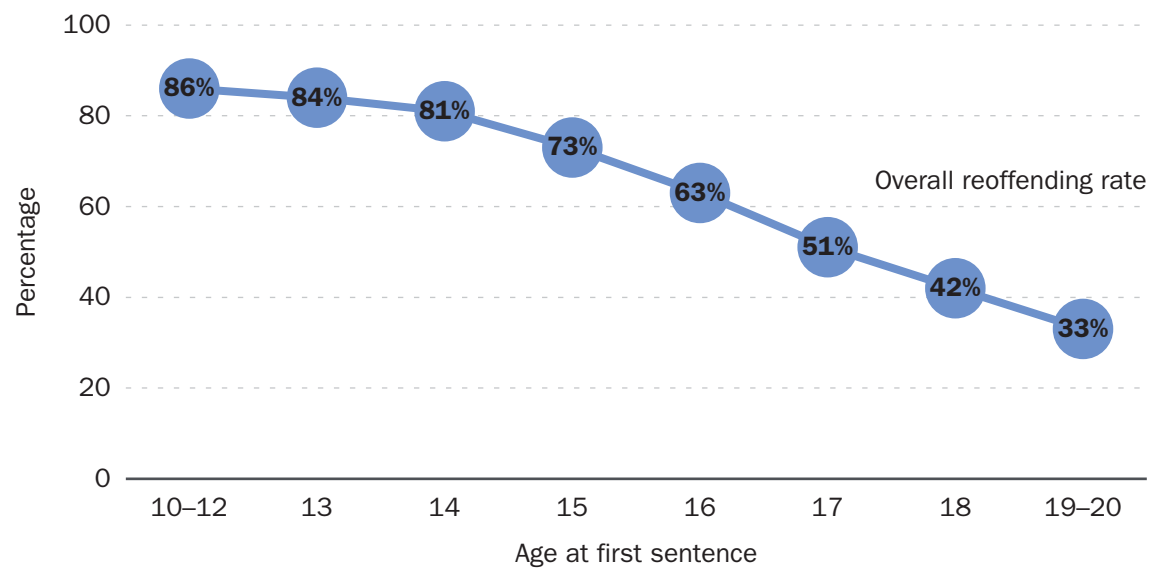
158. Ibid 2–4. For research on New South Wales, see Winifred Agnew-Pauley and Jessie Holmes, *Re-offending in NSW*, Bureau Brief no. 108 (2015). For research on New Zealand, see Arul Nadesu, *Reconviction Patterns of Released Prisoners: A 48-Months Follow-Up Analysis* (2008). For research on the United States, see Matthew R. Durose et al., *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010* (2014). For research on England and Wales, see Ministry of Justice, *Proven Reoffending Statistics Quarterly Bulletin: October 2013 to September 2014, England and Wales* (2016).

159. Sentencing Advisory Council (2016), above n 19, 25–26.

Children who were first sentenced aged 10–13 had particularly high reoffending rates, with over 80% reoffending at all and over 60% reoffending with an offence against the person.¹⁶⁰ The cohort of children first sentenced at a young age proceeded to commit a disproportionate volume of all youth crime.

- 4.10 Three-quarters of the children who were first sentenced aged 10–12 continued offending into the adult criminal jurisdiction, and 36% were sentenced to an immediate term of adult imprisonment before the age of 22.¹⁶¹

Figure 7: Reoffending rate, by age at first sentence¹⁶²



Children who offend are different from adult offenders

- 4.11 All children and young people have a range of challenges as they grow and develop. When combined with family dysfunction, abuse, neglect, exposure to violence, low socioeconomic conditions or negative peer influences, these challenges can contribute to antisocial behaviour and criminal offending. The Sentencing Council for England and Wales' *Sentencing Children and Young People* guideline explains that:

It is important to bear in mind any factors that may diminish the culpability of a child or young person. Children and young people are not fully developed and they have not attained full maturity. As such, this can impact on their decision making and risk taking behaviour. It is important to consider the extent to which the child or young person has been acting impulsively and whether their conduct has been affected by inexperience, emotional volatility or negative influences. They may not fully appreciate the effect their actions can have on other people and may not be capable of fully understanding the distress and pain they cause to the victims of their crimes. Children and young people are also likely to be susceptible to peer pressure and other external influences and changes taking place during adolescence can lead to experimentation, resulting in criminal behaviour. When considering a child or young person's age their emotional and developmental age is of at least equal importance to their chronological age (if not greater).¹⁶³

¹⁶⁰. Ibid 27 (Table 5).

¹⁶¹. Ibid 30–31 (Figure 19).

¹⁶². Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria: Fact Sheet* (2016) 2; Sentencing Advisory Council (2016), above n 19, 26 (Figure 18).

¹⁶³. Sentencing Council for England and Wales, *Sentencing Children and Young People Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery: Definitive Guideline* (2017) 4 [1.5].

4.12 Research also suggests that children make decisions differently from adults due to 'psychosocial immaturity'¹⁶⁴ and that 'the part of our brain responsible for impulse control, planning and decision-making (the prefrontal cortex) is not fully developed until we are about 25 years of age'.¹⁶⁵ Children's brain development is also affected by maltreatment, exposure to violence or other trauma, neglect, disrupted family bonds and attachment, and poverty.¹⁶⁶ This is particularly relevant to children in the youth justice system:

It is well recognised that children and young people are continuing to develop physiologically, psychologically and emotionally, and this must be taken into account when responding to their criminal offending. In addition, the small group of children and young people who enter the youth justice system experience increased vulnerability in a range of ways. Many children and young people in youth justice detention have a history of trauma, neglect and abuse, and child protection involvement. They are also more likely to experience family violence, have mental health problems or a disability, engage in drug and alcohol misuse, be disengaged from school and experience homelessness. Aboriginal and Torres Strait Islander children and young people experience intergenerational trauma and the continuing impacts of dispossession, colonisation and discrimination. Children and young people from refugee backgrounds may have experienced war and conflict, which can be compounded by experiences of displacement and the loss of family networks.¹⁶⁷

4.13 The criminal profile of children and young people who offend also differs from that of adults. Cunneen, White and Richards suggest that, unlike adult crime, crime by children and young people tends to be committed in groups and in public areas, and their offending often occurs close to where they live. Further, their offences tend to be attention-seeking, public and gregarious, episodic, unplanned and opportunistic.¹⁶⁸

4.14 According to Victorian Crime Statistics Agency data, offenders aged 10–14 are more likely than older offenders to commit property offences, are similarly likely to commit offences against the person and are less likely to commit drug offences, public order and security offences, and justice procedures offences (Table 1).

Table 1: Percentage of alleged offender incidents, by offence type and age group, January 2018 to December 2018¹⁶⁹

Age group	Property and deception offences	Crimes against the person	Drug offences	Public order and security offences	Justice procedures offences	Other offences
10–14	57.6	31.7	1.7	6.2	2.6	0.2
15–19	45.4	30.2	7.9	9.9	6.3	0.3
20–39	37.8	24.6	9.7	12.0	15.8	0.2
40+	28.6	31.9	6.7	12.0	20.4	0.4
All ^a	36.9	27.5	8.4	11.6	15.4	0.2

a. 'All persons' includes people of an 'unknown' age group.

164. Gene Griffin and Sarah Sallen, 'Considering Child Trauma Issues in Juvenile Court Sentencing' (2013) 34(1) *Children's Legal Rights Journal* 1, 2; Laurence Steinberg and Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty* (2003) 58(12) *American Psychologist* 1009, 1014.

165. Mark Marien, "'Cross-Over Kids': Childhood and Adolescent Abuse and Neglect and Juvenile Offending' (Paper presented at the National Juvenile Justice Summit, Melbourne, 26–27 March 2012) 2.

166. *Ibid* 3.

167. Australian Children's Commissioners and Guardians, *Statement on Conditions and Treatment in Youth Justice Detention* (2017) 9 (citations omitted).

168. Chris Cunneen et al., *Juvenile Justice in Australia* (5th ed., 2015) 55. See also Marien (2012), above n 165, 2.

169. Sentencing Advisory Council analysis of Crime Statistics Agency, *Data Tables – Alleged Offender Incidents – Year Ending December 2018* (2019) Table 8.

Most children known to child protection do not offend, but many children charged with offences are known to child protection

- 4.15 In Australia¹⁷⁰ and internationally,¹⁷¹ children involved in the child protection system have been found to be over-represented in the youth justice system.
- 4.16 A consistent theme of research into the overlap between youth justice and child protection is that, while most children who are known to child protection do not end up as offenders, a significant proportion of children who are charged with offences are known to child protection.
- 4.17 For example, in the four-year period from 1 July 2013 to 30 June 2017, 7.7% of the 48,379 Australian young people who received child protection services were also under youth justice supervision (a custodial or supervised community order) in the same period. In comparison, 47.7% of the 7,776 young people under youth justice supervision were also receiving child protection services (Figure 8, page 36).¹⁷²
- 4.18 Compared to the general population:
- young people who received child protection services were nine times more likely to be under youth justice supervision; and
 - young people under youth justice supervision were nine times more likely to be receiving child protection services.¹⁷³
- 4.19 Victorian children who received a child protection service were the least likely in Australia to be under youth justice supervision (5.4%).¹⁷⁴ However, 'this rate of youth justice supervision is still almost 11 times the rate for the age-equivalent Victorian population (0.5%).'¹⁷⁵ Children under youth justice supervision in Victoria were the most likely in Australia to have also received a child protection service during the same four-year period (60.4%). This is 'just over 10 times the rate of child protection among the age-equivalent Victorian population'.¹⁷⁶

170. Cashmore (2011), above n 38, 33; Australian Institute of Health and Welfare (2018), above n 29, 6; Youth Parole Board (2018), above n 97, 15; Catia Malvaso, 'Investigating the Complex Links between Maltreatment and Youth Offending' (aifs.gov.au, 2017) Australian Institute of Family Studies <<https://aifs.gov.au/cfca/2017/08/30/investigating-complex-links-between-maltreatment-and-youth-offending>> at 8 October 2018; Adam Dean, 'Young People Involved in Child Protection and Youth Justice Systems' (aifs.gov.au, 2018) Australian Institute of Family Studies <<https://aifs.gov.au/cfca/2018/07/24/young-people-involved-child-protection-and-youth-justice-systems>> at 13 May 2019; Kath McFarlane, 'From Care to Custody: Young Women in Out-of-Home Care in the Criminal Justice System' (2010) 22(2) *Current Issues in Criminal Justice* 345; Jesuit Social Services, *Thinking Outside: Alternatives to Remand for Children, Summary Report* (2013) 20; Stewart et al. (2008), above n 38; Malvaso et al. (2017), above n 38; Devon Indig et al., *2009 NSW Young People in Custody Health Survey: Full Report* (2011) 31; Marien (2012), above n 165, 1, 6–8.

171. See for example, Department for Education (England), *Outcomes for Children Looked After by Local Authorities in England as at 31 March 2014*, Statistical First Release no. 49/2014 (2014) 18; Sentencing Council for England and Wales (2017), above n 163, 6 [1.16].

172. Australian Institute of Health and Welfare (2018), above n 29, 6. In that report, child protection data 'is restricted to investigated notifications, child protection orders and out-of-home care. Excluded are notifications that were not investigated, child protection orders that were 'other' or 'not stated' and living arrangements that do not constitute out-of-home care': *ibid* 3.

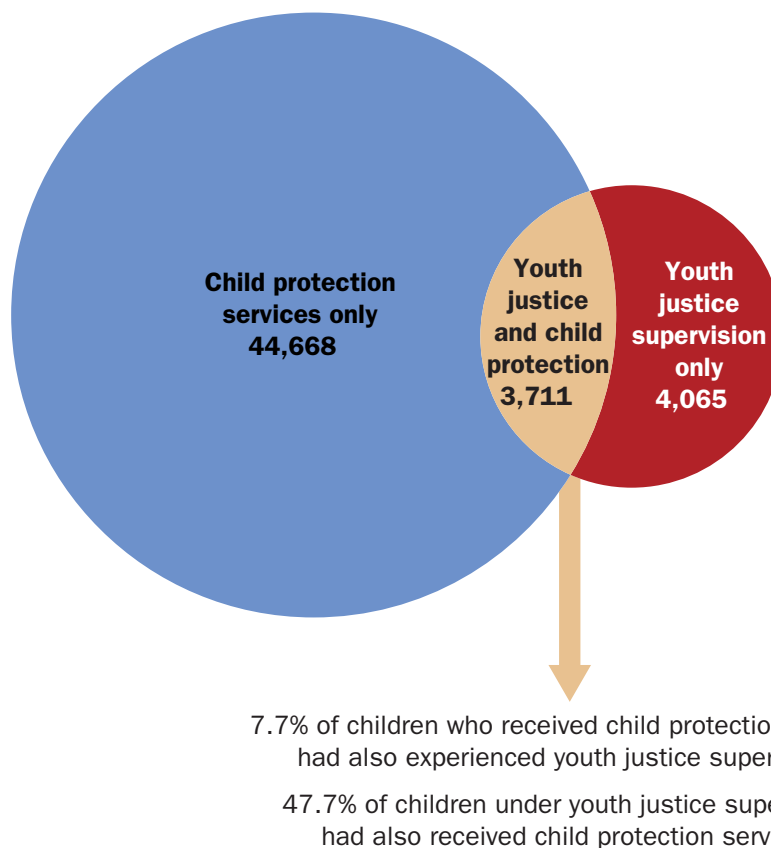
173. *Ibid* v. The data excludes New South Wales and the Northern Territory. The data includes only children who were aged 10–14 at 1 July 2013. Data is restricted to the period between 1 July 2013 and 30 June 2017. For data included in the definition of 'child protection services' see above n 67.

174. *Ibid* 10. In comparison, 7.7% of Australian children who had received a child protection service had also experienced youth justice supervision.

175. *Ibid*; Australian Institute of Health and Welfare, *Data Tables: Young People in Child Protection and under Youth Justice Supervision: 1 July 2013 to 30 June 2017*, Data Linkage Series no. 24 (2018) tables S3, S15.

176. Australian Institute of Health and Welfare (2018), above n 29, 11. In comparison, 47.7% of Australian children under youth justice supervision also received child protection services during the same four-year period: *ibid* 17.

Figure 8: Overlap between the child protection system and youth justice supervision: children in Australia who received child protection services, were under youth justice supervision, or both, 1 July 2013 to 30 June 2017¹⁷⁷



Source: Australian Institute of Health and Welfare, Young people in child protection and under youth justice supervision 1 July 2013 to 30 June 2017 (2018) Data Linkage Series no. 24. Cat. No. CSI 26, 7.

Excludes New South Wales and the Northern Territory. Includes only children who were aged 10–14 at 1 July 2013.

4.20 A Victorian Youth Parole Board survey of 209 males and 17 females detained on sentence and remand on 1 December 2017 showed that 37% were currently and/or previously subject to a child protection order.¹⁷⁸ Similarly, a 2015 Victorian study by Jesuit Social Services found that vulnerable and disadvantaged children and young people were highly overrepresented among those who were on remand. The study found that all 27 children who were first remanded aged 10–12 were known to the child protection service, and 14 of the 27 children were known to the child protection service before their third birthday. Jesuit Social Services concluded that:

[t]he justice system appears impotent in halting these children's trajectories, with most going on to experience substantial youth justice involvement. They belong in the welfare system not the justice system.¹⁷⁹

177. Australian Institute of Health and Welfare (2018), above n 29, 7 (Figure 2.1). Data is restricted to the period between 1 July 2013 and 30 June 2017. For data included in the definition of 'child protection services', see above n 67.

178. Youth Parole Board (2018), above n 97, 15–16.

179. Jesuit Social Services (2013), above n 170, 20. For more information about the Victorian Child Protection System and Child Protection Orders, see Department of Health and Human Services (2019), above n 40; Department of Health and Human Services (2017), above n 5.

Children in out-of-home care are more likely than other children to end up in the youth justice system

- 4.21 Australian and international evidence suggests that children who are placed in out-of-home care are 'grossly over-represented in the juvenile justice system'.¹⁸⁰ This is particularly the case for children placed in residential care.¹⁸¹
- 4.22 A 2016 study by Victoria Legal Aid examined the progression of children in out-of-home care into the criminal justice system. Looking at young people assisted by Victoria Legal Aid with child protection matters, the study found that:
- almost one in three young people who were placed in out-of-home care later returned to Victoria Legal Aid for assistance with criminal charges;
 - those placed in out-of-home care were almost twice as likely to face criminal charges as those who remained with their families; and
 - those placed in out-of-home care were more likely than other children to be charged with criminal damage for property-related offending.¹⁸²
- 4.23 A 2018 update by Victoria Legal Aid showed that, of the Victorian children placed in state residential care who had sought legal aid assistance for child protection matters, two out of every three also sought Victoria Legal Aid's help for criminal charges, and more than half (57%) of children in residential care faced criminal charges within 12 months of their residential care placement.¹⁸³
- 4.24 In 2007, Wise and Egger found that 21% of children aged 11–17 living in out-of-home care in Victoria had been cautioned or charged by police in the previous six months.¹⁸⁴

Why are children in care over-represented in the youth justice system?

- 4.25 The reasons why children known to child protection are over-represented among children who offend are many, complex and likely to vary from child to child. Considerable evidence demonstrates an association between child maltreatment and youth offending.¹⁸⁵

180. Marien (2012), above n 165, 1, 6–8. See also Australian Institute of Health and Welfare (2017), above n 38, 14; Victoria Legal Aid (2016), above n 7, 9; Commission for Children and Young People (2015), above n 132, 27; Indig et al. (2011), above n 170, 31; Kath McFarlane, 'Care-Criminalisation: The Involvement of Children in Out of Home Care in the NSW Criminal Justice System' (PhD Thesis, University of New South Wales, 2016); Elizabeth Fernandez et al., 'Children's Court Challenges and Possibilities: A Study of the Children's Court of New South Wales' (Paper presented at the Association of Children's Welfare Agencies (ACWA) Best Practice Forum, Sydney, 23 July 2014); Kelly Richards and Lauren Renshaw, *Bail and Remand for Young People in Australia: A National Research Project*, Australian Institute of Criminology Research and Public Policy Series no. 125 (2013); Sarah Wise and Samuel Egger, *The Looking After Children Outcomes Data Project: Final Report* (2008) 15.

181. Victoria Legal Aid, 'Action Needed to Stop Children in State Care Entering Youth Justice', Media Release (26 September 2018) <<https://www.legalaid.vic.gov.au/about-us/news/action-needed-to-stop-children-in-state-care-entering-youth-justice>> at 13 May 2019; McFarlane (2018), above n 25.

182. Victoria Legal Aid (2016), above n 7, 1. The study considered children who had been seen by Victoria Legal Aid for a child protection matter and compared children who were placed in out-of-home care with those whose child protection matter did not result in out-of-home care. Victoria Legal Aid found that 30% of those in out-of-home care returned to Victoria Legal Aid for assistance with a criminal charge, compared with 18% of those who remained with their family: *ibid* 9.

183. Victoria Legal Aid (2018), above n 182. These findings are consistent with a 2008 study by Wise and Egger, which found that of 614 surveyed children in out-of-home care in Victoria, 21% of children aged 10 or older had been cautioned, warned or charged by police in the last six months. Those in residential care were nine times more likely than children in home-based care to have had such criminal involvement: Wise and Egger (2008), above n 180, 15.

184. Wise and Egger (2008), above n 180, 15.

185. Stewart et al. (2002), above n 38; Cashmore (2011), above n 38; Hurren et al., 'Transitions and Turning Points Revisited: A Replication to Explore Child Maltreatment and Youth Offending Links within and across Australian Cohorts' (2017) 65 *Child Abuse & Neglect* 24; Malvaso et al. (2017), above n 38, 40; Adam Dean, *The Intersection between the Child Protection and Youth Justice Systems: CFA Resource Sheet* (2018).

Children with both child protection and criminal justice histories 'comprise a particularly complex at-risk and vulnerable population'.¹⁸⁶

While a number of risk factors have been identified as increasing the likelihood of juvenile offending, none are as consistent as the detrimental effect of child abuse and neglect.¹⁸⁷

- 4.26 The prior exposure of a child to severe maltreatment, neglect, offending and violence may increase the likelihood of the child engaging in trauma-related behaviour that may also constitute an offence (such as substance abuse or aggression).¹⁸⁸ Childhood trauma influences children's development and ability to regulate their behaviour. This might result in, for example, heightened vigilance, stress intolerance, antisocial behaviour and 'fight or flight' responses to triggers.¹⁸⁹
- 4.27 Child abuse and neglect have long been recognised as risk factors for juvenile offending. However, the association between maltreatment and offending is complex and 'can involve a range of factors that influence the risk of subsequent offending behaviour, including variations in the maltreatment experiences and placement in out-of-home care'.¹⁹⁰ Factors that may contribute to the over-representation of children in out-of-home care in the youth justice system include:
- circumstances arising from the experience of out-of-home care itself (this includes the potential for exposure to predatory adults or other children involved in high-risk and offending behaviour; increased trauma due to removal from family, friends, community and school and difficulties forming secure and stable relationships with carers);
 - reserving residential care as a measure of last resort (this results in residential care units grouping together some of the most traumatised, vulnerable, at-risk and complex-needs children, some of whom have ended up in residential care because other out-of-home care placements have been unable to manage their problematic behaviour);
 - multiple out-of-home care placements (this reduces the opportunity to form relationships with carers and for therapeutic treatment and interventions. There is evidence that a lack of stability and multiple out-of-home care placements increases the risk of subsequent offending); and
 - approaches to managing children's behaviour in out-of-home care, particularly residential care (this includes, for example, the use of police to locate and return children who have run away from care or to respond to problematic and trauma-influenced behaviours in circumstances that might not involve police if the child was living in their family home).¹⁹¹ Victoria Legal Aid reported that:

186. Douglas Thomas et al., *When Systems Collaborate: How Three Jurisdictions Improved Their Handling of Dual-Status Cases* (2015) 3.

187. Stewart et al. (2002), above n 38, 1.

188. Ibid; McFarlane (2018), above n 25, 415; Mendes et al., *Good Practice in Reducing the Over-Representation of Care Leavers in the Youth Justice System: Phase Three Report* (2014) 26; Joseph Ryan et al., 'Adolescent Neglect, Juvenile Delinquency, and the Risk of Recidivism' (2013) 42(3) *Journal of Youth and Adolescence* 454; Carolyn Smith et al., 'Adolescent Maltreatment and Its Impact on Young Adult Antisocial Behaviour' (2005) 29(10) *Child Abuse and Neglect* 1099; Victoria Legal Aid (2016), above n 7, 7.

189. New South Wales Government, *Joint Protocol to Reduce the Contact of Young People in Residential Out-of-Home-Care with the Criminal Justice System* (2016) 5, 15; Victoria Legal Aid (2016), above n 7, 11; Mendes et al. (2014), above n 188, 32–34; Griffin and Sallen (2013), above n 164, 9–10.

190. Dean (2018), above n 185.

191. Commission for Children and Young People (2015), above n 132, 14; Mendes et al. (2014), above n 188, 24–25; Victoria Legal Aid (2016), above n 7, 7; McFarlane (2010), above n 170, 345–346; Carol Hayden, 'Offending Behaviour in Care: Is Children's Residential Care a "Criminogenic" Environment?' (2010) 15(4) *Child & Family Social Work* 461; McFarlane (2017), above n 25. Joseph Ryan and Mark Testa, 'Child Maltreatment and Juvenile Delinquency: Investigating the Role of Placement and Placement Instability' (2005) 27(3) *Children and Youth Services Review* 227; Stewart et al. (2002), above n 38; Joseph Ryan et al., 'Juvenile Delinquency in Child Welfare: Investigating Group Home Effects' (2008) 30(9) *Children and Youth Services Review* 1088; Marien (2012), above n 165, 12; Melissa Jonson-Reid and Richard Barth, 'From Placement to Prison: The Path to Adolescent Incarceration from Child Welfare Supervised Foster or Group Care' (2000) 22(7) *Children and Youth Services Review* 493.

[w]hile serious offending by young people may warrant a police response, we also see cases where police have been called to a residential facility to deal with behaviour by a young person that would be unlikely to come to police attention had it occurred in a family home. We have represented children from residential care who have received criminal charges for smashing a cup, throwing a sink plug or spreading food around a unit's kitchen ... the current practice in many residential care facilities of relying on police to manage disputes over behavioural incidents is leading to an excessive criminalisation of children in residential care – propelling them into the very criminal justice system they should be protected from.¹⁹²

4.28 The 2014 Victorian Auditor-General's report noted that:

[c]hildren in residential care have generally been exposed to multiple traumas in the form of family violence, alcohol and drug abuse, or sexual, physical and emotional abuse since they were very young. They may have a parent who is in prison or a struggling single parent with mental health issues. Some have been born to mothers who were very young, often with a violent partner. They usually have other siblings in care, and one of their parents may also have been in care as a child. They are usually known to child protection at an early age. They come to residential care typically as a young adolescent, having experienced a number of placements in home-based care that have since broken down or were only available for short periods of time.¹⁹³

4.29 The 1984 Carney review set out principles that guided its consideration of out-of-home care, including the principle that:

[i]n taking over the role of parents as custodians or guardians, the state acquires a new and onerous responsibility. In discharging this responsibility the state must maintain its commitment to provide a level of care which is equivalent to that provided by good parents. This includes providing individual caring treatment, and developing the intellect, character and emotional and physical health of the child. The standard of care expected of the state is no less than that which good parents would provide for their children.¹⁹⁴

Current initiatives to improve the outcomes of children in care

4.30 The last few years have seen 'unprecedented scrutiny of ... Victoria's out-of-home care system',¹⁹⁵ including the announcement of a number of major policy and legal changes to the child protection and out-of-home care systems.¹⁹⁶

4.31 In its 2016 *Roadmap for Reform*, the Victorian Government committed to reducing the use of residential care and 'transform[ing] it from a long-term placement option into a short-term "intensive trauma-informed behaviour support service"'.¹⁹⁷ As part of the *Roadmap for Reform* platform, Victoria Legal Aid has called for the adoption of a protocol between police and care providers to reduce the criminalisation of children in residential out-of-home care.¹⁹⁸

192. Victoria Legal Aid (2016), above n 7, 1, 3.

193. Victorian Auditor-General, *Residential Care Services for Children* (2014) ix.

194. Child Welfare Practice and Legislation Review Committee (Victoria) (1984), above n 75, 287.

195. Victoria Legal Aid (2016), above n 7, 3; Commission for Children and Young People, '*...safe and wanted...: Inquiry into the Implementation of the Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014*' (2017); Commission for Children and Young People (2015), above n 132; Victorian Auditor-General (2014), above n 193; Cummins et al. (2012), above n 72.

196. For an overview of key changes and reforms that are planned or underway within child protection systems across Australia since July 2010, see Sarah Wise, *Developments to Strengthen Systems for Child Protection across Australia*, CFCA Paper no. 44 (2017).

197. Victoria Legal Aid (2016), above n 7, 15. See further Victorian Government, *Roadmap for Reform: Strong Families, Safe Children – The First Steps* (2016); Victorian Government, *Roadmap for Reform: Children and Families – Progress and Directions 2018* (2018).

198. Victoria Legal Aid (2016), above n 7, 15–16.

- 4.32 The Department of Health and Human Services, the Department of Justice and Community Safety, Victoria Police and out-of-home care providers are currently working in partnership to develop an agreement entitled *Working Together to Reduce the Criminalisation of Young People in Residential Care*. The agreement, which is under development, aims to focus on alternative approaches to criminal charges and promote services that prevent further progression into the justice system.
- 4.33 The *Building Resilience in Children and Young People Initiative* is a collaborative approach between the Department of Health and Human Services, Department of Justice and Community Safety and Victoria Police. It aims to reduce the levels of criminalisation of children in residential care by:
- reducing the frequency of police attending incidents involving young people living in residential care;
 - promoting alternative means to laying criminal charges for managing behavioural issues; and
 - improving relationships, communication and information-sharing between local police and residential services.¹⁹⁹
- 4.34 The initiative includes a pilot project called Community around the Child, which provides intensive training to local residential care workers, care team members and police. While the pilot is currently being evaluated, early signs appear promising: there have been fewer children reported missing from residential care, there has been a reduced police callout rate to residential houses, and there has been less contact with police and a reduction in combative and aggressive behaviour by children participating in the project.²⁰⁰

The timing of trauma may influence the likelihood of offending

- 4.35 The timing of a child's experience of abuse or neglect is relevant to their likelihood of becoming involved in the youth justice system.²⁰¹ In particular:
- children whose maltreatment persists from childhood into adolescence or ... starts in adolescence are much more likely to be involved in crime and the juvenile justice system than those whose maltreatment was limited to their childhood.²⁰²
- 4.36 Childhood transitions, such as starting primary school and moving from primary school to high school, have also been found to be significant in 'children's exposure to maltreatment and their subsequent likelihood of offending'.²⁰³ Providing supports to enhance the ability of vulnerable children to perform well and feel positive about school decreases the likelihood of children engaging in antisocial behaviour.²⁰⁴

199. Richard Watkins and Soula Kontomichalos-Eyre, 'Community around the Child' (Presentation at the 2018 ANZSOC Conference, The University of Melbourne, 3 December 2018).

200. Renee O'Donnell et al., 'Community around the Child in Out of Home Care' (Presentation at the Crime Prevention and Communities Conference, Australian Institute of Criminology, Melbourne, 7–8 June 2018); Watkins and Kontomichalos-Eyre (2018), above n 199.

201. Cashmore (2011), above n 38, 33–34; Marien (2012), above n 165, 11; Malvaso (2017), above n 170; Malvaso et al. (2017), above n 38, 33.

202. Cashmore (2011), above n 38, 31. See also Hurren et al. (2017), above n 185, 24–26; Catia Malvaso et al., 'Risk Factors That Influence the Maltreatment–Offending Association: A Systematic Review of Prospective and Longitudinal Studies' (2016) 31 *Aggression and Violent Behavior* 1; Malvaso et al. (2017), above n 38, 33.

203. Cashmore (2011), above n 38, 34–36.

204. Ibid 37–38.

Childhood trauma is usually accompanied by multiple areas of disadvantage that contribute to offending

- 4.37 Children who have suffered maltreatment and, in some cases, removal into out-of-home care are not only more likely to end up in the criminal justice system but are also at increased risk of experiencing poor outcomes in other areas of life. Such children may be at a greater risk of experiencing homelessness, poor physical and mental health, issues relating to their intellectual functioning, disability, poor education outcomes, difficulties in accessing employment and housing, lower emotional, financial and social support, and higher rates of substance abuse and early parenthood.²⁰⁵
- 4.38 The factors that accompany child maltreatment may play a part in increasing the child's risk of offending. For example, there are established links between child maltreatment and youth homelessness, and between youth homelessness and offending.²⁰⁶ Children and young people who are homeless 'have often experienced complex and multiple traumas, and are particularly vulnerable to ... [both] victimisation and offending'.²⁰⁷ The risk of homelessness for child victims of abuse and neglect, or for children who have experienced out-of-home care, may also partially explain their over-representation on remand (see [3.20]–[3.26]).
- 4.39 Childhood disadvantage may also be associated with an increased likelihood that children alleged to have committed offences will be charged by police rather than given a police caution. For example, in a 2017 study, the Crime Statistics Agency reported on 5,981 children alleged to have committed an offence between 1 April 2015 and 31 March 2016 and found that children were more likely to be charged than cautioned if they were Aboriginal and Torres Strait Islander children, had a history of family violence (either as victim or perpetrator) and lived in more socioeconomically disadvantaged postcodes.²⁰⁸ However, this finding is complex. A charge outcome was also associated with offence type and prior history, which are likely to figure strongly in police decisions to charge or caution a child.²⁰⁹ Regardless of considerations of causality, the study suggests that children who are charged with an offence and therefore proceed to the Children's Court are likely to be more complex, disadvantaged and traumatised, commit more serious offending and have a higher likelihood of prior offending, compared with children who are kept out of the Children's Court by means of a police caution.
- 4.40 Concerns about the complex needs of young people in youth justice prompted the Victorian Youth Parole Board to comment that it is:
- imperative that the child protection and youth justice services work collaboratively to implement supports that will assist young people to overcome, as much as possible, the effects of traumatic experiences early in life.²¹⁰

205. Marien (2012), above n 165, 3–4; Griffin and Sallen (2013), above n 164, 6–7, 10–11; Philip Mendes, 'Young People Transitioning from State Out-of-Home Care: Jumping Hoops to Access Employment' (2009) 83 *Family Matters* 32, 33; Leah Bromfield and Alexandra Osborn, 'Getting the Big Picture: A Synopsis and Critique of Australian Out-of-Home Care Research', *Child Abuse Prevention Issues* no. 26 (2007); Leah Bromfield et al., *Out-Of-Home Care in Australia: Messages from Research* (2005) 6–7; Cashmore (2011), above n 38, 33–34; Victoria Legal Aid (2016), above n 7; Mendes et al. (2014), above n 188, 24, 32–39; Susan Baidawi and Rosemary Sheehan, 'Cross-Over Kids: Effective Responses to Children and Young People in the Youth Justice and Statutory Child Protection Systems' (forthcoming, 2019) 62–80. Anna Stewart and Emily Hurren, 'Child Maltreatment, Homelessness and Youth Offending' (aifs.gov.au, 2017) Australian Institute of Family Studies <<https://aifs.gov.au/cfca/2017/10/04/child-maltreatment-homelessness-and-youth-offending>> at 13 May 2019.

206. Stewart and Hurren (2017), above n 205.

207. *Ibid.*

208. Kimberley Shirley, *The Cautious Approach: Police Cautions and the Impact on Youth Reoffending*, In Brief no. 9 (2017) 10–11, 13.

209. *Ibid.* 20.

210. Youth Parole Board, Annual Report 2014–15 (2015) 13.

Aboriginal and Torres Strait Islander children are over-represented in care and in custody

4.41 Evidence suggests that Aboriginal and Torres Strait Islander children are over-represented in Australia in both the child protection system, including out-of-home care,²¹¹ and the criminal justice system, including in custody.²¹² In Australia in 2014–16, Aboriginal and Torres Strait Islander children were 16 times more likely than other children to be both involved in the child protection system and under youth justice supervision.²¹³

Child protection system

4.42 In Victoria in 2016, Aboriginal children were 8.3 times more likely than non-Aboriginal children to be the subject of a child protection substantiation.²¹⁴ From June 2015 to June 2016, the number of Aboriginal children in out-of-home care increased by 24%, from 1,511 Aboriginal children as at 30 June 2015 to 1,876 Aboriginal children as at 30 June 2016 – 'the highest number of children in care over the last decade'.²¹⁵ The Victorian Government reported in 2017 that, 'we are not on track to close the gap' in relation to child protection.²¹⁶

4.43 The new Victorian Aboriginal Children in Aboriginal Care program is one of a number of recent initiatives aiming to reduce the over-representation of Aboriginal children in care.²¹⁷ If the Children's Court makes a child protection order for an Aboriginal child, the Secretary to the Department of Health and Human Services may authorise an approved Aboriginal Community Controlled Organisation to take on the responsibility of administering the child's protection order; including case management, under the program.²¹⁸ The program is intended to:

- improve the support and decision making for Aboriginal children who have been placed on Children's Court protection orders
- maintain Aboriginal children's cultural identity and promote connection to family, community and culture
- support Aboriginal children to return home to parents or extended families where it is safe to do so, or support the identification of culturally safe alternative care
- maintain connection to Country for Aboriginal children.²¹⁹

211. Australian Institute for Health and Welfare (2018), above n 52, vii, 14–15; Productivity Commission, *Report on Government Services 2017. Volume F: Community Services* (2017) 16.3; Natalie Lewis et al., *The Family Matters Report 2018: Measuring Trends to Turn the Tide on the Over-Representation of Aboriginal and Torres Strait Islander Children in Out-of-Home Care in Australia* (2018) 9.

212. Australian Institute of Health and Welfare, *Youth Detention Population in Australia*, Bulletin no. 145 (2018) 2; Adam Dean (2018), above n 185, adapted from Australian Institute of Health and Welfare (2017), above n 38; Marien (2012), above n 165, 7–9.

213. Dean (2018), above n 185, Figure 3, adapted from Australian Institute of Health and Welfare (2017), above n 38, 9, 11. In these publications, 'young people' were restricted to those aged 10–16 on 1 July 2014. The data excludes New South Wales and the Northern Territory, and is limited to the period between 1 July 2014 and 30 June 2016.

214. Victorian Government, *Victorian Aboriginal Affairs Report 2017* (2017) 11. 'In 2008, the Council of Australian Governments committed to implementing the National Indigenous Reform Agreement (NIRA). The aim of NIRA was to frame the task of "closing the gap" in Indigenous disadvantage and identified the objectives, outcomes, outputs, performance indicators and benchmarks that would address this, including Aboriginal health, early childhood development, education, housing, economic participation and governance and leadership. Efforts to close the gap in Victoria and implement the strategic areas identified in NIRA resulted in the Victorian Aboriginal Affairs Framework (VAAF): ibid 6.

215. Ibid 11.

216. Ibid.

217. For discussion of this and other recent initiatives, see Lewis et al. (2018), above n 211, 21–22, 45.

218. *Children, Youth and Families Act 2005* (Vic) s 18; Early Childhood and School Education Group, Department of Education and Training, and Youth and Families Division, Department of Health and Human Services (2018), above n 1, 3.

219. Department of Health and Human Services, *Aboriginal Children in Aboriginal Care: Information Sheet* (2017) 1.

- 4.44 Alongside such initiatives, the government has increased funding to Aboriginal and Torres Strait Islander community-controlled organisations for family services. Their aim is to prevent children from coming to the attention of the child protection service and preserve children in parental care, with an early intervention focus.²²⁰ The 2018 Family Matters report notes that:
- Victoria has demonstrated high commitment to Aboriginal participation and self-determination and accountability to Aboriginal people. This is highlighted in its commitments to partnership through the *Wungurilwil Gaggapduir: Aboriginal Children and Families Agreement*, overseen by the Aboriginal Children's Forum, and through increasing investment in ACCO [Aboriginal Community Controlled Organisation] case management and the delegation of statutory child protection functions to ACCOs.²²¹

Youth justice system

- 4.45 In 2016 in Victoria, Aboriginal youth were also 'significantly over-represented in the justice system at 13 times the rate of non-Aboriginal Victorian youth', the Victorian Government acknowledging that it is 'not on track to close the gap' in justice supervision.²²² The reasons for the over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system are many, complex and interrelated. Factors include:
- underlying issues that contribute to offending and criminal justice responses, including 'the continuing effects of colonisation', intergenerational trauma, systemic racism and high rates of poverty; and
 - offence patterns and criminal justice responses, for example, 'a greater likelihood of coming into contact with police and justice systems for Indigenous peoples'.²²³
- 4.46 The Royal Commission into Aboriginal Deaths in Custody found that:
- the high number of Aboriginal deaths in custody was related to the overrepresentation of Aboriginal people in the criminal justice system. The most significant cause of this overrepresentation was the extremely disadvantaged and unequal position of Aboriginal people within the broader society, which left them vulnerable to lifelong involvement with the justice system.²²⁴
- 4.47 Some of the specialist responses for Aboriginal and Torres Strait Islander children in the youth justice system are discussed at [3.33]–[3.35].

220. Premier of Victoria, 'Building a Strong Future for Aboriginal Children', Media Release (26 April 2018) <<https://www.premier.vic.gov.au/building-a-strong-future-for-aboriginal-children/>> at 13 May 2019. See further Department of Health and Human Services, *Wungurilwil Gaggapduir: Aboriginal Children and Families Agreement* (2018) 28–33.

221. Lewis et al. (2018), above n 211, 13.

222. Victorian Government (2017), above n 214, 14.

223. Dean (2018), above n 185. See also Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory (2017), above n 133, vol. 1, 166–180; Harry Blagg et al., *Systemic Racism as a Factor in the Over-Representation of Aboriginal People in the Victorian Criminal Justice System* (2005).

224. Koori Justice Unit, Department of Justice, *Victorian Aboriginal Justice Agreement Phase 3* (2013) 10 (note 1). See also Cheryl Axleby, 'Indigenous Youth Incarceration: Ending the Injustice' (indigenoux.com.au, 2018) @Indigenoux <<https://indigenoux.com.au/indigenous-youth-incarceration-ending-the-injustice/#.XADE7YT5i70>> at 13 May 2019.

Children from culturally and linguistically diverse backgrounds are over-represented in the youth justice system

- 4.48 Evidence suggests that children from culturally and linguistically diverse (CALD) backgrounds are over-represented in custody. A recent Victorian youth justice review found that children and young people from CALD backgrounds comprised 39% of the custodial population.²²⁵
- 4.49 In their recent youth justice review, Penny Armytage and Professor James Ogloff AM observed that:

In Victoria some culturally and linguistically diverse (CALD) groups are also over-represented in youth justice, particularly Maori, Pacific Islander and South Sudanese young people. This over-representation suggests a need for culturally relevant and sensitive responses to address their offending that considers challenges experienced by these young people and their communities.

While the majority of migrants and refugees do not become involved in crime, occasionally second-generation migrants get caught in a cycle of offending. In past years, Vietnamese young people became involved in offending; currently it is South Sudanese Australians. The youth justice system has not responded to this group of young people effectively. Many are returning to the system multiple times. Youth consultations revealed that young African people feel targeted because of their skin colour and feel excluded from opportunities, which in turn drives their offending behaviour. An effective crime prevention approach must harness the strengths of the broader Sudanese community and build on the strengths of existing, albeit geographically limited, approaches.²²⁶

225. Victorian Auditor-General (2018), above n 132, 19.

226. Armytage and Ogloff (2017), above n 132, 9–10.

5. What proportion of sentenced and diverted children are 'crossover kids'?

5.1 This chapter addresses the first two research questions for the project.

Research Question 1: Prevalence of 'crossover kids' in the youth justice system

What proportion of children sentenced or diverted in the Victorian Children's Court in 2016 and 2017 (the 'study group') were known to the child protection service? Specifically, in the period from 18 June 1996 to 3 September 2018, what proportion of children:

- (a) were the subject of a child protection report?
- (b) were the subject of a child protection report that was investigated?
- (c) were the subject of a child protection report that was investigated and substantiated?
- (d) were the subject of a child protection order made in the Family Division of the Children's Court?
- (e) experienced out-of-home care, including residential care?

Research Question 2: Over-representation of Aboriginal and Torres Strait Islander children

What proportion of the sentenced and diverted children known to the child protection service were Aboriginal and Torres Strait Islander children?

- 5.2 As discussed at [1.16]–[1.17], this report identifies broad categories of child protection involvement, rather than defining a particular group of children as 'crossover kids' and limiting the analysis to that group. Each category is examined separately in this chapter:
- (a) Children who were the subject of at least one child protection report (this includes uninvestigated and unsubstantiated reports and unborn child reports).
 - (b) Children who were the subject of an *investigated* report.
 - (c) Children who were the subject of a *substantiated* report.
 - (d) Children who were the subject of a child protection order.
 - (e) Children who experienced out-of-home care (this includes the proportion of children who experienced residential care).
- 5.3 This chapter also discusses differences in the findings relating to Aboriginal and Torres Strait Islander children and non-Aboriginal and Torres Strait Islander children for each of these child protection categories.

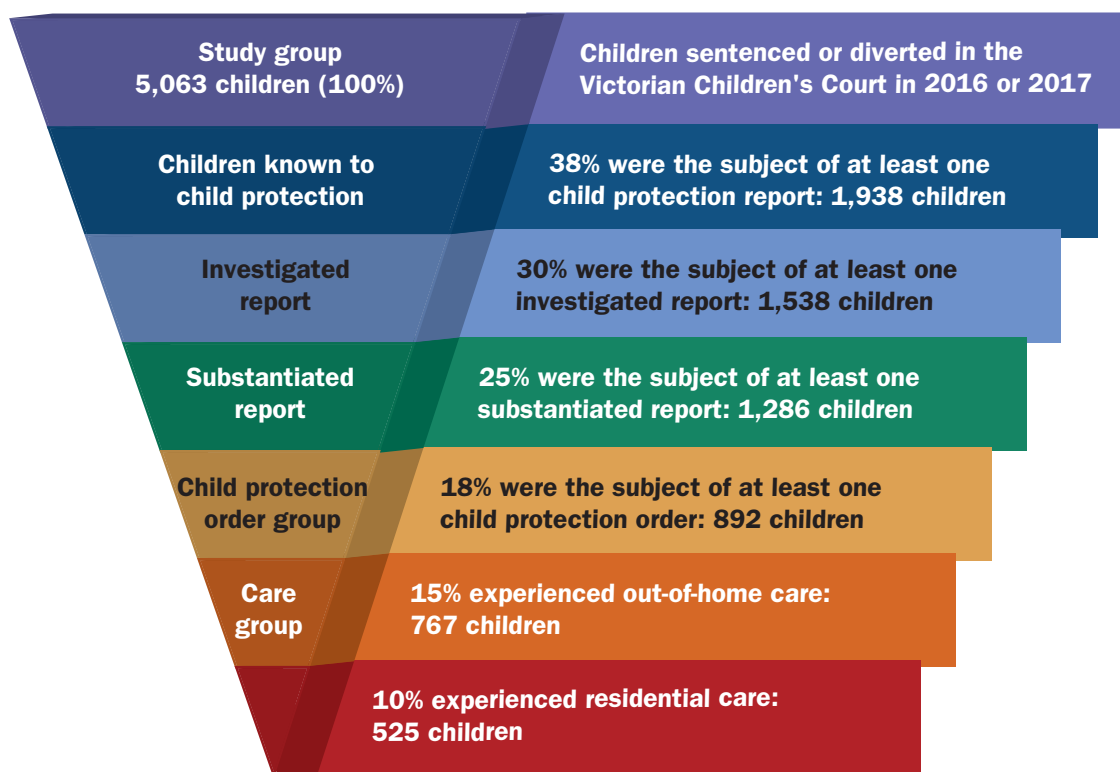
Overview

The prevalence of children known to the child protection service among sentenced and diverted children

5.4 Figure 9 provides an overview of the proportion of children in the study group who had experienced the different levels of child protection involvement at least once in their lifetime.²²⁷ Of the 5,063 sentenced and diverted children in the study group:

- 38% were the subject of at least one report to the Victorian child protection service, including uninvestigated and unsubstantiated reports;
- 30% were the subject of at least one investigated report;
- 25% were the subject of at least one substantiated report;
- 18% were the subject of at least one child protection order;
- 15% experienced out-of-home care; and
- 10% experienced residential care.

Figure 9: Prevalence and level of child protection involvement from 18 June 1996 to 3 September 2018, among children in the study group of children sentenced and diverted in 2016 and 2017



227. A child may be counted in multiple categories. If a child has no child protection history, that child is only counted in the top (study group) bar. If a child has been the subject of at least one child protection report, the child is also counted in the second (child protection report) bar. If the child has been the subject of at least one investigated report, the child is also counted in the third (investigated report) bar and so on.

- 5.5 Participants at both the Council's roundtables agreed that the findings shown in Figure 9 represent a high level of involvement of sentenced and diverted children with the child protection system. One participant described the finding as having 'huge' implications for the sentencing of children, both at an individual level and in terms of systemic challenges:

this is clearly a systemic issue that we are dealing with ... [i.e.] [t]he crossover issues and the pathway once you are in out-of-home care to a criminal offence, and then how it's dealt with.²²⁸

Proportion of sentenced and diverted children known to the child protection service who were Aboriginal and Torres Strait Islander children

- 5.6 Consistent with previous research (see [4.41]–[4.46]), Aboriginal and Torres Strait Islander children were substantially over-represented in the group of children known to the child protection service.
- 5.7 Of the 1,938 children in the study group who were the subject of at least one child protection report, 13% were Aboriginal and Torres Strait Islander children (Figure 10).²²⁹ This is a substantial over-representation given that on 30 June 2016, 1.6% of the 808,556 Victorians aged 10–20 were Aboriginal and Torres Strait Islander peoples (13,033 children).²³⁰ Of the 767 children who had experienced out-of-home care, around one in five (19%) were Aboriginal and Torres Strait Islander children. Participants at Roundtable 1 described the proportions of Aboriginal and Torres Strait Islander children shown in Figure 10 as 'a massive over-representation'.²³¹

Figure 10: Proportion of children in each child protection category who were Aboriginal and Torres Strait Islander children²³²

Report to child protection: 1,938 children	Children known to child protection	13% were Aboriginal and Torres Strait Islander children (253)
Investigated report: 1,538 children	Investigated report	15% were Aboriginal and Torres Strait Islander children (230)
Substantiated report: 1,286 children	Substantiated report	16% were Aboriginal and Torres Strait Islander children (205)
Child protection order: 892 children	Child protection order group	18% were Aboriginal and Torres Strait Islander children (164)
Out-of-home care: 767 children	Care group	19% were Aboriginal and Torres Strait Islander children (142)
Residential care: 525 children	Residential care	17% were Aboriginal and Torres Strait Islander children (87)

228. Roundtable 2: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (4 April 2019).

229. Of the 1,938 children, 84.3% were categorised as 'non-Indigenous' and 2.7% were categorised as 'unknown/not stated'. The data provided by the Department of Health and Human Services for this project included information about the Aboriginal and Torres Strait Islander status of children who were known to child protection. Comparable data was not available for children who were not known to the child protection service.

230. Australian Bureau of Statistics (2018), above n 18.

231. Roundtable 1: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (2 April 2019).

232. The child protection categories depicted in Figure 10 are overlapping rather than distinct. For example, all the 1,286 children with a substantiated report would also have had an investigated report, and all the children with an investigated report would have had a report to the child protection service.

- 5.8 Compared with the Victorian population aged 10–20 on 30 June 2016:
- children in the study group who were the subject of at least one child protection report (1,938 children) were eight times more likely than the general population to be Aboriginal and Torres Strait Islander children; and
 - children in the study group who had experienced out-of-home care (767 children) were 11.5 times more likely than the general population to be Aboriginal and Torres Strait Islander children.

(a) How many children were the subject of a child protection report?

Making a report to the child protection service

- 5.9 Any person may make a report to the Victorian child protection service or to a member of the police force if the person has a significant concern for the wellbeing of a child.²³³ Section 162 of the *Children, Youth and Families Act 2005* (Vic) ('CYF Act') sets out the grounds for finding a child in need of protection (See Panel 2, page 19).

What proportion of children in the study group were the subject of a child protection report (including uninvestigated and unsubstantiated reports)?

- 5.10 Of the 5,063 children in the study group, 38% or 1,938 children were the subject of at least one report to the child protection service, including unborn child reports made while the child's mother was pregnant with the child (Figure 9).

Study group

The study group for the project comprises 5,063 children sentenced or diverted at least once in 2016 or 2017. Each child was counted only once. If a child had more than one sentence in the two-year study period, the first sentence was counted as the index sentence.

- 5.11 The 1,938 children who were the subject of at least one child protection report included 400 children who did not have a report about them investigated by the child protection service. Therefore, a caution in considering these 400 children is that, while they were known to the child protection service, the reported issues in these cases did not meet the threshold for protective intervention. However, some such cases still involve a level of intervention. The child protection practitioner may provide advice or assistance to the child or their family or refer the child or family for service provision (for example, to family services).²³⁴ For these 400 children:

- 246 were the subject of more than one child protection report (61.5% of the 400 children);
- the number of uninvestigated reports made about them ranged from one to 23; and
- the average number of reports about them was 2.9, and the median was two.

233. *Children, Youth and Families Act 2005* (Vic) ss 28–29, 181, 183. See further [2.3].

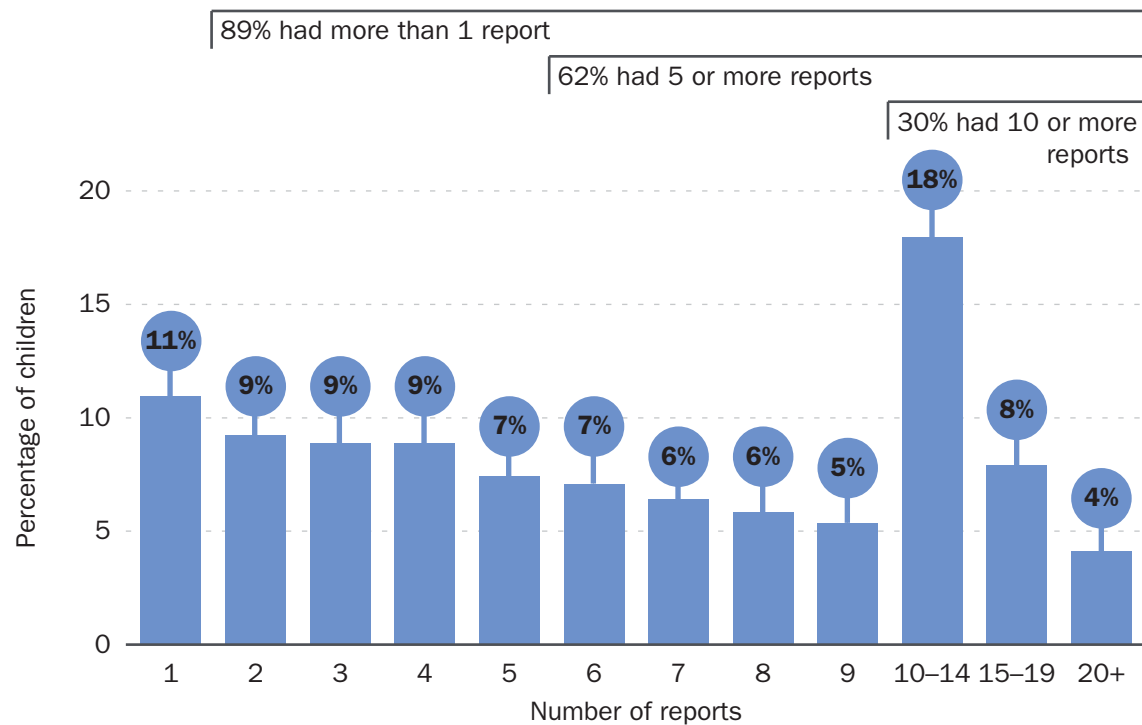
234. Department of Health and Human Services, 'Receiving and Processing Reports: Advice', *Child Protection Manual* (Department of Health and Human Services, 2018) <<http://www.cpmanual.vic.gov.au/advice-and-protocols/advice/intake/receiving-and-processing-reports>> at 20 March 2019.

Number of reports to the child protection service

5.12 Of the 1,938 children who were the subject of at least one child protection report:

- most were the subject of multiple reports to the child protection service raising concerns about their welfare (89%);
- over half (62%) were the subject of five or more reports; and
- 30% were the subject of 10 or more reports (Figure 11).

Figure 11: Percentage of 1,938 children known to the child protection service, by the number of reports about the child



5.13 Children who were the subject of at least one child protection report had a median of six child protection reports.

5.14 Aboriginal and Torres Strait Islander children had a higher median number of reports than non-Aboriginal and Torres Strait Islander children. The median was also higher for girls than for boys (Panel 5).

Panel 5: Aboriginal and Torres Strait Islander children: median number of reports

The median number of reports was higher for Aboriginal and Torres Strait Islander children (9 reports) than for non-Aboriginal and Torres Strait Islander children (6 reports).

The median number of reports were higher for girls than for boys:

- Aboriginal and Torres Strait Islander girls had a median of 9 reports, and Aboriginal and Torres Strait Islander boys had a median of 8 reports.
- Non-Aboriginal and Torres Strait Islander girls had a median of 7 reports, while non-Aboriginal and Torres Strait Islander boys had a median of 6 reports.

- 5.15 Roundtable participants suggested that the higher number of reports for Aboriginal and Torres Strait Islander children may reflect repeat concerns over the welfare of these children, and that many of the contributing factors might relate to the impact of intergenerational trauma, including:
- a predisposition of child protection to continue involvement in families with previous issues, including the protection of the parents when they were children;
 - pre-existing trauma, health and welfare issues, coupled with insufficient assessment and treatment prior to contact with the criminal justice system; and
 - institutional attitudes that labelled culturally appropriate parenting practices as being deficient (for example, extended families living together in the same home being deemed inappropriate because the house was 'too crowded' and children had to share rooms).²³⁵

- 5.16 Participants at Roundtable 2 generally agreed that the Victorian context mirrored the interstate experience described by one participant who reflected on her work with Aboriginal children appearing before the courts in other states:

every single young person had significant histories of trauma ... most of the kids get diverted and you don't ever see them again, but the ones that get to the courts – they'd been failed ... these kids had been failed by education, by health, and the Police were somehow picking up the pieces.²³⁶

- 5.17 The case study of 'Darcy', from a recent Monash University study of 300 children with youth justice and child protection involvement,²³⁷ provides insight into the type of case in which a child was the subject of multiple reports, started offending early and experienced residential care (Case Study 1).

(b) How many children were the subject of an investigated report?

Assessment and classification of reports

- 5.18 All reports to the child protection service are subjected to an intake assessment: to make a professional judgement of risk and needs to determine whether the child may be in need of protection, and how urgent the matter is, or whether there are significant concerns for the child's wellbeing.²³⁸

235. Roundtable 1: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (2 April 2019); Roundtable 2: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (4 April 2019). See also [5.36].

236. Participant at Roundtable 2: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (4 April 2019).

237. Baidawi and Sheehan (forthcoming, 2019), above n 205.

238. Department of Health and Human Services (2018), above n 234.

Case Study 1: 'Darcy'*

'Darcy is a 17 year-old Indigenous male with charges related to property damage, theft, and assault. His charges commenced at 12 years of age, and he was previously sentenced to two Good Behaviour Bonds and a Probation Order. A Magistrate noted some of Darcy's offending was 'very violent'. Darcy was first notified to Child Protection at birth, and had 16 notifications [reports] and four substantiations. In his early life, Darcy's mother was subject to a 12 month supervision order, during which he was often in the care of his grandparents until he was a toddler. Early protective concerns related to parental alcohol and substance abuse, transience, and severe family violence perpetrated by Darcy's father, who was imprisoned on multiple occasions for violence towards his mother, including attempted murder. At six, while Darcy was escaping family violence with his mother, she suddenly died from the impact of family violence. Darcy then lived initially with his father, who was subsequently jailed in relation to the violence against his mother. While residing with other family, Darcy was a victim of sexual abuse.

'Following his father's release, Darcy was returned to his care and was subsequently physically assaulted, including having weapons held to his throat. It was during this period at 9 years of age when Darcy began using cannabis, and was expelled from school in Grade 6 for fighting. Other schools were subsequently reluctant to enrol him. Soon after, Darcy first entered out-of-home care at age 12, after his father repeatedly contacted services asking that Darcy be taken away. Feeling rejected, Darcy was placed in residential care but often absconded to family, or to spend time with other homeless children in the city. Around this time his offending began. He was arrested for shoplifting, and stated that he had no clothes, no money and nowhere to go. Though he has a large care team, and has experienced some supportive kinship placements, Youth Justice and other services have challenges working with Darcy as he is often missing for weeks at a time and cannot be located.'

Reproduced with permission from Susan Baidawi and Rosemary Sheehan, '*Cross-Over Kids: Effective Responses to Children and Young People in the Youth Justice and Statutory Child Protection Systems* (forthcoming, 2019) 34.

*Not the child's real name

- 5.19 The child protection practitioner responsible for the intake assessment gathers information and assesses whether the child is in need of protection, using the test set out in section 162 of the CYF Act (Panel 2, page 19). The child protection practitioner determines whether the reporter's concerns 'meet the threshold for further action of any kind by child protection' based on the intake contact (the discussion with the person who made the report) and consideration of any Victorian child protection history. If the practitioner decides that the report requires further action, the practitioner classifies the report based on the concerns raised (Panel 6).²³⁹
- 5.20 An investigation 'starts once a report is classified as a protective intervention report. It concludes when a decision is made on whether the report is substantiated' and must include direct contact with the child.²⁴⁰

239. Ibid.

240. Department of Health and Human Services, 'Investigation Policy', *Child Protection Manual* (Department of Health and Human Services, 2016) <<http://www.cpmanual.vic.gov.au/policies-and-procedures/phases/investigation/investigation-policy>> at 20 March 2019.

Panel 6: Classification where intake report requires follow up

Protective intervention report:

where a child may be in need of protection from significant harm (either immediate or cumulative), or as a result of abandonment or a parent's death or incapacity, the report is to be classified as a protective intervention report (*Children, Youth and Families Act 2005* (Vic) s 30(1)(d) or s 187(1)(b)).

Child wellbeing report: where the issues relate to significant concern for a child's wellbeing, the report is to be classified as a child wellbeing report.

Unborn child report: where the report relates to significant concern for the wellbeing of an unborn child after the child is born, the report is to be classified as an unborn child report.

New allegations regarding a current client: where a contact at intake relates to an existing client and contains new allegations, the matter should be referred to the allocated practitioner or team and the procedures for recording and investigating a new allegation regarding a current client should be followed.

Therapeutic treatment report: where the report relates to a child aged 10 or over exhibiting sexually abusive behaviours it is to be classified as a therapeutic treatment report.

Source: Department of Health and Human Services, *Child Protection Manual*.

The purpose of an investigation

5.21 The purpose of an investigation is to:

assess the child and their circumstances to determine:

- the extent and nature of the reported concerns, or any other concerns that are identified during the investigation, and whether the child is in need of protection
- past and immediate risks to the child and the likelihood of future harm
- the most appropriate response to meet the needs of the child
- the most appropriate service response to assist the parents and family
- whether ongoing statutory intervention is required to meet the child's safety and developmental needs and to provide them with permanency.

This will involve gathering and analysing relevant information to determine whether significant harm to the child has occurred or is likely and whether the parents have not protected, or are unlikely to protect the child, and therefore whether the report is substantiated.²⁴¹

What proportion of reported children had a report investigated?

5.22 Over three-quarters (79%) of the 1,938 children who had been the subject of a child protection report had at least one report investigated in their lifetime (1,538 children or 30% of the study group) (Figure 9).

5.23 A number of participants at Roundtable 1 agreed that this investigation rate is high and suggested that this group of children are at the serious end of the child protection spectrum.²⁴²

5.24 The investigation rate was far higher for Aboriginal and Torres Strait Islander children than for non-Aboriginal and Torres Strait Islander children and higher for girls than for boys (Panel 7).²⁴³

241. Department of Health and Human Services (2016), above n 14.

242. Participants at Roundtable 1: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (2 April 2019).

243. In total, 52 children (2.7% of the 1,938 child protection report group) were removed from this analysis due to unknown Aboriginal and Torres Strait Islander status.

Panel 7: Aboriginal and Torres Strait Islander children: investigation rate

91% of Aboriginal and Torres Strait Islander children who were the subject of a child protection report had at least one report investigated (230 children) compared with 79% of reported non-Aboriginal and Torres Strait Islander children (1,296 children).

Girls were more likely than boys to have a report investigated:

- of the reported Aboriginal and Torres Strait Islander children, 98% of girls had a report investigated (89 girls) and 87% of boys had a report investigated (141 boys)
- of the reported non-Aboriginal and Torres Strait Islander children, 84% of reported girls had a report investigated (402 girls) and 78% of boys had a report investigated (894 boys).

(c) How many children were the subject of a substantiated report?**The decision to substantiate**

- 5.25 Within 28 days of the child protection service receiving a child protection report, the protective intervener (the child protection practitioner conducting the investigation), in consultation with their team manager, must determine a case to be either:
- substantiated; or
 - not substantiated.²⁴⁴
- 5.26 The case is substantiated if the protective intervener 'is satisfied on reasonable grounds, based on one or more of the grounds defined in section 162 of the CYF Act that the child is in need of protection'.²⁴⁵ This:
- generally involves considering whether the child has experienced, or is likely to be at risk of, significant harm to their safety or development and will focus on current and past harm, and an assessment of likelihood of future harm. An assessment of a person's responsibility for causing harm or likely capacity to cause harm to a child is connected with the substantiation decision.²⁴⁶
- 5.27 For context, of the 107,062 reports made to the child protection service in the 2015–16 financial year, 27% were investigated and 14% were substantiated, meaning that 52% of investigated reports were substantiated (see further [2.5]).

244. Department of Health and Human Services, 'Substantiation: Advice', *Child Protection Manual* (Department of Health and Human Services, 2016) <<http://www.cpmanual.vic.gov.au/advice-and-protocols/advice/investigation/substantiation-and-risk-level>> at 13 May 2019.

245. Department of Health and Human Services, 'Decision on Outcome of Investigation', *Child Protection Manual* (Department of Health and Human Services, 2018) <<http://www.cpmanual.vic.gov.au/policies-and-procedures/phases/investigation/decision-outcome-investigation>> at 13 May 2019.

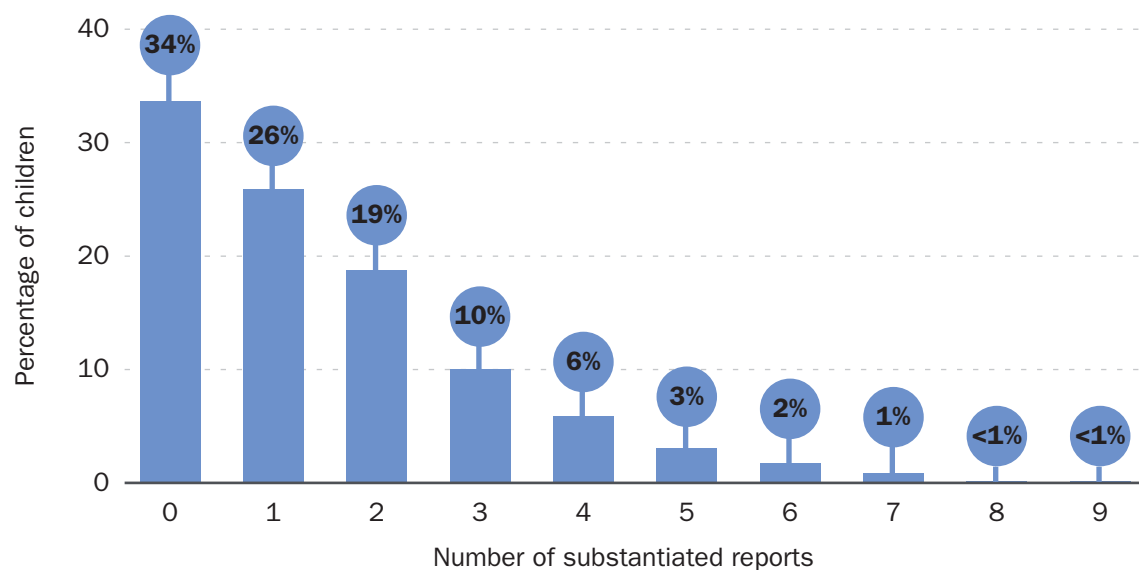
246. Department of Health and Human Services (2016), above n 244.

What proportion of reported children had a report substantiated?

5.28 Of the 1,938 children who had been the subject of a child protection report:

- two-thirds (66%) had at least one report substantiated by the child protection service. These children comprised 25% of the whole study group (Figure 9, page 46);
- 41% had two or more substantiated reports; and
- 12% had four or more substantiated reports in their lifetime (Figure 12).

Figure 12: Percentage of 1,938 children known to the child protection service, by number of substantiated reports about the child



5.29 Like the investigation rate (see further [5.24]), the substantiation rate was higher for Aboriginal and Torres Strait Islander children than non-Aboriginal and Torres Strait Islander children, and girls had a higher substantiation rate than boys (Panel 8).²⁴⁷

Panel 8: Aboriginal and Torres Strait Islander children: substantiation rate

Aboriginal and Torres Strait Islander children who were the subject of a child protection report were more likely to have a report substantiated (81% of reported Aboriginal and Torres Strait Islander children (205 children) had a report substantiated) than non-Aboriginal and Torres Strait Islander children (66% or 1,072 children).

Girls were more likely than boys to have a report substantiated:

- Of the reported Aboriginal and Torres Strait Islander children, 87% of girls had a substantiated report (79 girls) compared with 78% of boys (126 boys).
- Among the non-Aboriginal and Torres Strait Islander children, 73% of girls had a substantiated report (349 girls) compared with 63% of boys (723 boys).

247. A total of 52 children (2.7% of the 1,938 child protection report group) were removed from the analysis in Panel 8 due to unknown Aboriginal and Torres Strait Islander status.

(d) How many children were the subject of a child protection order?

Child protection order

- 5.30 After substantiating a report and deciding that further protective intervention is required, the Department of Health and Human Services may issue a protection application in the Children's Court.
- 5.31 In this chapter, the term *child protection order* refers collectively to four categories of orders made by the Family Division of the Children's Court of Victoria under the CYF Act:
1. protection orders (see [2.8]–[2.9]);
 2. interim accommodation orders (see [2.10]);
 3. permanent care orders (see [2.11]); and
 4. therapeutic treatment orders (see [3.13]–[3.15]).

What proportion of the *study group* had a child protection order?

- 5.32 Almost one in five children in the study group (18% or 892 children) were the subject of at least one child protection order in their lifetime (Figure 9).
- 5.33 In comparison, the rate of child protection orders in the general population of Victorian children is 8.9 per 1,000 children (0.9%), suggesting that children with current or previous child protection orders are over-represented in the youth justice system.²⁴⁸

What proportion of *reported children* had a child protection order?

- 5.34 Of the 1,938 children who were the subject of a child protection report, 46% were the subject of a child protection order at least once in their lifetime (892 children).
- 5.35 Like the investigation and substantiation rate, the rate of child protection orders was higher for Aboriginal and Torres Strait Islander children than for non-Aboriginal and Torres Strait Islander children and higher for girls than for boys (Panel 9).²⁴⁹

Panel 9: Aboriginal and Torres Strait Islander children: rate of child protection orders

Aboriginal and Torres Strait Islander children who were the subject of a child protection report were more likely to ultimately be the subject of a child protection order (65% or 164 children) than non-Aboriginal and Torres Strait Islander children (44% or 722 children).

Of the Aboriginal and Torres Strait Islander children who were the subject of a child protection report, 75% of the girls (68 girls) and 59% of the boys (96 boys) had a child protection order. Of the non-Aboriginal and Torres Strait Islander children, 57% of girls (274 girls) and 39% of boys (448 boys) were the subject of a child protection order.

248. Australian Institute of Health and Welfare (2018), above n 52, 38. The counting rules for the Australian Institute of Health and Welfare study are different in that they measure the number of Victorian children who were the subject of a child protection order on a particular day, whereas the Council has measured the number of children who were the subject of a child protection order at any time in their lifetime. The Council's next report will examine the number of children in the study group who were the subject of a child protection order on a particular day.

249. A total of 52 children (2.7% of the 1,938 child protection report group) were removed from the analysis in Panel 9 due to unknown Aboriginal and Torres Strait Islander status.

5.36 Youth justice stakeholders identified a range of factors that might explain the higher number of reports, rates of investigation, substantiation and child protection orders for Aboriginal and Torres Strait Islander children than for non-Aboriginal and Torres Strait Islander children. One roundtable participant commented that:

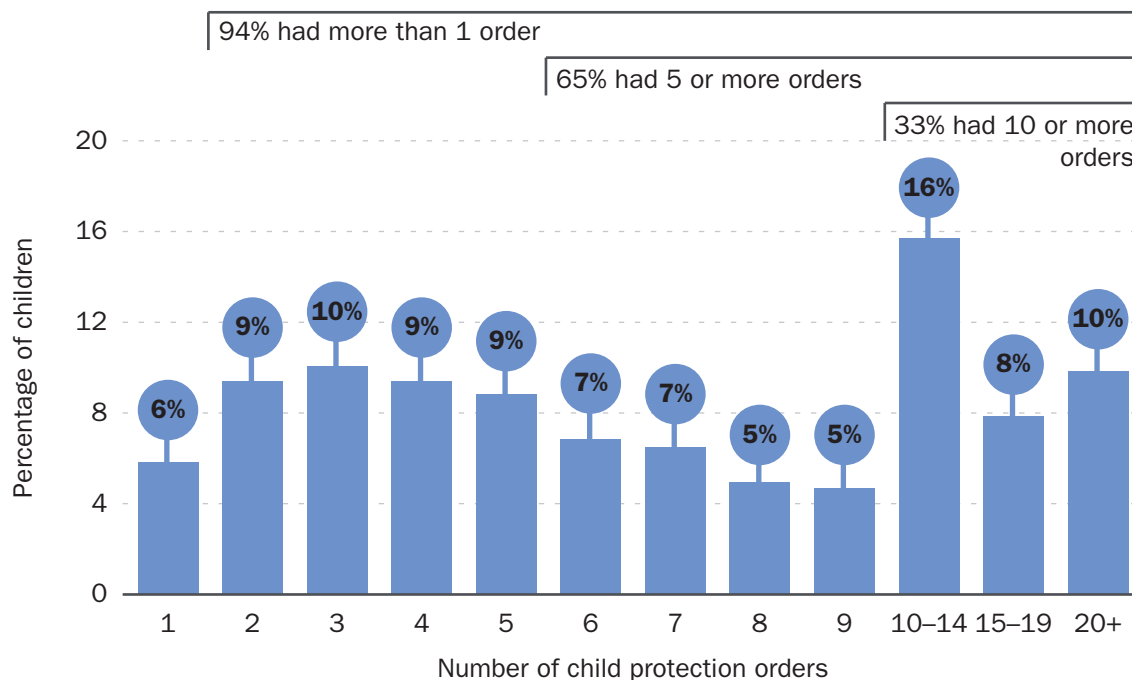
[t]here's a whole range of factors, [from] systemic racism at one end, and a whole raft of issues that are ultimately about intergenerational trauma ... [including] higher levels of multiple risk factors for children in some Aboriginal families, including substance abuse and family violence.²⁵⁰

Number of child protection orders

5.37 Of the 892 children in the child protection order group, 94% had more than one child protection order in their lifetime, around two-thirds (65%) had five or more orders in their lifetime and one-third (33%) had 10 or more child protection orders in their lifetime (Figure 13). The average (median) number of child protection orders was six, and the child with the highest number of unique child protection orders was the subject of 78 child protection orders.

5.38 Figure 13 includes both temporary orders (interim accommodation orders) and final orders (protection orders and permanent care orders) in the count of the number of child protection orders per child. Therapeutic treatment orders are also included, although only one child in the study group was the subject of a therapeutic treatment order. The count of orders shown indicates *new* court orders. Variations or extensions of *existing* orders are not captured in Figure 13.²⁵¹

Figure 13: The 892 children who were the subject of child protection orders, by the number of orders in their lifetime



250. Roundtable 1: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (2 April 2019).

251. The dataset includes an *Order ID* for each new court order made in respect of the child. The order retains the same *Order ID* if any variation or extension is made to it. Each *Order ID* in relation to a child is counted only once in Figure 13.

- 5.39 While acknowledging that this count includes interim orders, roundtable participants agreed that Figure 13 represented a high number of orders per child. One participant at Roundtable 1 suggested that changes in placement and other disruptions to continuity (such as multiple orders) might also have an effect on offending rates.²⁵²

Types of child protection orders: overview

- 5.40 The Children's Court has the power to make a broad range of orders for the protection of children, depending on the circumstances and the level of protection required.²⁵³
- 5.41 Extensive changes to the suite of available child protection orders came into effect on 1 March 2016 (during the study period for this report).²⁵⁴ These changes were:
intended to reduce the time children spend in out-of-home care before permanent arrangements are in place for their care. Where possible, this will be achieved by children returning home safely within specified timelines. Where it is not safe for a child to return home permanently, alternative ongoing care arrangements will be found.²⁵⁵
- 5.42 Interim protection orders, custody to third-party orders and supervised custody orders were all abolished on 1 March 2016, and a number of other orders were renamed 'to more accurately reflect their intention'.²⁵⁶ For example, supervision orders became family preservation orders.²⁵⁷
- 5.43 As the current project includes child protection involvement over a child's lifetime, children in the study group are likely to have been the subject of both the previous protection orders and the new protection orders.
- 5.44 Figure 14 shows the types of orders made over the lifetime of the 892 children who were the subject of a child protection order (the 'child protection order group'). A child was counted if they had been the subject of a particular order in the 22-year period from 18 June 1996 to 3 September 2018. As most children were the subject of multiple orders in their lifetime, many children are counted in more than one order type.
- 5.45 The two main categories of child protection orders discussed in this section are:
- interim accommodation orders, which provide for the protection of the child prior to a decision being made about whether they are in need of protection;²⁵⁸ and
 - protection orders, which are orders made once the child has been found to be in need of protection.

252. Roundtable 1: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (2 April 2019).

253. Judicial College of Victoria, '13 – Orders in the Family Division', *Children's Court Bench Book* (Judicial College of Victoria, 2017) <<http://www.judicialcollege.vic.edu.au/eManuals/CHCBB/index.htm#59795.htm>> at 1 March 2019.

254. The orders were amended by the *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* (Vic), with most changes becoming operative on 1 March 2016.

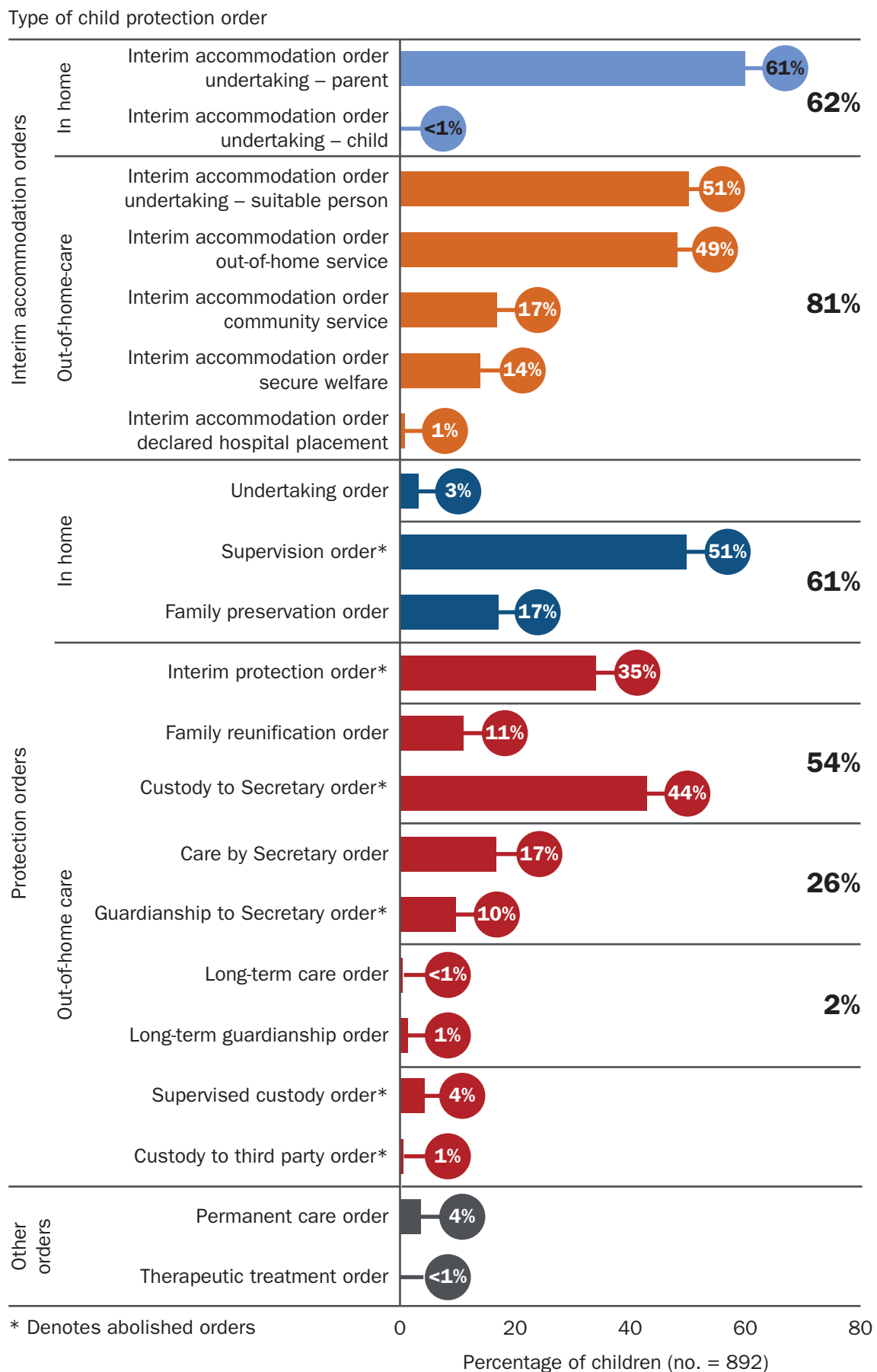
255. Department of Health and Human Services (2015), above n 46, 1.

256. Victoria, 'Children, Youth and Families Amendment (Permanent Care and Other Matters) Bill 2014', *Parliamentary Debates*, Legislative Assembly, 7 August 2014, 2658 (Mary Wooldridge, Minister for Community Services).

257. Judicial College of Victoria, '13.3.5 – 2014 Amending Act Changes to Protection Orders', *Children's Court Bench Book* (Judicial College of Victoria, 2017) <<http://www.judicialcollege.vic.edu.au/eManuals/CHCBB/index.htm#59821.htm>> at 1 March 2019.

258. *Children, Youth and Families Act 2005* (Vic) s 262.

Figure 14: The 892 children who were the subject of a child protection order, by order type



Interim accommodation orders: children at risk

- 5.46 After the child protection service issues a protection application, the court may make an interim accommodation order, which is a temporary order that the court decides is needed to keep the child safe until it determines the child protection application.²⁵⁹ Interim accommodation orders cover where the child must live until the next court date and may involve:
- releasing the child, for example, into the care of their parent;
 - placing the child with a suitable person;
 - placing the child in an out-of-home care service, a secure welfare service or a declared hospital;
 - placing the child with a disability service provider; or
 - placing the child in a declared parent and baby unit.²⁶⁰
- 5.47 An application for an interim accommodation order may be made in a range of circumstances.²⁶¹ Many applications for interim accommodation orders are triggered by a child being taken into emergency care by police or child protection practitioners.²⁶² Children may be immediately removed by police or child protection practitioners 'only in the most serious of circumstances where a child has suffered significant harm, or is at imminent risk of significant harm and the child's parents have not protected or are unlikely to protect them'.²⁶³ See Panel 10 (page 60) for examples of circumstances requiring the immediate removal of a child. Interim accommodation orders can also be made following a protection application by notice or after another order has been breached.
- 5.48 When making an interim accommodation order, the court is required to consider the best interests principles under section 10 of the CYF Act, including that the child is only to be removed from their parent if there is an unacceptable risk of harm to the child (under section 10(3)(g)).²⁶⁴

259. *Children, Youth and Families Act 2005* (Vic) ss 10, 262. See for example, *Department of Human Services v DR* [2013] VSC 579 (25 October 2013); *DOHS v Ms K and Mr L* [2009] VChC 3 (18 May 2009); *Purcell v RM & Ors* [2004] VSC 14 (9 January 2004); Judicial College of Victoria, '8.2 – "Best Interests" Principles', *Children's Court Bench Book* (Judicial College of Victoria, 2017) <<http://www.judicialcollege.vic.edu.au/eManuals/CHCBB/index.htm#59762.htm>> at 1 March 2019.

260. *Children, Youth and Families Act 2005* (Vic) ss 263(1)(a)–(g). See further Department of Health and Human Services (2017), above n 5.

261. Section 262(1) of the *Children, Youth and Families Act 2005* (Vic) sets out the circumstances in which the court may make an interim accommodation order, for example, where the child has been placed in emergency care by a protective intervener (police or child protection practitioners): *Children, Youth and Families Act 2005* (Vic) s 262(1)(a); or if a protection application has been filed with the registrar: *Children, Youth and Families Act 2005* (Vic) s 262(1)(b). A protection application is made to the Family Division of the Children's Court for a finding that a child is 'in need of protection': *Children, Youth and Families Act 2005* (Vic) s 3(1).

262. Judicial College of Victoria, '13.2 – Interim Accommodation Order', *Children's Court Bench Book* (Judicial College of Victoria, 2017) <<http://www.judicialcollege.vic.edu.au/eManuals/CHCBB/index.htm#59803.htm>> at 18 February 2019. See also Department of Health and Human Services (2017), above n 5.

263. Department of Health and Human Services (2016), above n 17.

264. *Children, Youth and Families Act 2005* (Vic) ss 10, 262; see for example, *Department of Human Services v DR* [2013] VSC 579 (25 October 2013); *DOHS v Ms K and Mr L* [2009] VChC 3 (18 May 2009); *Purcell v RM & Ors* [2004] VSC 14 (9 January 2004); Judicial College of Victoria (2017), above n 259.

Panel 10: Examples of circumstances requiring immediate removal of child

- The child has sustained a serious physical injury without a satisfactory explanation and parents or caregivers are unable or unwilling to protect the child from further injury.
- The child has suffered sexual abuse, or there is a high likelihood that the child will suffer sexual abuse and the child's parents or caregivers are assessed as unable or unwilling to protect the child from further sexual abuse.
- A child is at immediate risk of significant harm.
- Parents are affected by substances that impact on their ability to care for their child.
- A young person places themselves at immediate risk of significant harm and their parents have not protected them or are unlikely to protect them.
- Conflict between a young person and their parents is extreme and has the potential to escalate and the young person is at immediate risk of significant harm.
- The home environment exposes the child to unreasonable risk of harm, and the parents have not protected them or are unlikely to provide a safe environment for the child.

Department of Health and Human Services, Child Protection Manual

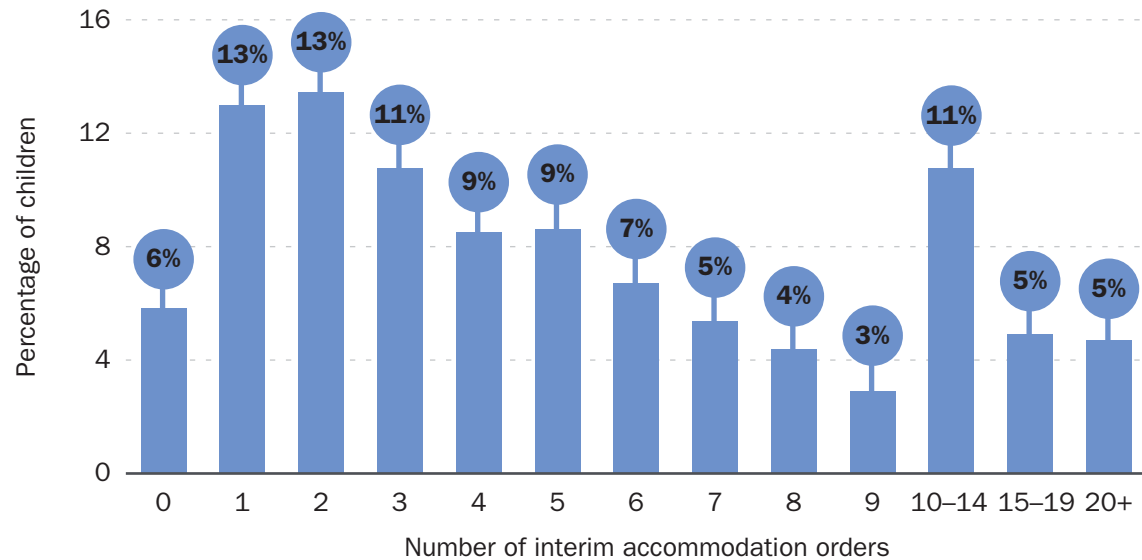
5.49 Figure 14 (page 58) shows the placement types of children on interim accommodation orders, grouped according to whether or not the placement involved out-of-home care. Of the 892 children who were the subject of at least one child protection order (the child protection order group):

- 61% were placed on at least one interim accommodation order on their parents undertaking, that is, not involving out-of-home care (548 children); and
- 81% were placed on at least one interim accommodation order involving out-of-home care (726 children). Placements with a suitable person or in an out-of-home care service were the most common placement types.²⁶⁵ This finding indicates that 81% of children placed on child protection orders (14% of the 5,063 sentenced and diverted children in the study group) were found by the court to be at an unacceptable risk of harm.

5.50 Overall, 94% of the 892 children in the child protection order group were placed on at least one interim accommodation order of any type in their lifetime (840 children) (Figure 15), and around one in five children were the subject of 10 or more interim accommodation orders in their lifetime. However, new interim accommodation orders do not necessarily equate to a new child protection matter; rather they are likely to reflect a change in placement type while the child protection hearing is still ongoing.

265. Interim accommodation orders involving out-of-home care included orders where the child was placed with a suitable person (51% of those with child protection orders), in an out-of-home care service (49%) or community service (17%), in secure welfare (14%) or in a declared hospital placement (1%).

Figure 15: The 892 children who had been the subject of at least one child protection order, by the number of interim accommodation orders in their lifetime



5.51 Some of the children who were the subject of interim accommodation orders involving out-of-home care are likely to have been removed from their families in circumstances in which they were perceived to have suffered significant harm, or be at an imminent risk of significant harm. Some interim accommodation orders might be made for reasons not directly indicative of abuse, such as the illness or incapacity of a sole carer. Regardless of the reason for the interim accommodation order, participants at both the Council's roundtables agreed that the removal of a child from the family home involves a level of disruption or trauma in its own right and this would have an effect on a child over and above their experiences once they entered out-of-home care.²⁶⁶

5.52 Of the children in the child protection order group, girls were more likely than boys to have been the subject of an interim accommodation order (Panel II). There were no significant differences between Aboriginal and Torres Strait Islander children and non-Aboriginal and Torres Strait Islander children.

Panel 11: Aboriginal and Torres Strait Islander children: interim accommodation orders

Of the children in the child protection order group, interim accommodation orders were imposed in relation to:

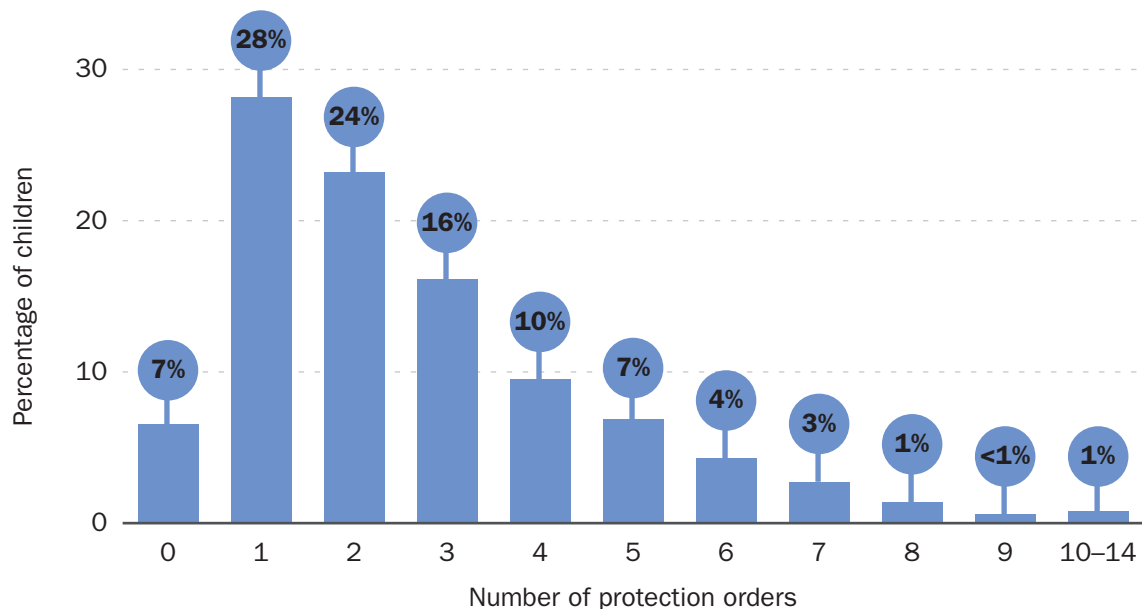
- 96% of both Aboriginal and Torres Strait Islander girls (65 girls) and non-Aboriginal and Torres Strait Islander girls (264 girls)
- 92% of Aboriginal and Torres Strait Islander boys (88 boys) and 93% of non-Aboriginal and Torres Strait Islander boys (417 boys).

266. Participants at Roundtable 1: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (2 April 2019); participants at Roundtable 2: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (4 April 2019).

Protection orders: children in need of protection

5.53 Almost one in five children in the study group (18% or 892 children) were the subject of at least one *child protection order* made in their lifetime (Figure 9). Of these 892 children, 93% (833 children) were the subject of at least one *protection order* – a final order made by the Children's Court once the court is satisfied that the child is in need of protection based on one or more grounds in section 162 of the CYF Act (Figure 16). In other words, 16% of all sentenced and diverted children in the study group were the subject of a protection order made by the Children's Court.

Figure 16: Children who had ever been the subject of a child protection order, by the number of protection orders in their lifetime (892 children)



Interim protection orders (abolished)

5.54 Interim protection orders (abolished from 1 March 2006)²⁶⁷ were made after the court was satisfied that a child was in need of protection and were used to trial a particular course of action for up to three months prior to a final protection order being made. Interim protection orders were made in relation to 35% of the children in the child protection order group (311 of 892 children).

Undertakings

5.55 A person, including a child, the child's parent or a person living with the child, may be required to enter into a written undertaking to do, or refrain from doing, certain things.²⁶⁸ The consent of the person giving the undertaking is required. Once an undertaking is made, the Department of Health and Human Services ceases to be involved in the matter.²⁶⁹

267. Interim protection orders made under the previous section 291 of the *Children, Youth and Families Act 2005* (Vic) were abolished upon repeal of former Division 9 of Part 4.9 of the *Children, Youth and Families Act 2005* (Vic).

268. Judicial College of Victoria, '13.4 – Undertaking', *Children's Court Bench Book* (Judicial College of Victoria, 2017) <<http://www.judicialcollege.vic.edu.au/eManuals/CHCBB/index.htm#59822.htm>> at 18 February 2019.

269. Undertakings are made under *Children, Youth and Families Act 2005* (Vic) ss 272, 278. A section 278 undertaking is a protection order, which means that it requires the protection application to be proven before it can be made. A section 272 undertaking is a 'common law' or 'no proof' undertaking that can be made without the protection application being proven: Judicial College of Victoria (2017), above n 268.

- 5.56 Undertakings were not a common order among the Council's study group. Of the 892 children in the child protection order group, only 3% had been the subject of an undertaking (Figure 14).

Family preservation orders (and supervision orders)

- 5.57 Family preservation orders are protection orders made after a protection application is proven. The order allows a child to remain in their parents' care while the protective concerns are addressed. The child lives with one or both parents who remain responsible for the child, and the order makes the Secretary to the Department of Health and Human Services responsible for the child's supervision. The 'objective is to help the family to make changes needed to keep the child safe at home so the family can stay together permanently'.²⁷⁰ Family preservation orders usually include conditions to be observed by the child or a parent of the child.²⁷¹ For example, the child or parent might be required to accept visits from the Department of Health and Human Services, cooperate with the Department, accept support services or go to family violence counselling.²⁷²
- 5.58 Of the 892 children in the child protection order group, 17% were the subject of a family preservation order and 51% were the subject of a (since abolished) supervision order. Overall, 61% of the child protection order group (11% of the study group) were the subject of at least one family preservation order and/or supervision order in their lifetime (545 children).
- 5.59 Aboriginal and Torres Strait Islander children in the child protection order group were more likely than non-Aboriginal and Torres Strait Islander children to be the subject of a supervision order and/or family preservation order (Panel 12).

Panel 12: Aboriginal and Torres Strait Islander children

Two-thirds (66%) each of Aboriginal and Torres Strait Islander boys (63 of 96 boys) and girls (45 of 68 girls) in the child protection order group were the subject of a supervision order and/or family preservation order.

A lower proportion of non-Aboriginal and Torres Strait Islander children were the subject of such orders (59% or 266 of 448 boys and 61% or 166 of 274 girls).

Family reunification orders (and custody to Secretary orders)

- 5.60 Family reunification orders give the Secretary to the Department of Health and Human Services parental responsibility for the sole care of the child for up to 12 months.²⁷³ The court may include conditions on the order.²⁷⁴ Family reunification orders are made where:
- the Court has decided that a child is in need of protection and cannot safely stay in their parents' care while the protective concerns are being addressed. This order grants parental responsibility for the child to the Secretary of the Department of Health and Human Services (the department), with the limitation that parents' agreement is needed about major long-term issues. It will usually include conditions.

270. Department of Health and Human Services (2017), above n 5.

271. *Children, Youth and Families Act 2005* (Vic) s 281(1). See further Judicial College of Victoria, '13.5.3 – Conditions of a FPO', *Children's Court Bench Book* (Judicial College of Victoria, 2017) <<http://www.judicialcollege.vic.edu.au/eManuals/CHCBB/index.htm#59828>> at 18 February 2019.

272. For more conditions, see Children's Court of Victoria, *Coloured Minutes Forms: Conditions (Pink Form)* (2019).

273. *Children, Youth and Families Act 2005* (Vic) s 287(1). See further Judicial College of Victoria, '13.6 – Family Reunification Order (Formerly Custody to Secretary Order)', *Children's Court Bench Book* (Judicial College of Victoria, 2017) <<http://www.judicialcollege.vic.edu.au/eManuals/CHCBB/index.htm#59837.htm>> at 18 February 2019.

274. *Children, Youth and Families Act 2005* (Vic) s 287(1)(d).

The child will stay in out of home care and the objective is for the child to be reunified with their parent/s once this has happened, and within 12 months, or up to 24 months where permanent reunification is likely by then.²⁷⁵

5.61 Family reunification orders replaced:

- interim protection orders to out-of-home care;
- custody to third party orders;
- supervised custody orders; and
- custody to Secretary orders where family reunification was the objective *and* the child had been in out-of-home care for less than two years (custody to Secretary orders were replaced by care by Secretary orders where ongoing out-of-home care was required *or* the child had been in out-of-home care for two years or more).²⁷⁶

Panel 13: Aboriginal and Torres Strait Islander children

Aboriginal and Torres Strait Islander boys were more likely than other children to have been the subject of a family reunification or custody to Secretary order:

- 60% or 58 of 96 Aboriginal and Torres Strait Islander boys
- 53% or 238 of 448 non-Aboriginal and Torres Strait Islander boys, 54% or 37 of 68 Aboriginal and Torres Strait Islander girls and 53% or 145 of 274 non-Aboriginal and Torres Strait Islander girls.

5.62 The new family reunification order was also changed considerably compared with the previous custody to Secretary orders. For example, the former maximum period of 12 months was amended to require the court to take into account the period the child had already been in out-of-home care. The 2014 amending Act 'introduced timelines within which reunification of children placed in out-of-home care must be achieved ... [which] is a substantive departure from the framework for [Custody to Secretary Orders] under the former version of the CYF Act'.²⁷⁷ The 2014 amending Act also restricted the court's ability to extend a family reunification order.²⁷⁸ An extension cannot be granted:

- unless there is 'compelling evidence' that it is likely that the child's parent will permanently resume care of the child during the extension period; and
- if the extension will result in the child being placed in out-of-home care for a cumulative period that exceeds 24 months.²⁷⁹

5.63 If the child remains unable to safely return to their parents care after 24 months, the Department may commence finding a permanent placement for the child by applying for a care by Secretary order. At that point the child is unlikely to be returned to their parents, unless the Secretary is satisfied that it is in the child's best interests.²⁸⁰

275. See further Department of Health and Human Services (2017), above n 5.

276. *Children, Youth and Families Amendment (Permanent Care and Other Matters) Act 2014* (Vic). See further Department of Health and Human Services, 'Legislative Changes Overview', *Child Protection Manual* (Department of Health and Human Services, 2016) <<http://www.cpmanual.vic.gov.au/advice-and-protocols/information-sheets/permanency-children/legislative-changes-overview>> at 13 May 2019.

277. Judicial College of Victoria, '13.6.9 – Comparison with Former Custody to Secretary Order', *Children's Court Bench Book* (Judicial College of Victoria, 2017) <<http://www.judicialcollege.vic.edu.au/eManuals/CHCBB/index.htm#59836.htm>> at 18 February 2019.

278. *Children, Youth and Families Act 2005* (Vic) s 294A; *ibid*.

279. *Children, Youth and Families Act 2005* (Vic) s 294A; *ibid*.

280. *Children, Youth and Families Act 2005* (Vic) s 289(1). See further Department of Health and Human Services (2017), above n 5.

- 5.64 Of the 892 children in the child protection order group, 11% were the subject of a family reunification order and 44% were the subject of a custody to Secretary order at some stage in their lifetime. Overall, 54% (482 of the 892 children in the child protection order group) were the subject of at least one family reunification order and/or custody to Secretary order in their lifetime (10% of the study group).
- 5.65 Aboriginal and Torres Strait Islander boys were more likely than other children to have been the subject of a family reunification or custody to Secretary order (Panel 13).

Care by Secretary orders (and guardianship to Secretary orders)

- 5.66 Care by Secretary orders are made when:
- the Court has decided that family reunification will not be achieved in a timely way for the child, or the child has been in out of home care for 24 months and still cannot safely return to their parents' care.²⁸¹
- 5.67 Under this order, the Secretary to the Department of Health and Human Services has parental responsibility for the child for two years. This means the Department is responsible for the child's care and wellbeing and for all decisions concerning them. Usually, the objective is to find a permanent or long-term carer for the child as soon as possible, preferably with extended family or, if not, with another family. In exceptional circumstances, the objective may still be family reunification.²⁸² The court cannot attach conditions to a care by Secretary order. They operate for a fixed two-year period.
- 5.68 Care by Secretary orders replaced:
- guardianship to Secretary orders; and
 - custody to Secretary order where ongoing out-of-home care was required or the child had been in out-of-home care for two years or more.²⁸³
- 5.69 Of the 892 children with child protection orders, 17% were the subject of a care by Secretary order and 10% were the subject of a guardianship to Secretary order at some stage in their lifetime. Overall, 26% were the subject of at least one care by Secretary order and/or guardianship to Secretary order in their lifetime (231 children or 5% of the study group).

Long-term care orders (formerly long-term guardianship to Secretary orders)

- 5.70 A long-term care order gives the Secretary to the Department of Health and Human Services parental responsibility, to the exclusion of all other persons, for a child until they turn 18 or marry (whichever happens first).²⁸⁴ Such orders are made where the court decides that 'the child is in need of long-term care and there is a suitable carer available to raise the child'.²⁸⁵
- 5.71 The court cannot impose conditions on a long-term care order. They operate until the child is 18 years (or marries).

281. See further *ibid.*

282. See further *ibid.*

283. Department of Health and Human Services (2016), above n 276.

284. *Children, Youth and Families Act 2005* (Vic) s 290.

285. Department of Health and Human Services (2017), above n 5.

5.72 In the Second Reading Speech to the Children, Youth and Families Amendment (Permanent Care and Other Matters) Bill 2014, the Minister explained that:

[a] long-term care order is targeted to circumstances where a child remains under the long-term parental responsibility of the secretary with an identified carer able to care for the child until they reach 18 years. This order will generally be made when the carer requires the department's continued support and a permanent care order is therefore not an option.²⁸⁶

5.73 Long-term guardianship to Secretary orders were renamed long-term care orders (with some changes) under the 2014 amendments.

5.74 Of the 892 children in the child protection order group, less than 1% were the subject of a long-term care order and 1% were the subject of a long-term guardianship to Secretary order at some stage in their lifetime. Overall, 2% were the subject of at least one long-term care order and/or long-term guardianship to secretary order in their lifetime (17 children). A further 4% (33 children) were the subject of a permanent care order. In total, 5.6% of the 892 children with child protection orders were the subject of at least one long-term care order, long-term guardianship to Secretary order or permanent care order in their lifetime.

Discussion

5.75 Of the 892 children who were the subject of a child protection order:

- 94% (840 children) were the subject of at least one *interim accommodation order* – a temporary order made after a protection application has been issued and the court determines that an interim order is needed to keep the child safe until it determines the child protection application.²⁸⁷ Of these children, 726 children were the subject of at least one interim accommodation order involving out-of-home care, meaning that the Children's Court found them to be at an unacceptable risk of harm;
- 93% (833 children) were the subject of at least one *protection order* – a final order made by the Children's Court once it is satisfied that the child is in need of protection based on one or more grounds in section 162 of the CYF Act; and
- 97% were the subject of an interim accommodation order involving out-of-home care and/or a protection order (866 children).

5.76 Therefore, 17% of sentenced and diverted children in the study group (866 children) were found by the Children's Court to be at an *unacceptable risk of harm* (resulting in an interim accommodation order involving out-of-home care) and/or to be *in need of protection* (resulting in a protection order). Many of these children are likely to have been immediately removed from their families by police or child protection practitioners at least once in 'the most serious of circumstances where [the] child has suffered significant harm, or is at imminent risk of significant harm'.²⁸⁸ Aside from indications of neglect or abuse, the risk of harm may also relate to circumstances such as the death or incapacitation of a child's parent.

286. Victoria, 'Children, Youth and Families Amendment (Permanent Care and Other Matters) Bill 2014', *Parliamentary Debates*, Legislative Assembly, 7 August 2014, 2659 (Mary Wooldridge, Minister for Community Services).

287. *Children, Youth and Families Act 2005* (Vic) ss 10, 262. See for example, *Department of Human Services v DR* [2013] VSC 579 (25 October 2013); *DOHS v Ms K and Mr L* [2009] VChC 3 (18 May 2009); *Purcell v RM & Ors* [2004] VSC 14 (9 January 2004); Judicial College of Victoria (2017), above n 259. Section 262(1) of the *Children, Youth and Families Act 2005* (Vic) sets out the circumstances in which the court may make an interim accommodation order; for example, where the child has been placed in emergency care by a protective intervener (police or child protection practitioners). A *protection application* is an application made to the Family Division of the Children's Court for a finding that a child is 'in need of protection': *Children, Youth and Families Act 2005* (Vic) s 3(1) (definition of 'protection application'). See also [2.10].

288. Department of Health and Human Services (2016), above n 17. See [5.47].

- 5.77 Figures 13 and 14 suggest that the 892 sentenced and diverted children who were the subject of a child protection order had a number of other key characteristics:
- 94% were the subject of multiple child protection orders, suggesting a lack of stability in many of their circumstances; and
 - around one-quarter were placed on a care by Secretary order (or a guardianship to Secretary order) with the object of finding a permanent, long-term carer for the child; however, few were ultimately placed on permanent orders – only 5.6% were the subject of a long-term care order, long-term guardianship to Secretary order or permanent care order.
- 5.78 Roundtable participants noted that, despite a recent legislative change intended to improve rates of permanent placements,²⁸⁹ a gap remained between the number of care by Secretary orders (made with the object of finding a permanent, long-term carer for the child) and the number of permanent orders. One participant commented that it was 'very concerning that such a small proportion of [children placed on care by Secretary orders] end up with a named carer'.²⁹⁰ A number of participants characterised this finding as indicating significant 'churn through the system'. One participant commented, 'what I've seen is constant extension and renewal of care by Secretary orders ... my sense is that they get renewed until the child leaves care'.²⁹¹
- 5.79 Participants commented that, although a permanent placement might be seen as desirable, there was a gap between the number of children requiring a permanent placement and the number of suitable carers available. This was often exacerbated by financial and support considerations, as permanent placements saw carers less able to access financial support as well as practical support such as respite care, services and assistance facilitating communication with a child's family of origin. Given the high rate of kinship care among permanent placements and the social circumstances of many kinship carers, this difference in support was a significant factor creating a disincentive for carers agreeing to a permanent placement.²⁹²
- 5.80 The second report for this project will examine this group of children in more detail. This will include the number of children from the child protection order group who were still in out-of-home care (aside from permanent care placements) when they turned 18, and the associations between the characteristics of this group and offending patterns.

(e) How many children experienced out-of-home care?

What is out-of-home care?

- 5.81 Out-of-home care is 'a temporary, medium or long-term living arrangement for children and young people who cannot live with their parents and who are on [child protection orders]'.²⁹³ Children may also be placed in out-of-home care by means of voluntary child care agreements (without the court's involvement). Voluntary out-of-home care placements are not included in the count of out-of-home care in this chapter.

289. Participant at Roundtable 1: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (2 April 2019).

290. Participant at Roundtable 1: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (2 April 2019).

291. Participant at Roundtable 2: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (4 April 2019).

292. Participant at Roundtable 2: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (4 April 2019).

293. *Children, Youth and Families Act 2005* (Vic) s 18; Early Childhood and School Education Group, Department of Education and Training, and Youth and Families Division, Department of Health and Human Services (2018), above n 1, 5. See further [2.12]–[2.19].

Panel 14: Aboriginal and Torres Strait Islander children: rate of out-of-home care

Aboriginal and Torres Strait Islander children who were the subject of a child protection report were more likely than non-Aboriginal and Torres Strait Islander children to experience out-of-home care (56% or 142 Aboriginal and Torres Strait Islander compared with 38% or 619 non-Aboriginal and Torres Strait Islander children).

The rate of out-of-home care for children who were the subject of a child protection report was higher for girls than for boys. Out-of-home care was experienced by:

- 63% of Aboriginal and Torres Strait Islander girls (57 girls) and 49% of non-Aboriginal and Torres Strait Islander girls (236 girls)
- 52% of Aboriginal and Torres Strait Islander boys (85 boys) and 33% of non-Aboriginal and Torres Strait Islander boys (383 boys).

Number of children who experienced out-of-home care

Court orders

5.82 Of the 892 children in the study group who were the subject of at least one child protection order, 87% had at least one order for out-of-home care (778 children).²⁹⁴

Actual placements

5.83 In total, 767 children (15% of the study group) had at least one recorded out-of-home care placement in their lifetime (whether before, at the time or after their offence and sentence) (Figure 9) This group of children is referred to as 'the care group'.²⁹⁵

5.84 The 15% of children who had experienced out-of-home care equates to a rate of 150 children per 1,000 children sentenced in 2016 or 2017. Consistent with the findings of other research, this rate is notably higher than the rate of children in out-of-home care in the general Victorian child population (7.5 children per 1,000 children aged 0–17), although allowance should be made for the different counting rules.²⁹⁶

5.85 Of the 1,938 children who were the subject of at least one child protection report, 40% were placed in out-of-home care at least once in their lifetime (767 children).

5.86 The out-of-home care placement rate was higher for Aboriginal and Torres Strait Islander children than for non-Aboriginal and Torres Strait Islander children and higher for girls than for boys (Panel 14).²⁹⁷

294. The category of *out-of-home care orders* in this analysis included care by Secretary orders, custody to Secretary orders, custody to third-party orders, family reunification orders, guardianship to Secretary orders, interim accommodation order: community service, interim accommodation order: declared hospital placement, interim accommodation order: out-of-home service, interim accommodation order: secure welfare, interim accommodation order: undertaking suitable person, interim protection order, long-term care orders, long-term guardianship to Secretary orders, permanent care orders, supervised custody orders and therapeutic treatment placement orders. Orders not classified as out-of-home care included family preservation orders, interim accommodation order: undertaking child, interim accommodation order: undertaking parent, supervision orders and undertakings.

295. Sixty children in the care group did not have a child protection order for out-of-home care recorded in the data and are therefore included in the count of out-of-home care placements but not in the count of child protection orders for out-of-home care. A further 71 children had a recorded child protection order for out-of-home care but did not have a recorded out-of-home care placement. This is likely to reflect a change in circumstances or incomplete data entry. In total, 707 children had both a child protection order for out-of-home care and details of an out-of-home care placement or placements recorded in the data.

296. Australian Institute of Health and Welfare (2018), above n 52, 63–65. See also Victoria Legal Aid (2016), above n 7, 5, citing Cummins et al. (2012), above n 72, 233. For a description of out-of-home care, see [2.12]–[2.19]. The rate of sentenced children who had experienced out-of-home care is cumulative and measures whether a child had ever experienced out-of-home care *across their lifetime*. The Australian Institute of Health and Welfare rate measures the rate of children in out-of-home care in Victoria on a particular day: 30 June 2017.

297. A total of 52 children (2.7% of the 1,938 child protection report group) were removed from the analysis in Panel 14 due to unknown Aboriginal and Torres Strait Islander status.

Number of out-of-home care placements

5.87 Most children who experienced out-of-home care (the care group) had more than one out-of-home care placement in their lifetime:

- around four in five children in the care group had more than one placement; and
- around one in two children in the care group had five or more placements.²⁹⁸

5.88 The number of placements was calculated by counting separate 'Placement IDs' in the child protection dataset. Each Placement ID represents a new placement for the dates specified on the placement record. For example, in the case of a child who was first placed with their maternal grandmother then placed with an aunt and then moved back to their maternal grandmother, each placement would have its own unique Placement ID, even though two of the placements were with the same person, namely the maternal grandmother. This is because the two placements with the maternal grandmother occur on different dates. So for this child, the data would show three out-of-home care placements. Therefore, while each new placement represents a disruption in the child's life, it does not necessarily represent a *new carer*. The number of placements:

- includes respite care placements (temporary short-term placements) that occur between other longer-term placements; and
- does not include respite care placements that occur within, or parallel to, longer term placements (for example, where a child's primary out-of-home care placement is supported by them being periodically looked after by a second set of carers). Respite care placements that occurred within the course of a longer-term placement were excluded from the data.

5.89 This finding suggests a degree of disruption and a lack of stability in the lives of sentenced and diverted children who experienced out-of-home care.

5.90 Participants at Roundtable 2 were concerned about the impact of the instability caused by placement changes and the use of residential care. One participant stated that changes in placement could happen with little warning, for reasons that would appear arbitrary for the child concerned. The child might 'come home from school one day and find [their] bags packed ... Once you're in residential care, the hope of stability disappears'. Another pointed out that staff turnover, as well as the disruption caused by moving, affected children's ability to form lasting bonds within their home environment, 'which is huge for young people with significant trauma and attachment issues'.²⁹⁹ Another participant commented that:

[y]oung people will identify the most important aspect of permanency as continuity of relationships with people who have their backs, who care for them ... but it's also continuity of relationships with their school, with their local sporting club, with their friends.³⁰⁰

5.91 The 1984 Carney review observed that:

[I]n taking over the role of parents ... the state acquires a new and onerous responsibility. In discharging this responsibility the state must ... provide a level of care which is equivalent to that provided by good parents.³⁰¹

298. This is a broad estimate of the number of placements based on placement IDs in the child protection data. During consultation on the findings, stakeholders queried what influence respite care placements had on the overall number of placements for each child. As the data in relation to the number of placements is complex, further analysis is required to provide more detailed findings on the number of placements. The Council will investigate the number of placements further in Report 2. See further Appendix 2 (Methodology).

299. Participant at Roundtable 2: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (4 April 2019).

300. Participant at Roundtable 2: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (4 April 2019).

301. Child Welfare Practice and Legislation Review Committee (Victoria) (1984), above n 75, 287.

- 5.92 A number of roundtable participants expressed concern about the number of children in court for criminal matters who did not have their child protection practitioner with them. One participant commented that there is:

almost a kind of resignation that that's the state of play. There are lots of magistrates who just assume that the department will not be there notwithstanding their role as the state parent in a particular child's case; the expectations are low ... when you talk about what can the court do, potentially there's something about compelling or requiring the Department to actively assume that role.³⁰²

- 5.93 Another participant commented that staff turnover is also an issue:

It goes back to the continuity of caregiver if you don't have the same worker building up a relationship [with the child], to get that young person to the assessment ... to all those services. If that's being left to residential unit staff, who are constantly rotating, of course these kids don't build up those relationships; they're in that resi[dential] unit very quickly or they get a new worker. We were all teenagers, [and] we know how quickly even teenagers from good backgrounds can build up resentment. Well, you add all this into that [and] it makes it a very difficult scenario when the state parent is on the paper but not in the court room, not in the driver's seat of the car.³⁰³

- 5.94 Other participants commented that, at the sentencing stage, children reliant on state services to support them through the trial and sentencing processes, and to complete the requirements of their sentencing orders, experienced significant disadvantage compared with children supported by their parents:

How often do you hear a magistrate say 'it's so good to see you're supported by your parents here today', and then there's a very noticeable absence when there's no one for a kid in [out-of-home] care? ... I've also had magistrates give lighter sentences on the basis that there's a supportive family at court who will ensure that the young person doesn't commit more offences, and it's an actual sentencing consideration and they do give lighter sentences based on that. Likewise diversion decisions, bail. So they're actually getting different outcomes I think and it's hard to quantify that.³⁰⁴

The courts have no faith that if you're in state care, you'll be rehabilitated and the risk will be managed. But if you're in a family and have a happy home, the prospects are much higher.³⁰⁵

Even though there is already a provision in the Act for them not to be treated more harshly because of their involvement in child protection, the reality is that the sentencing factors and considerations are skewed against them.³⁰⁶

- 5.95 The Council's second report for this project will examine the number of placements more closely, including whether there are associations between the number of placements and children's youth justice characteristics.

302. Participant at Roundtable I: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (2 April 2019).

303. Participant at Roundtable I: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (2 April 2019).

304. Participant at Roundtable I: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (2 April 2019). See also discussion at [3.21]–[3.26].

305. Participant at Roundtable I: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (2 April 2019). See also discussion at [3.21]–[3.26].

306. Participant at Roundtable I: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (2 April 2019), referring to *Children, Youth and Families Act 2005* (Vic) s 362(2). See also discussion at [3.21]–[3.26].

Number and combination of out-of-home care placement types

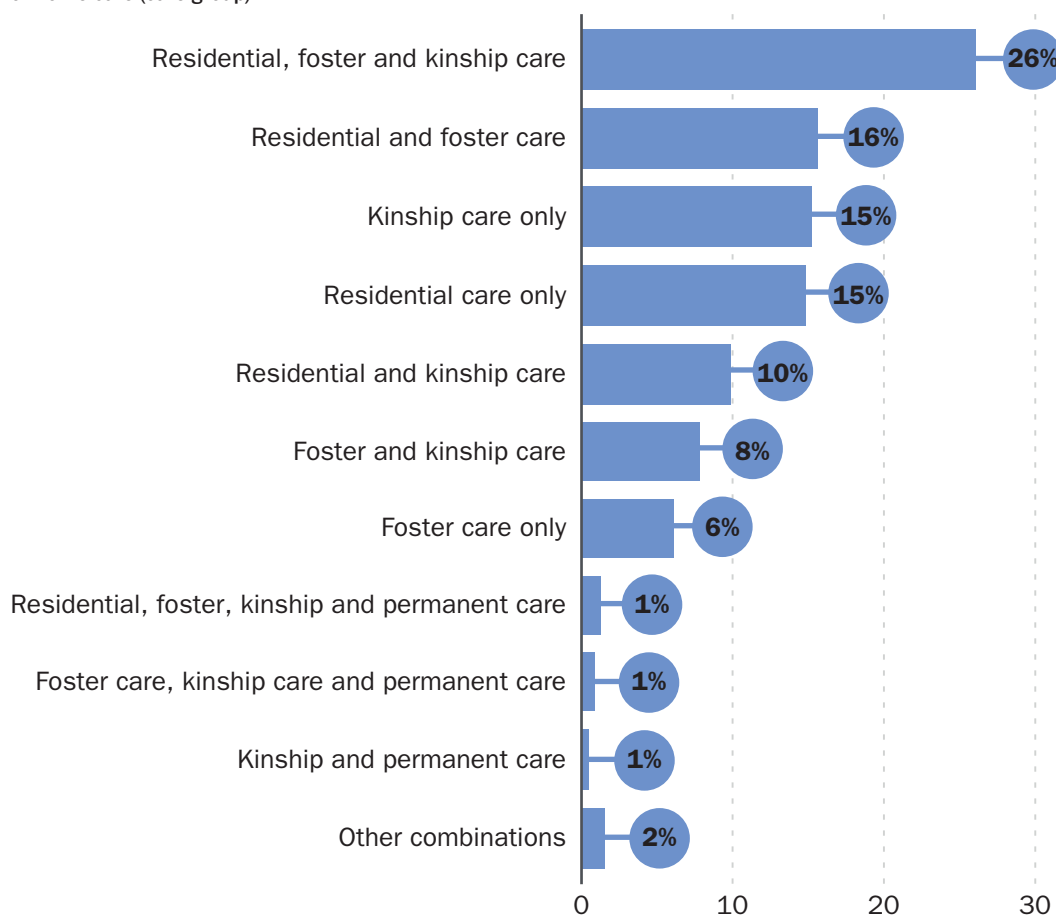
Number of placement types

5.96 In addition to having multiple placements, children in the care group were also likely to experience more than one *type* of placement. Of the 767 children in the care group, approximately two-thirds (64%) had experienced more than one *type* of out-of-home care placement in their lifetime (for example, foster care and residential care). Thirty per cent of the care group had experienced three or more placement types.

Placement type combinations

5.97 The most common placement type experience was a combination of at least one placement each of residential care, foster care and kinship care, with more than a quarter of the care group experiencing this combination (200 children) (Figure 17). The second most common experience for children in the care group was a combination of foster care and residential care (120 children or 16%), followed by kinship care only (117 children or 15%) and residential care only (114 children or 15%). The use of residential care was commonplace among children in the care group.

Figure 17: Placement type combinations in the lifetime of the 767 children in the study group who had experienced out-of-home care (care group)³⁰⁷



307. These categories do not overlap: each child is counted once in this graph. Placement types in the 'other/unknown' category were ignored for this exercise. For example, if a child had experienced a residential care placement, a kinship care placement and an 'other/unknown' placement, the child was categorised in the group 'residential care and kinship care'. Thirty children had other/unknown placements as well as at least one specified placement type. A further two children only had an 'other/unknown' placement. These two children are included on the graph in the 'other combinations' category.

Out-of-home care placement type: across a child's lifetime

Overall

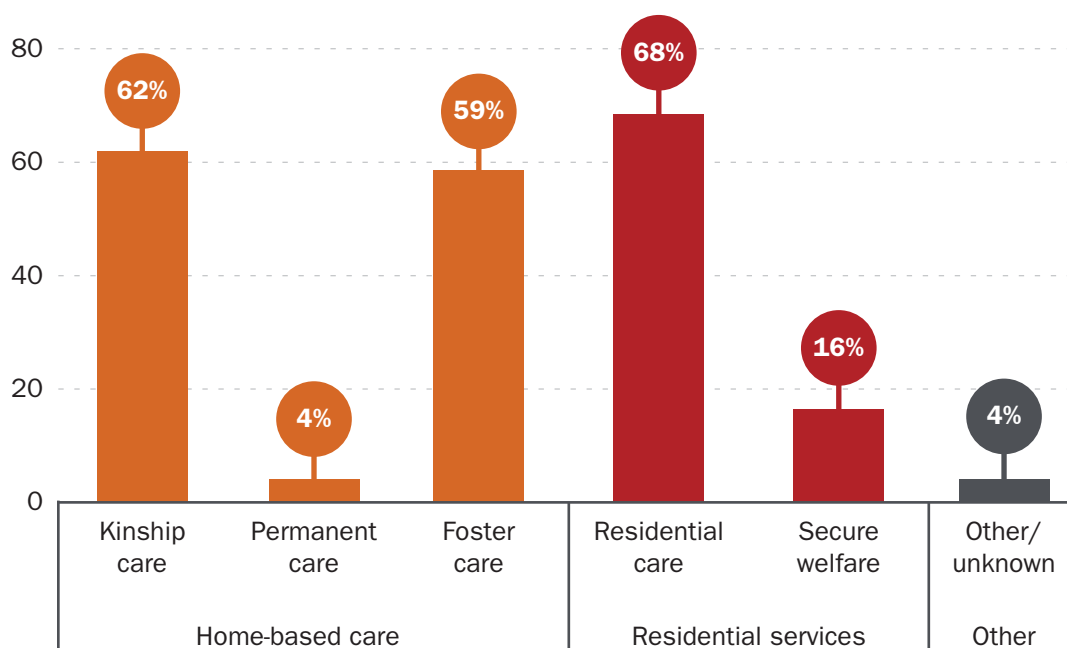
5.98 The majority of the 767 children who had experienced out-of-home care (the care group) had at least one residential care placement (525 children or 68%). This was the most prevalent placement type (Figure 18). This finding was particularly striking given the relatively low use of residential care placements in the general care population (Figure 4).

5.99 Kinship care and foster care were the next most common placement types: 62% of the care group experienced at least one kinship care placement and 59% experienced at least one foster care placement (Figure 18).³⁰⁸

5.100 One in six children in the care group (16% or 126 children) had a secure welfare placement at some stage in their lifetime. Participants at Roundtable 2 commented that this seemed to be a relatively high rate, considering that only 10 beds were available for secure welfare placement for boys and 10 for girls.³⁰⁹ Most roundtable participants agreed that this finding suggested that children who experienced secure welfare were over-represented in the youth justice system, with one participant describing the finding as a 'massive over-representation'.³¹⁰ Participants also commented that children in the youth justice system who have experienced secure welfare are a particularly vulnerable cohort:

Often the young people in secure welfare are the young people who have experienced incredibly high trauma over and above the experience of [the child protection] cohort, whose behaviours are incredibly complex; it might be a combination of absconding, offending and significant self-harm, and self-harm is probably the most prevalent.³¹¹

Figure 18: The 767 children in out-of-home care, by the proportion who had experienced each type of care in their lifetime³¹²



308. See [2.19] for discussion of common relationships between children and their kinship carer.

309. Participant at Roundtable 2: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (4 April 2019).

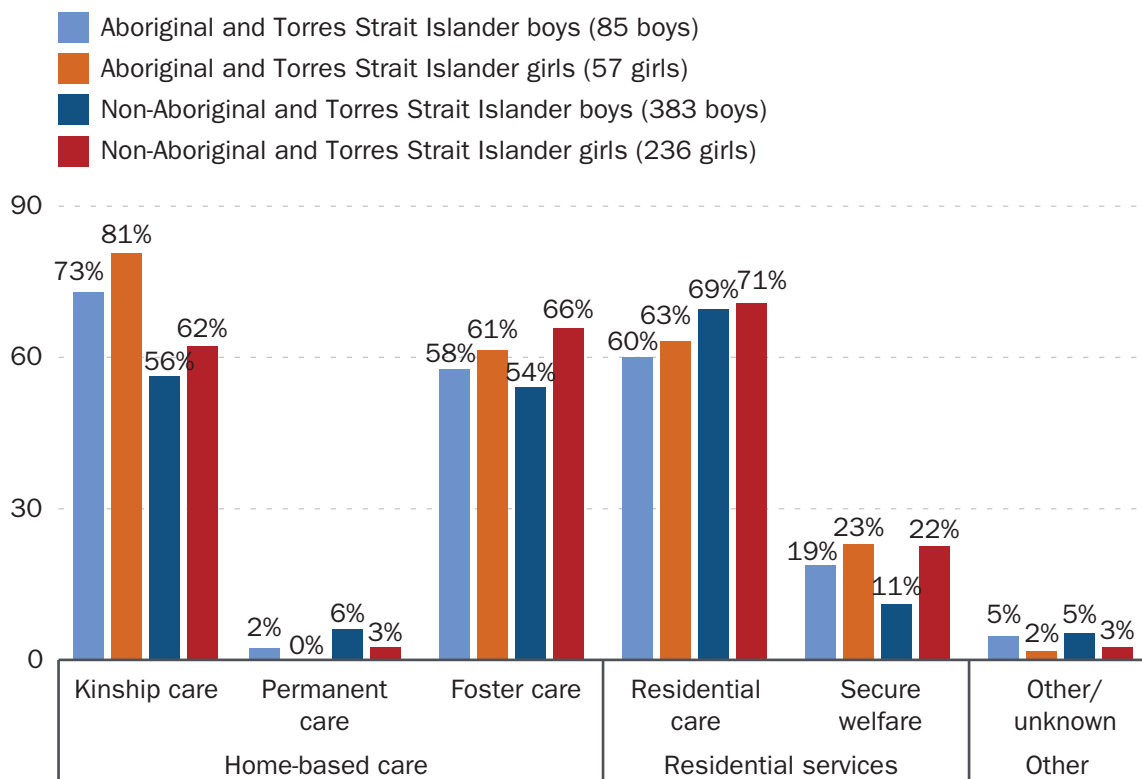
310. Participant at Roundtable 1: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (2 April 2019).

311. Participant at Roundtable 1: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (2 April 2019).

Aboriginal and Torres Strait Islander children and gender

5.101 Aboriginal and Torres Strait Islander children were more likely than non-Aboriginal and Torres Strait Islander children to have spent time in kinship care and less likely to have spent time in residential care (Figure 19). Girls were more likely than boys to have spent time in secure welfare. Non-Aboriginal and Torres Strait Islander boys were least likely to have spent time in secure welfare (11% of the 383 non-Aboriginal and Torres Strait Islander boys in the care group had experienced secure welfare). Three boys and three girls were excluded from Figure 19 due to their unknown Aboriginal and Torres Strait Islander status.

Figure 19: Children in out-of-home care, by gender and Aboriginal and Torres Strait Islander status, by proportion of children who had experienced each type of care in their lifetime



312. The 'secure welfare' category in Figure 18 excludes two people who received a secure welfare order from the court, but who were not recorded as receiving an out-of-home care placement. The secure welfare percentage remains at 16% regardless of whether these two children are excluded or included. 'Foster care' refers to a category called 'home-based care' in the Department of Health and Human Services data. This category includes foster care, therapeutic foster care (for children who need an extra level of intervention, for example, due to mental health issues), adolescent community placements (a transition placement for children aged 16–17 in group houses) and independent living. As the overwhelming majority of children in home-based care placements are in foster care, the Council has labelled this category 'foster care'. For example, on 31 December 2018, 1,583 Victorian children were in foster care. Of those children, 44 were in independent living, 18 were in an adolescent community placement, 79 were in therapeutic foster care and the remainder were in foster care: Department of Health and Human Services, unpublished data.

Out-of-home care placement type on 30 June 2017

- 5.102 A number of reasons have been suggested as to why children in out-of-home care are over-represented in the youth justice system.³¹³ Victoria Legal Aid notes that 'the problem appears to be particularly acute for children placed in residential care'.³¹⁴ The prevalence of residential care among placements experienced by the care group (Figure 18) supports previous research suggesting that children who have experienced residential care are over-represented among children in the youth justice system.
- 5.103 To further test this finding, the Council analysed the study group on a single day: the same day as the Australian Institute of Health and Welfare's study in Figure 4.
- 5.104 While Figure 4 includes children aged under 10,³¹⁵ the study group in the current report, being a youth justice cohort, includes only children aged 10 or older. For a more accurate comparison, therefore, the Council sought data directly from the Department of Health and Human Services on out-of-home care placements on 30 June 2017 for children aged 10–17. On 30 June 2017, 4,230 Victorian children aged 10–17 were in out-of-home care. Of these children, 10% were in residential care on 30 June 2017 (Figure 20).³¹⁶
- 5.105 In contrast, of the 213 children from the Council's study group who were in out-of-home care on 30 June 2017, 58% were in residential care (Figure 21) (a further seven children were excluded from the analysis due to two placement types being recorded). Consistent with previous research (see further [4.21]–[4.34]), this finding suggests that children who have experienced residential care are over-represented in the youth justice system.
- 5.106 Participants at the Council's roundtables commented that the criminalisation of behaviour that would not be criminalised in a child's own home was a key factor contributing to the over-representation of children in residential care in the youth justice system. A participant at Roundtable 1 commented on the practice of charging children with criminal damage for damaging property in residential care, partly due to the need for a police report for insurance purposes:
- with kids in residential care there is very often a policy of property damage equals criminal charge, because we need that to get that on insurance. That's a very negative way for a young person – they don't learn how to control emotion, how to repair damage, how to build relationships doing that; all they learn is lack of self-worth.³¹⁷
- 5.107 Other contributing factors mentioned by stakeholders included the involvement of police in situations other than criminal callouts, such as missing person reports. Stakeholders commented that the knowledge and understanding of children's responses to trauma was inconsistent among frontline police and that their responses to increased contact with a given child sometimes led to decreased tolerance upon further involvement with that child.

313. See further the discussion from [4.25].

314. Victoria Legal Aid, 'Appropriate Interventions for Children and Young People' (legalaid.vic.gov.au, 2018) <<https://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/appropriate-interventions-for-children-and-young-people>> at 11 February 2019.

315. Figure 4 (page 14) shows the care type for all Victorian children in out-of-home care on 30 June 2017 based on data in Australian Institute of Health and Welfare (2018), above n 65, Table S36 <<https://www.aihw.gov.au/reports-data/health-welfare-services/child-protection/data>> at 1 March 2019.

316. Department of Health and Human Services, unpublished data.

317. Roundtable 1: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (2 April 2019).

Finally, participants noted that children in residential care often had higher levels of all underlying risk factors, which had a compounding effect when combined with increased surveillance and decreased tolerance. As one participant commented, the effect was not solely attributable to 'care per se, it's the disadvantage that all of these things are indicating, that can attach to [care]'.³¹⁸

Figure 20: All Victorian children aged 10–17 who were in out-of-home care on 30 June 2017 (4,230 children), by placement type on 30 June 2017³¹⁹

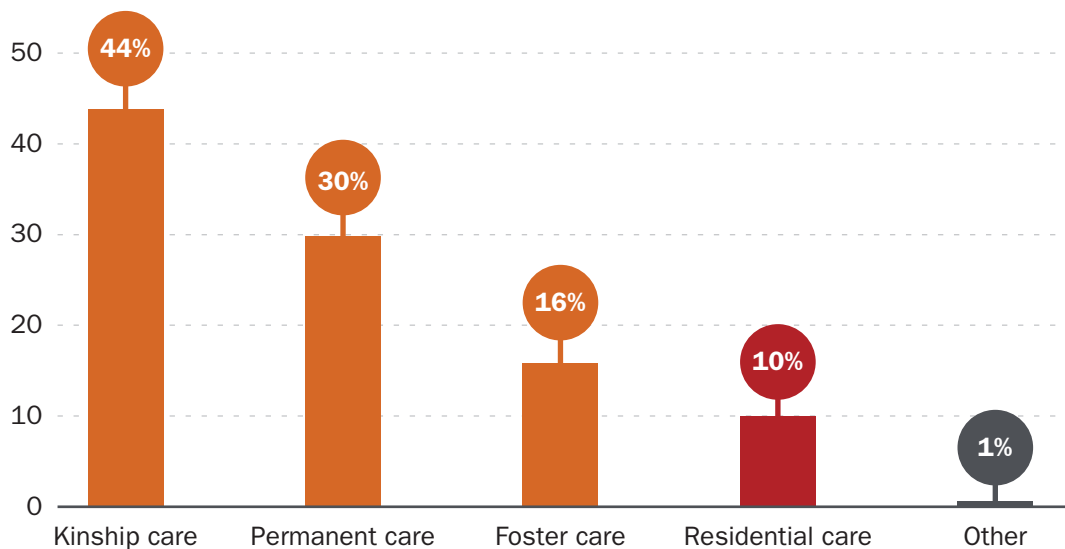
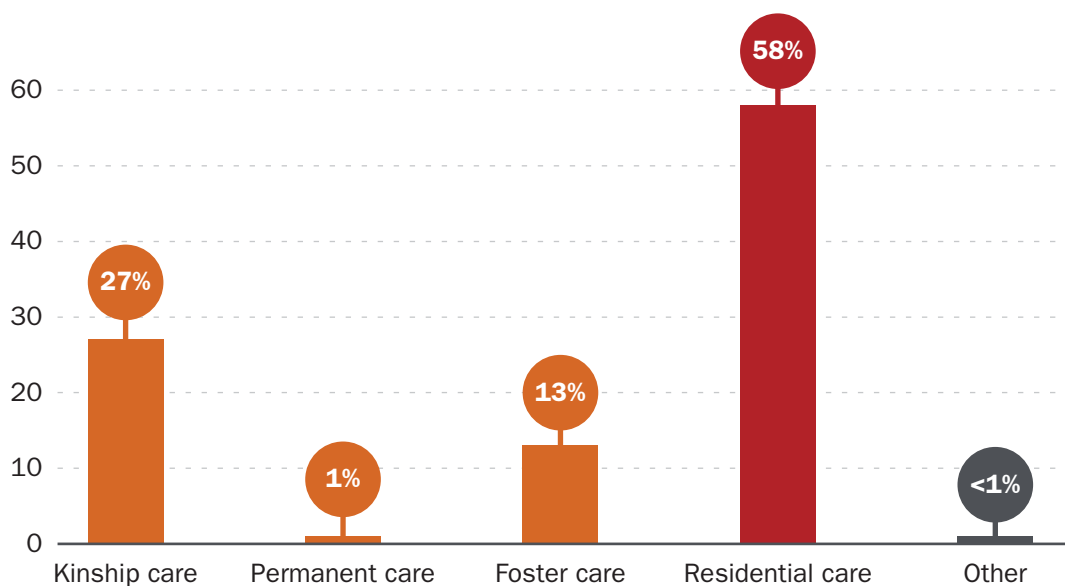


Figure 21: Children in the study group aged 10–17 who were in out-of-home care on 30 June 2017 (213 children), by placement type on 30 June 2017



318. Roundtable 1: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (2 April 2019).

319. Department of Health and Human Services, unpublished data.

Aboriginal and Torres Strait Islander girls

5.108 This chapter has found that, compared with sentenced and diverted Aboriginal and Torres Strait Islander boys and to other sentenced and diverted children, sentenced or diverted Aboriginal and Torres Strait Islander girls who were the subject of a child protection report had the highest rates of investigation, substantiation, child protection orders and out-of-home care and were the subject of a higher median number of child protection reports. Aboriginal and Torres Strait Islander children who were the subject of a child protection order were more likely than non-Aboriginal and Torres Strait Islander children to be the subject of an interim accommodation order.

Follow-up questions in the second report

5.109 The Council's second report for this project will look in more detail at the child protection profiles of the crossover kids identified in the current report, for example, examining the type of harm or risk reported to the child protection service and whether there are any associations between the type of harm and children's offence types. The report will look more closely at the children who had experienced out-of-home care, including the types of offences for which they were sentenced or diverted.

6. Sentence type and child protection

- 6.1 This chapter addresses Research Question 3, which assesses whether children who are known to the child protection service appear to be over-represented in relation to particular sentencing orders.

Research Question 3: Sentence type and child protection involvement

What proportion of children sentenced to specific sentence types were known to the child protection service?

Caution regarding sentence type and child protection background

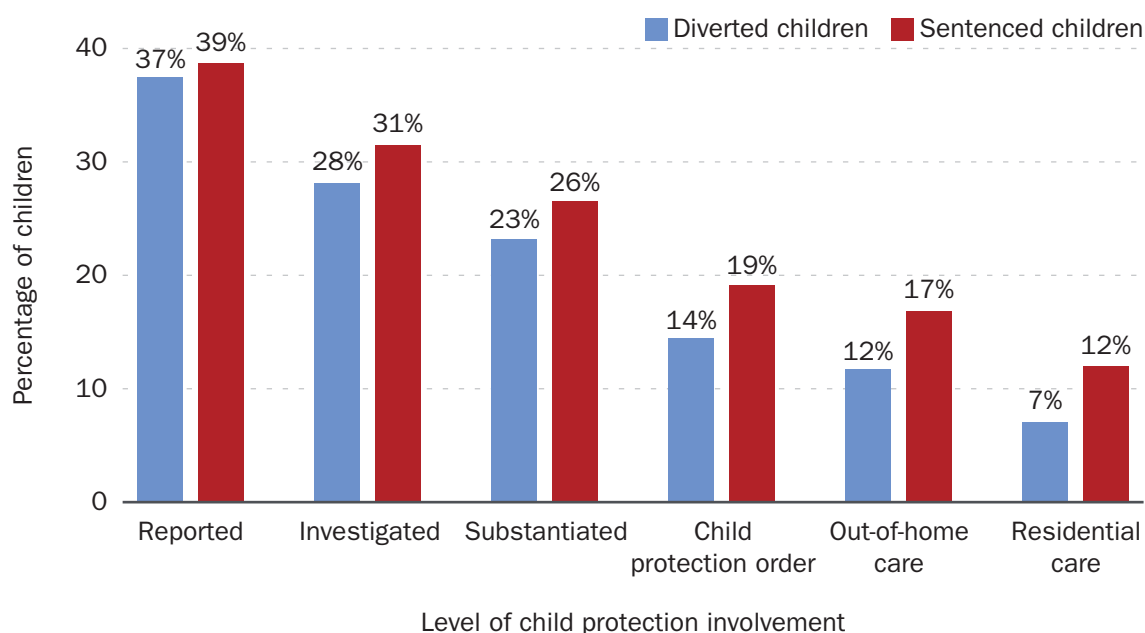
- 6.2 In this chapter, children with more severe sentence types were found to be more likely to have a child protection history. However, care must be taken in interpreting this finding.
- 6.3 The *Children, Youth and Families Act 2005* (Vic) ('CYF Act') provides that a child's appearance in the Family Division of the Children's Court, including as a child in need of protection, should not be an *aggravating* factor in sentencing that child: the Criminal Division must not impose a more severe sentence than it would have imposed had the child not had a matter in the Family Division.³²⁰ A child's experience of child protection would not, therefore, be expected to *directly* lead to a more severe sentence than those imposed on children with no child protection history. On the contrary, it is likely to be a mitigating factor that a child has experienced trauma, harm, abuse or removal from family into out-of-home care. More severe sentences are likely to reflect a combination of relatively serious offending and/or other aggravating factors, such as a lengthy prior criminal history or a history of breaching more lenient sentencing orders.
- 6.4 However, child protection involvement may *indirectly* contribute towards the over-representation in more severe sentencing options of children with child protection backgrounds. First, children from backgrounds of severe neglect, harm and dysfunction may be more likely to have issues with emotional regulation, enhanced flight or fight responses and other issues that affect compulsiveness and control. They may be more likely to respond to situations emotionally and possibly violently, particularly when living in out-of-home care. If such children are charged with offences such as offences against the person arising from this conduct, they are likely to face more severe sentences than children charged with lesser offences. Secondly, as previous research suggests, children in out-of-home care may be criminalised for behaviour that might not attract a criminal response if committed in the family home. Such children may be more likely to have criminal histories than children who remain with their families. This practice may indirectly contribute towards children in out-of-home care moving more quickly up the sentencing hierarchy than children who remain with their families.

320. *Children, Youth and Families Act 2005* (Vic) s 362(2).

Diversion versus sentenced children

- 6.5 The study group was divided according to the most severe order made by the court at their index sentence, starting with whether the child was diverted (1,659 children) or sentenced (3,404 children).³²¹
- 6.6 There was little difference in the proportion of sentenced and diverted children who had been the subject of a report to the child protection service (Figure 22). This may be surprising given diversion's role to divert less serious offenders away from the youth justice system. However, previous research, and the Council's findings in Chapter 7, suggest that children who enter the youth justice system at a younger age are more likely than older children to be known to the child protection service (see further [7.2]). Therefore, the relatively high proportion of diverted children who were known to child protection may reflect the higher proportion of younger children (aged 10–13) accessing the diversion program, compared with sentenced children.³²² This finding may also reflect efforts to divert children in the child protection system away from the youth justice system.
- 6.7 The gap between diverted and sentenced children widened as the level of child protection involvement increased. For example, similar proportions of diverted and sentenced children had been the subject of a child protection report, but the proportion of diverted children who had been the subject of a child protection order (14%) was around three-quarters of the proportion of sentenced children (19%). Similarly, the proportion of diverted children who had experienced residential care (7%) was around half the proportion of sentenced children who had experienced residential care (12%) (Figure 22).

Figure 22: Level of child protection involvement as a proportion of sentenced children and diverted children



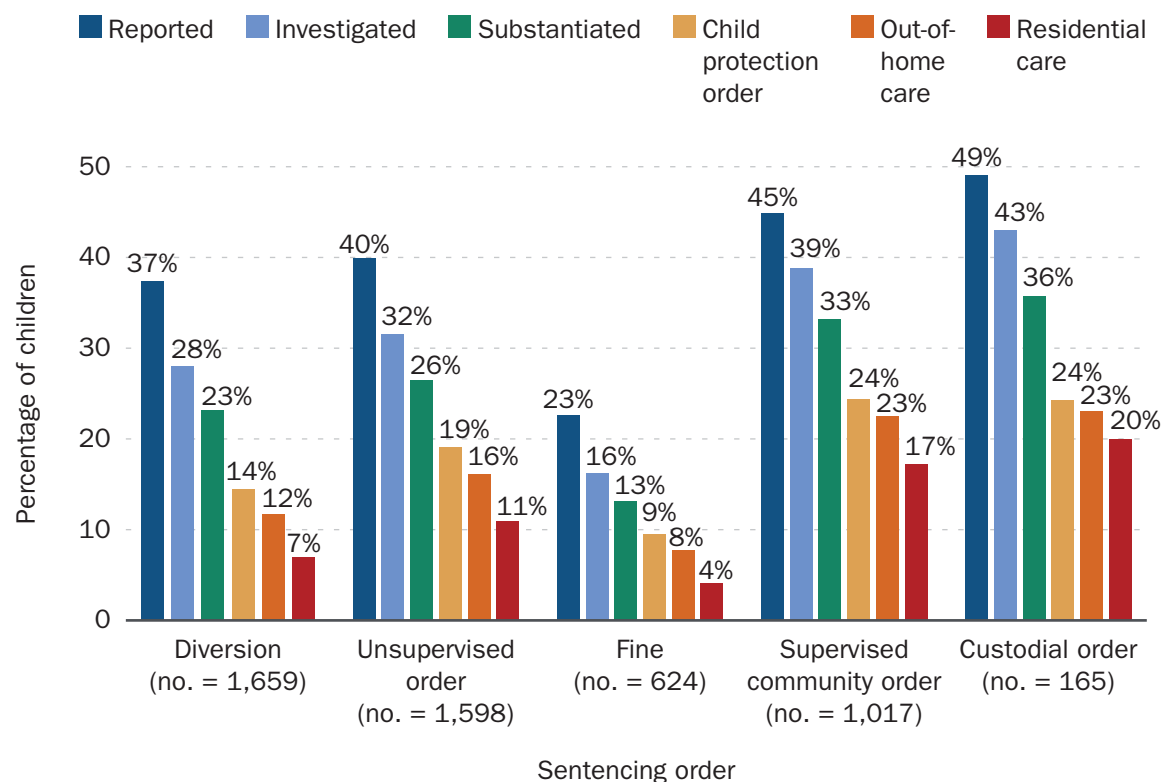
321. See further [1.9].

322. The proportion of *diverted* children aged 10–13 (6%) is double the proportion of *sentenced* children aged 10–13 (3%): 96 of the 1,659 children who received diversion were aged 10–13 (6%), and 100 of the 3,404 sentenced children were aged 10–13 at the time of sentence (3%).

Children sentenced to more severe sentences were more likely to have a child protection history

- 6.8 Looking at child protection history by sentence severity at the index sentence, Figures 23 and 24 show that children with more severe sentence types were more likely to have a child protection history. Both figures show the proportion of children with a child protection background who were sentenced to each sentence type. Figure 23 groups sentences into type and shows the proportion of children sentenced to that sentence type who had a child protection background, for example, the proportion of children sentenced to a *custodial order* who had been the subject of a report to child protection. Figure 24 shows each sentence separately, for example, the proportion of children sentenced to a *youth justice centre order* who had been the subject of a child protection report.
- 6.9 Eight children were sentenced to a youth residential centre order.³²³ These eight children were excluded from Figure 24 due to the distorting effect of small numbers. These children were included among the 165 children in the 'custodial orders' sentencing category shown in Figure 23. Of the eight children sentenced to a youth residential centre order, four had been reported at least once to the child protection service (50%). Each of those four children had at least one report investigated and substantiated, had at least one child protection order and had experienced out-of-home care, including residential care.

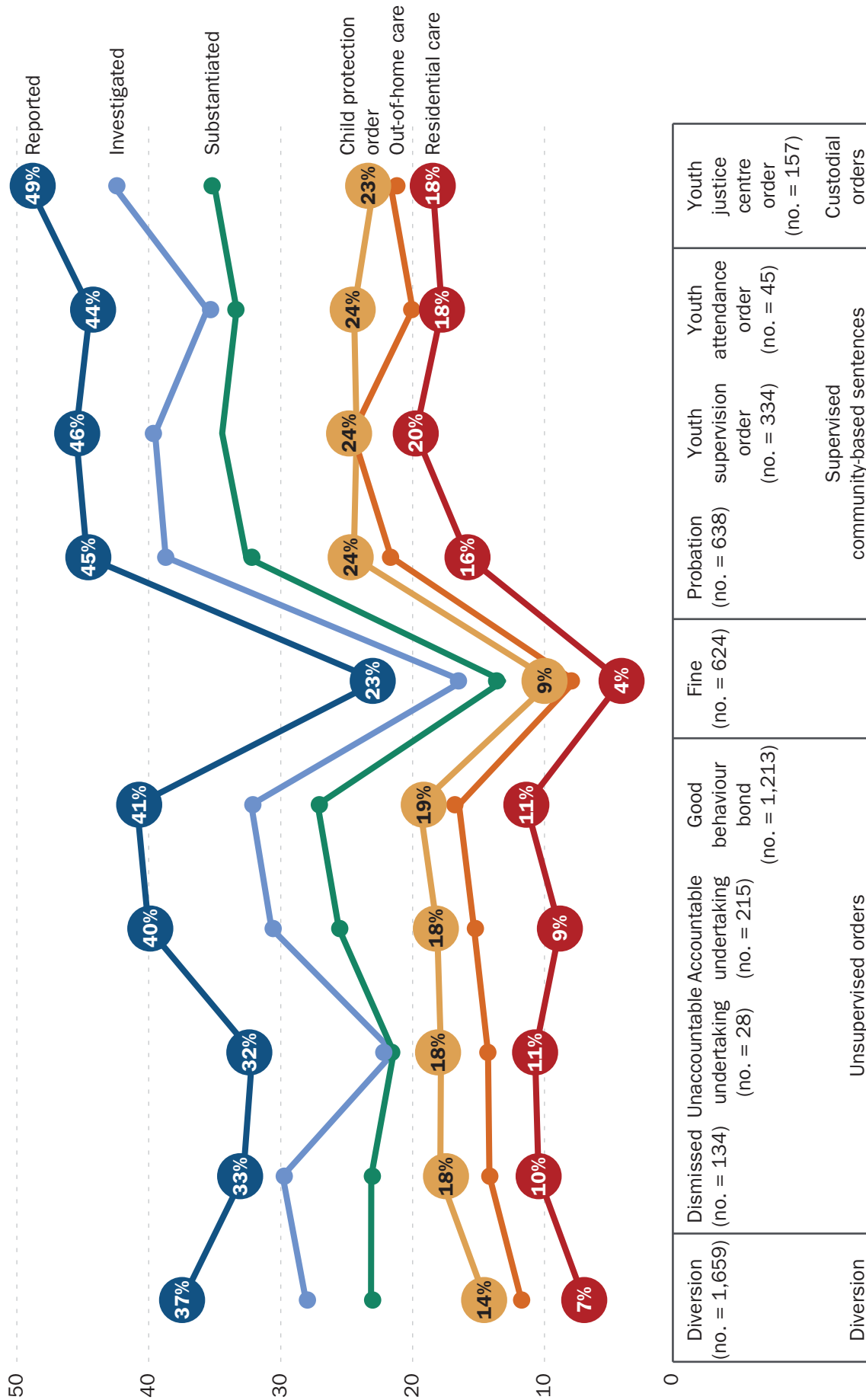
Figure 23: Level of child protection involvement, as a proportion of children sentenced to types of sentencing orders³²⁴



323. A youth residential centre order is detention in a youth residential centre for offenders aged under 15. The order is for a maximum of one year for a single offence or two years for more than one offence. While detained, offenders participate in education and programs that address their offending behaviour: *Children, Youth and Families Act 2005* (Vic) ss 410–411.

324. Eight children were excluded from Figure 24 due to their sentence type being recorded in the data as 'convicted and discharged', which is an order in the adult jurisdiction but not in the Children's Court. These eight children are included in Figure 23 in the category of 'unsupervised order'.

Figure 24: Level of child protection involvement, as a proportion of children sentenced to particular sentencing orders³²⁵



325. Eight children were excluded from Figure 24 due to their sentence type being recorded in the data as 'convicted and discharged', which is an order in the adult jurisdiction but not in the Children's Court.

Unsupervised orders

- 6.10 The proportion of children who had been the subject of a child protection report among children sentenced to unsupervised low-end orders (40% or 638 children) was similar to that of diverted children (37% or 621 children). Compared to the proportion of diverted children who were the subject of a child protection report (37% or 621 children), the proportion of children with a child protection report was:
- lower for children who had their charges proven and dismissed (33% or 44 children) or were sentenced to unaccountable undertakings (32% or 9 children); and
 - slightly higher for children who were sentenced to accountable undertakings (40% or 86 children) and good behaviour bonds (41% or 496 children).
- 6.11 Compared to diverted children, a slightly higher proportion of children sentenced to unsupervised low-end orders were the subject of a child protection order (19% compared with 14%). A slightly higher proportion of children sentenced to unsupervised low-end orders experienced out-of-home care (16% compared with 12% of diverted children).

Fines

- 6.12 The proportion of fined children who were known to child protection was noticeably lower than that for diverted children and that for children who received all other sentence types. Of fined children:
- 23% were the subject of at least one child protection report (141 children);
 - 16% were the subject of at least one investigated report (101 children);
 - 9% were the subject of a child protection order (59 children); and
 - 8% had experienced out-of-home care (48 children).³²⁶
- 6.13 This lower rate could reflect different offence types common to children who are, and are not, known to child protection. For example, transit offences (offences relating to public transport such as failing to have a valid ticket) had the lowest rate of children known to child protection.³²⁷ The most likely sentence for a transit offence is a fine.³²⁸ In the 2016 youth reoffending report, the Council observed that:
- the lower reoffending rate for fines (45%) is likely to reflect factors relating to the offender and the offence that influence the prospect of reoffending. For example, fines were a common disposition for transit offences (83% of all charges of a transit offence sentenced at the index sentence received a fine), and transit offences were associated with lower reoffending rates.
- Fines were also more common for older offenders than for younger offenders, and older offenders had lower reoffending rates. Therefore, the lower reoffending rate associated with fines is likely to reflect factors relating to the offence and the offender, rather than the effectiveness of fines as a sentencing disposition.³²⁹

326. In this report, the data relating to fines does not include data from the Children and Young Persons Infringement Notice System (CAYPINS) under *Children, Youth and Families Act 2005* (Vic) sch 3. Only fines imposed as a sentence in the Children's Court are included in the data.

327. Preliminary analysis indicates that 17% of children sentenced for transit offences had been the subject of at least one investigated child protection report. The association between offence type and the likelihood of a child protection history will be explored in the second report for this project.

328. The Council's 2016 youth reoffending report found that 83% of all charges of a transit offence sentenced at the index sentence in that study received a fine: Sentencing Advisory Council (2016), above n 19, 38.

329. Ibid 38 (citations omitted). See also Sentencing Advisory Council, *Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria* (2014) 310 [10.2.14]–[10.2.15]. For a discussion of sentencing effectiveness and unpaid fines, see *ibid* 319 [10.5.1]–[10.5.2].

- 6.14 The lower proportion of children known to child protection in the fined group may also reflect the likelihood that a fine may be very difficult to pay for a child experiencing issues relating to child protection, such as living in out-of-home care. A fine imposed in such circumstances may also be virtually impossible to enforce, rendering it meaningless as a sentence. The *Children, Youth and Families Act 2005* (Vic) ('CYF Act') provides that if the sentencing court decides to fine a child, the court must consider a child's financial circumstances *when determining the fine amount* (as opposed to when considering *whether* to fine the child at all). However, unlike the adult system, there is no provision for the Children's Court to still impose a fine if it is unable to take financial circumstances into account.³³⁰ In practice, it is unlikely that the court would impose a fine if a child clearly lacked the capacity to pay. Consultation with representatives of the Children's Court confirmed that children are not usually fined, other than in connection with transit offences.³³¹

Supervised community orders

- 6.15 Of the children in the study group sentenced to supervised community orders (probation orders, youth supervision orders and youth attendance orders):³³²
- 45% were the subject of at least one child protection report (457 children);
 - 39% were the subject of at least one investigated report (395 children);
 - almost one-quarter (24%) were the subject of at least one child protection order (248 children);
 - almost one-quarter (23%) experienced out-of-home care (229 children); and
 - 17% (175 children) experienced residential care (16% of children sentenced to probation, 20% of children sentenced to a youth supervision order and 18% of children sentenced to a youth attendance order experienced residential care).

Custodial orders

- 6.16 Previous research suggests that children who have experienced child protection and out-of-home care are over-represented among children sentenced to custodial orders.³³³
- 6.17 Consistent with such research, the Council found that the group of 165 children sentenced to custodial orders³³⁴ had the highest rates of child protection involvement: almost half were the subject of at least one child protection report (49% or 81 children) and 43% were the subject of at least one *investigated* report (71 children).
- 6.18 Children sentenced to custodial orders had the same rates of child protection orders (24%) and out-of-home care (23%) as children sentenced to supervised community orders.
- 6.19 Four of the eight children sentenced to youth residential centre orders experienced out-of-home care (with all four experiencing residential care). Of the 157 children sentenced to youth justice centre orders, 22% experienced out-of-home care (34 children) and 18% experienced residential care (29 children).

330. *Sentencing Act 1991* (Vic) s 52.

331. Meeting with representatives of the Children's Court of Victoria (3 April 2019).

332. These orders are made under the *Children, Youth and Families Act 2005* (Vic) ss 360(1)(f)–(h). Youth control orders (under section 360(1)(ha)) would also be included in this category, but these orders commenced after the study period for this report.

333. In the final report for the inquiry into youth justice centres in Victoria, it was noted that 45% of sentenced or remanded children and young people had been subject to a previous child protection order: Legislative Council Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Youth Justice Centres in Victoria: Final Report* (2018) 19–26. See also Australian Institute of Health and Welfare (2018), above n 95, 6, 12; Youth Parole Board (2018), above n 97, 15–16.

334. Custodial orders are youth residential centre orders or youth justice centre orders: *Children, Youth and Families Act 2005* (Vic) ss 360(1)(i)–(j). At their index sentence, eight children were sentenced to a youth residential centre order and 157 children were sentenced to a youth justice centre order.

- 6.20 Participants at both the Council's roundtables commented on the high rate of children known to child protection among children sentenced to custodial orders. They emphasised that early intervention, and the linking of supportive services to early contacts with the criminal justice system, are crucial.
- 6.21 A number of participants expressed surprise at the high proportion of children sentenced to a custodial order who had *no* prior contact with the child protection system. Participants agreed that the fact that a child had no child protection history did not necessarily imply a lack of comparable trauma history. As two participants commented, it was likely that a significant proportion of the group with no child protection history may also have experienced trauma, but that those children were 'not on anyone's radar'. Participants commented that some children from culturally and linguistically diverse (CALD) backgrounds experienced significant trauma prior to arriving in Australia, but because their parents were trying to manage their child's trauma-related behaviour, child protection concerns were not raised. Therefore, some of these children had little or no intervention before appearing in court charged with criminal offences. Roundtable participants agreed that these children sometimes 'go from zero to hitting the court hard', but 'what we don't know is how many contacts they have had with police, or their pathways' in to the youth justice system.³³⁵ These comments are consistent with the findings of a recent Victorian youth justice review that children and young people from CALD backgrounds comprised 39% of the custodial population.³³⁶
- 6.22 Another participant suggested that some of the children with no child protection background who were sentenced to custodial orders might belong to a distinct group of offenders. This group might begin offending later in adolescence and then stop, rather than engaging in criminal behaviour from a young age and continuing to offend.³³⁷

Aboriginal and Torres Strait Islander children

- 6.23 Previous research suggests that Aboriginal and Torres Strait Islander children are over-represented in both the child protection system and the youth justice system (see [4.41]–[4.46]). Consistent with this research, Aboriginal and Torres Strait Islander children in the study group were over-represented in every sentence type and child protection category, particularly among children sentenced to immediate custody (Figure 25). Aboriginal and Torres Strait Islander children comprised 1.6% of the 808,556 Victorian people aged 10–20 on 30 June 2016.³³⁸ In contrast, of the 165 children sentenced to a custodial order (a youth residential centre order or a youth justice centre order), Aboriginal and Torres Strait Islander children comprised:
- 21% of children sentenced to a custodial order who had also been the subject of a report to the child protection service (17 children);
 - 35% of children sentenced to a custodial order who had also been the subject of a child protection order (14 children); and
 - 33% of children sentenced to a custodial order who had also experienced residential care (11 children) (Figure 25).
- 6.24 Therefore, the greatest over-representation of Aboriginal and Torres Strait Islander children occurred at the intersection between the most severe sentence type (custodial orders) and the most serious end of the child protection system (child protection orders, out-of-home care and residential care) (Figure 25).

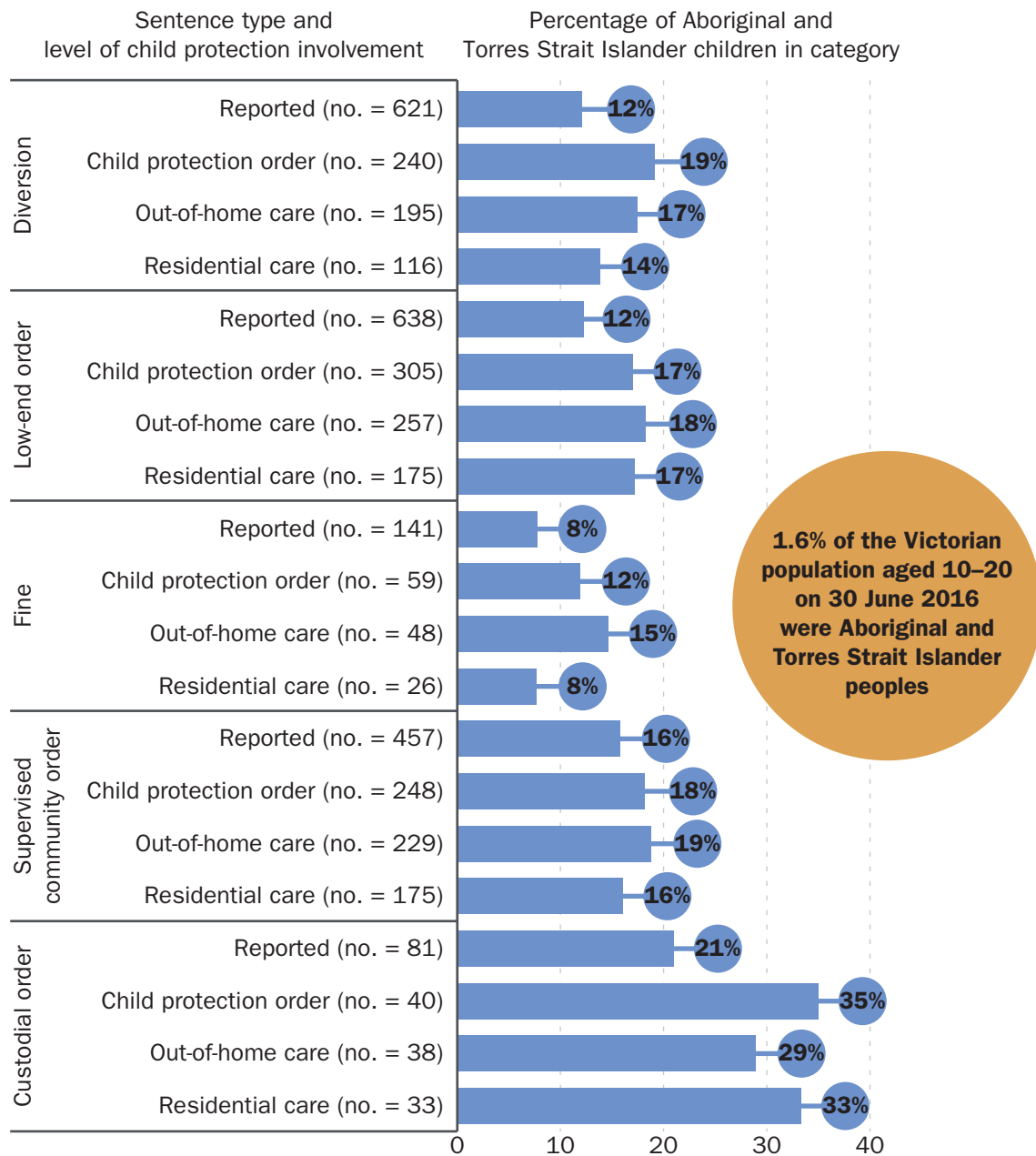
335. Participant at Roundtable 1: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (2 April 2019).

336. Victorian Auditor-General (2018), above n 132, 19; see also discussion at [4.48].

337. Roundtable 1: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (2 April 2019).

338. Australian Bureau of Statistics (2018) above n 18.

Figure 25: Proportion of Aboriginal and Torres Strait Islander children among children sentenced to particular sentence types and known to the child protection service³³⁹



Follow-up questions in the second report

6.25 The Council's second report for this project will include a more detailed analysis of the association between age, gender, criminal justice factors such as offence type, prior offences and sentence type, and child protection factors such as age at first report and whether a child was placed in out-of-home care. For example, the Council will examine whether children known to the child protection service at their index sentence were more likely to have prior offences than children who were not known to the child protection service.

339. Each bar on the graph looks at the proportion of Aboriginal and Torres Strait Islander children among the children sentenced to that order with that level of child protection intervention. A child's most severe sentence at their index sentence was used for this analysis. Therefore, the groups of children sentenced to particular sentence types shown in Figure 26 do not overlap. However, the child protection categories do overlap. For example, 165 children were sentenced to a custodial order, and these children do not overlap with the 1,017 children sentenced to a supervised community order. Of the 165 children sentenced to a custodial order, 81 children had been the subject of a report to the child protection service. These children overlap with the 40 children sentenced to a custodial order who had been the subject of a child protection order. For each of these categories, the proportion who were Aboriginal and Torres Strait Islander children are shown.

7. Are children first sentenced at a young age more likely to be known to child protection?

- 7.1 The Council's 2016 youth reoffending study found that the younger children were at their first sentence, the more likely they were to reoffend generally, to reoffend violently, to progress to the adult criminal justice system and to be sentenced to a term of adult imprisonment before their 22nd birthday.³⁴⁰
- 7.2 Previous research suggests that children who are younger at their first youth justice contact are more likely to be known to child protection. Children known to child protection 'have a younger age of first contact with the criminal justice system compared to the overall youth justice population'.³⁴¹ This chapter examines whether there was an association between a child's age at first sentence or diversion and the likelihood that they were known to child protection.

Research Question 4: Age at first sentence and child protection involvement

Are children first sentenced at a young age more likely than older children to be known to the child protection service?

Age at first sentence

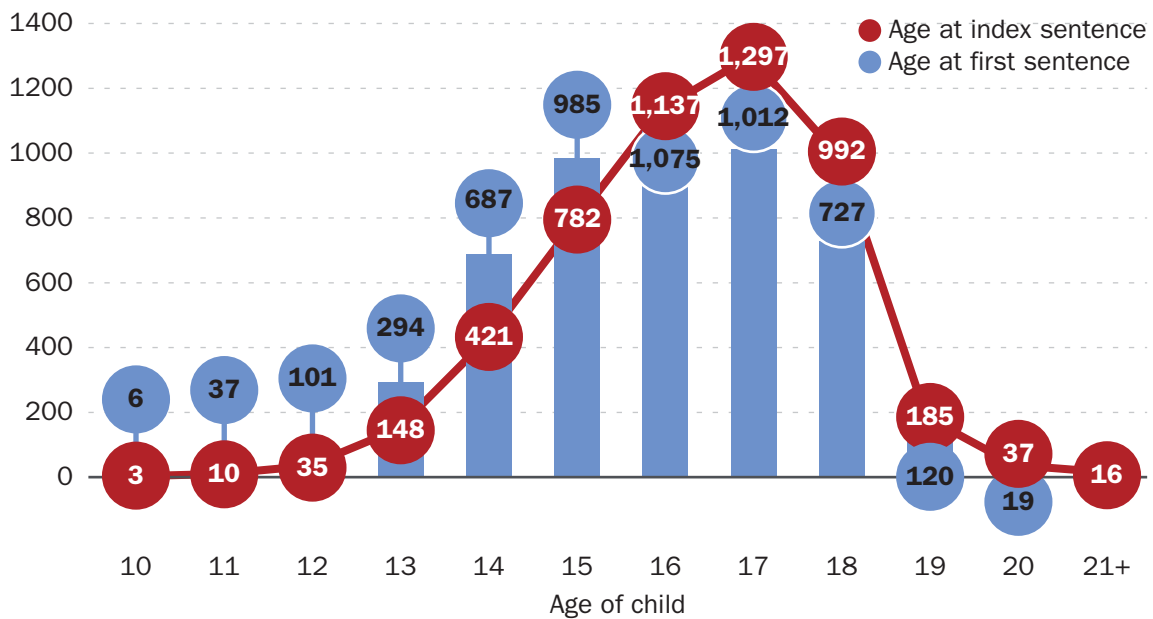
- 7.3 There were two key age measures for children in the study group:
1. a child's age at their **index sentence** (the sentence or diversion case in 2016 or 2017 that brought the child into the Council's study group); and
 2. a child's age at their **first sentence** (the first sentence or diversion the child received in their lifetime).
- 7.4 For the analysis in this chapter, children were classified according to their age at **first sentence**. For example, if a child was aged 16 at their index sentence in 2016 or 2017 but was aged 10 the first time they were sentenced or diverted in the Children's Court, the child was classified as being aged 10 at first sentence. Age at first sentence or diversion was chosen as a significant milestone in a child's youth justice trajectory. It is a more meaningful measure than the index sentence, which is likely to be a more random point in a child's involvement with youth justice.

340. Sentencing Advisory Council (2016), above n 19, 52. See also Shuling Chen et al., *The Transition from Juvenile to Adult Criminal Careers*, New South Wales Crime and Justice Bulletin no. 86 (2005).

341. Baidawi and Sheehan (forthcoming, 2019), above n 205, 17; see also Australian Institute of Health and Welfare (2017), above n 38; McFarlane (2018), above n 25.

7.5 Figure 26 shows the number of children in the study group according to their age at their index sentence and their age at first sentence. For example, three children in the study group were aged 10 at their index sentence, while six children in the study group were aged 10 at their first sentence. When first sentence is used as an age measure, the study group has a higher proportion of younger children, as would be expected.

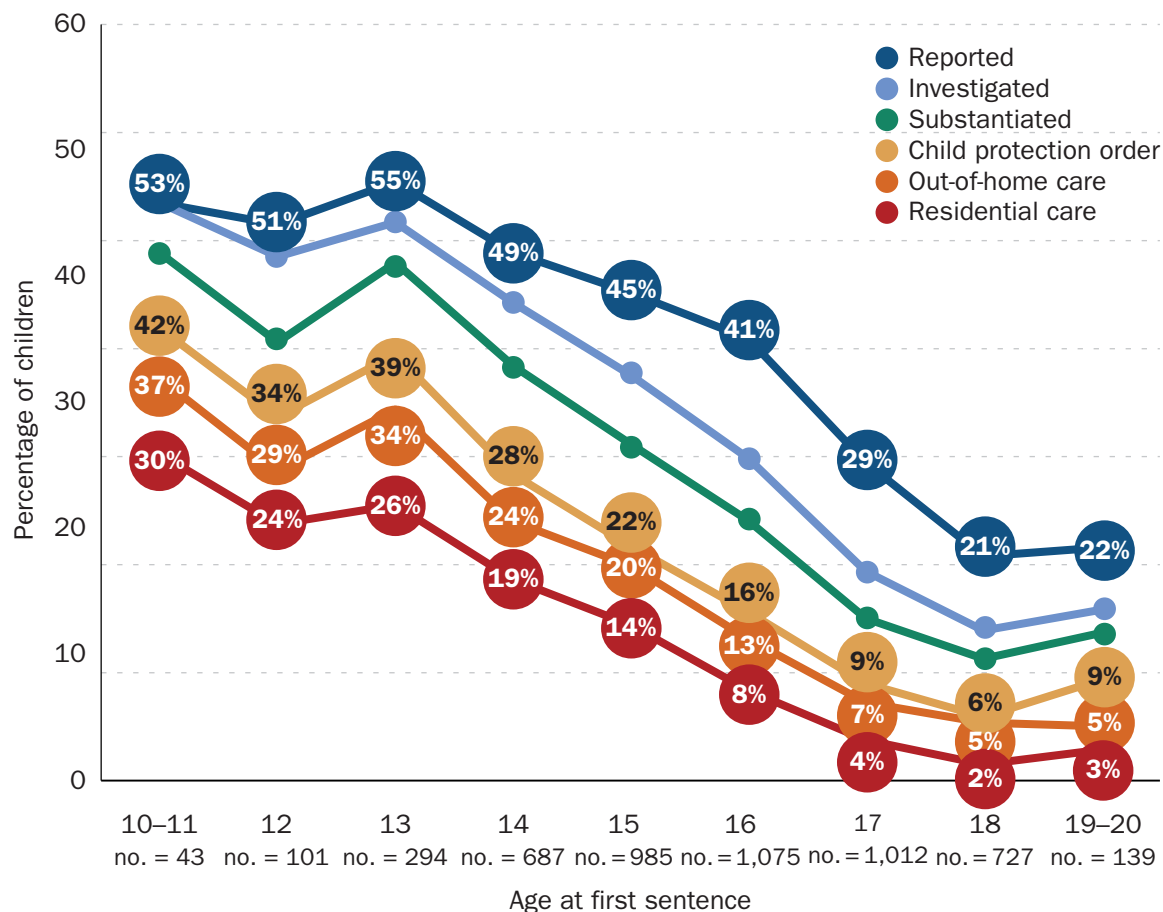
Figure 26: Number of children in the study group, by age at index sentence and age at first sentence



Overview: the younger children were at first sentence, the more likely they were to be known to child protection

7.6 There was a clear relationship between a child's age at their first sentence and the likelihood of (and level of) child protection involvement. The younger children were at first sentence, the more likely they were to have:

- been the subject of a report to the child protection service at least once in their life (younger children were also more likely to have been the subject of a report that was investigated or substantiated);
- been the subject of a child protection order made in the Children's Court (this means the Children's Court found the child in need of protection or, if a protection application was issued but not determined, the court decided that an interim order was needed to keep the child safe until it determined the protection application);
- experienced out-of-home care at least once in their life; and
- experienced residential care (Figure 27).

Figure 27: Age at first sentence and the prevalence of a child protection history³⁴²

Younger children were more likely to have been the subject of a child protection report

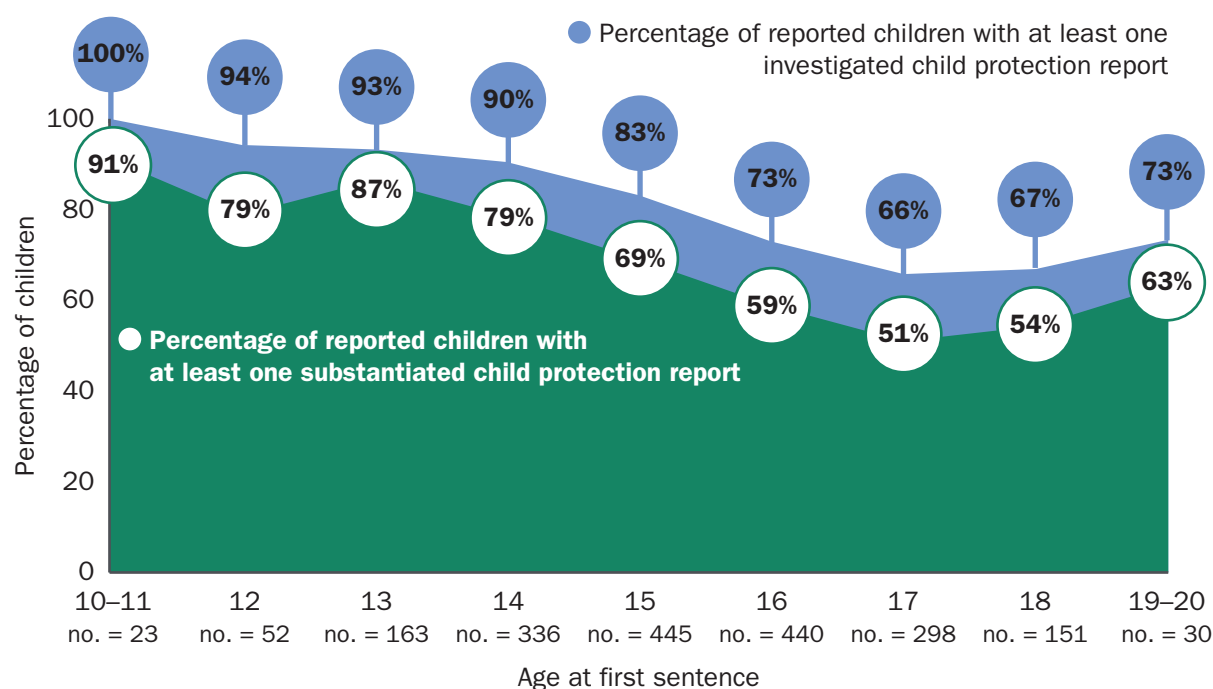
7.7 Over half of the children who were first sentenced aged 10–13 were the subject of at least one child protection report (54% or 238 children), compared with less than one-quarter of people aged 18–20 (21% or 181 people). The proportion of sentenced children with at least one child protection report decreased with each year of age at first sentence (Figure 27).

342. Six children in the study group were first sentenced aged 10, and 37 children were first sentenced aged 11. Due to privacy concerns and the volatility of small numbers, these children were combined into one subgroup of 'aged 10–11' for the analysis in this chapter. The age shown in the graphs in this chapter is the child's age at first sentence, not, for example, their age at the time they experienced residential care, which could have been before, at the time of or after their first sentence date.

Younger children were more likely to have investigated and substantiated reports

7.8 Looking at the 1,938 children who were the subject of at least one child protection report (the child protection report group), the younger those children were at first sentence, the more likely they were to have had at least one of their child protection reports investigated. For example, all the children aged 10–11 at first sentence who had been the subject of a child protection report had at least one report investigated (Figures 27 and 28).

Figure 28: Children who were the subject of at least one report to the child protection service (1,938 children), by age at first sentence and the proportion of children who had at least one report investigated or substantiated



7.9 As discussed at [5.18]–[5.21], when a report is made to the child protection service, intake staff gather information and assess the seriousness of the concerns raised and the perceived risk to the child before deciding whether further action is necessary (such as an investigation). One hypothesis for the finding in Figure 28 is that a higher proportion of younger children who had been the subject of a child protection report were the subject of serious concerns reported to the child protection service.

7.10 Stakeholders agreed that the higher investigation rate of children who were younger at first sentence suggested that those children were more likely than older children to have been the subject of more serious child protection reports. One participant at Roundtable 2 suggested that, 'we would expect that children who come into the justice system early face the most significant adversity, so the fact that such a significant proportion of children who are younger at first sentence were known to child protection services could be interpreted as saying that we have a functioning child protection system, that it's actually noticing these children'.³⁴³

343. Roundtable 2: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (4 April 2019).

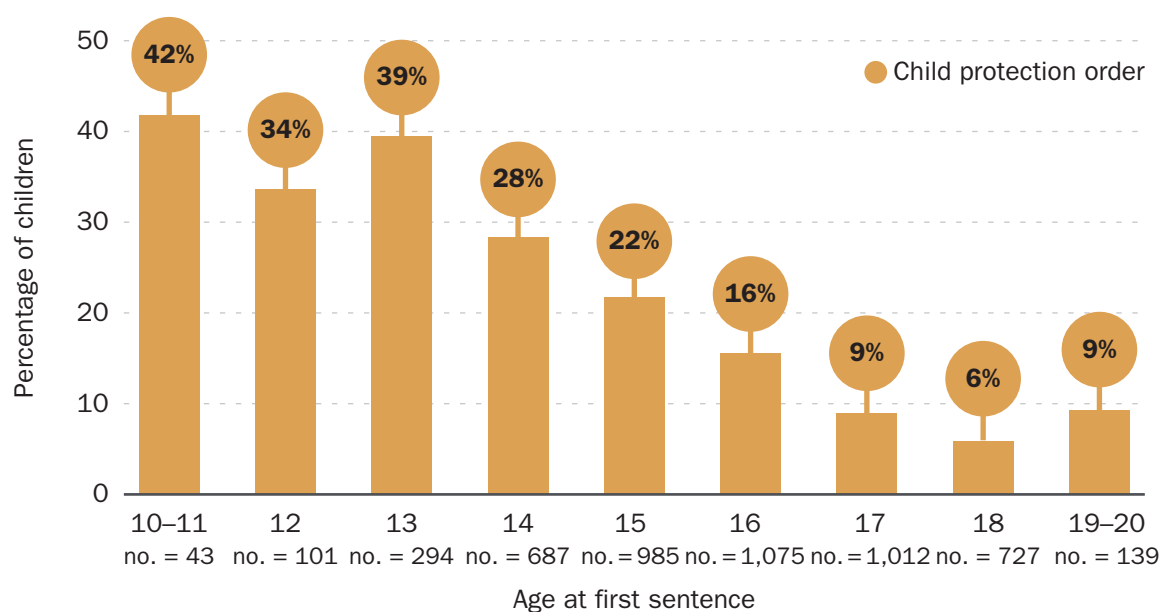
- 7.11 The Council's second report for this project will examine whether age at first report to the child protection service is associated with age at first sentence. The Australian Institute of Health and Welfare notes that:

Age is one of the factors that child protection workers consider when determining the time taken to respond to a [report], the type of response, and whether a [report] will be substantiated. Across Australia in 2016–17, children in younger age groups were more likely to be the subjects of substantiations than those in older age groups.³⁴⁴

Younger children were more likely to have been the subject of a child protection order

- 7.12 Of children aged 10–13 at first sentence, 38% were the subject of a child protection order at least once in their lifetime (168 children). Each year of age was associated with a decrease in the proportion of sentenced children who were the subject of a child protection order (Figure 29).

Figure 29: Age at first sentence and the prevalence of a child protection order³⁴⁵



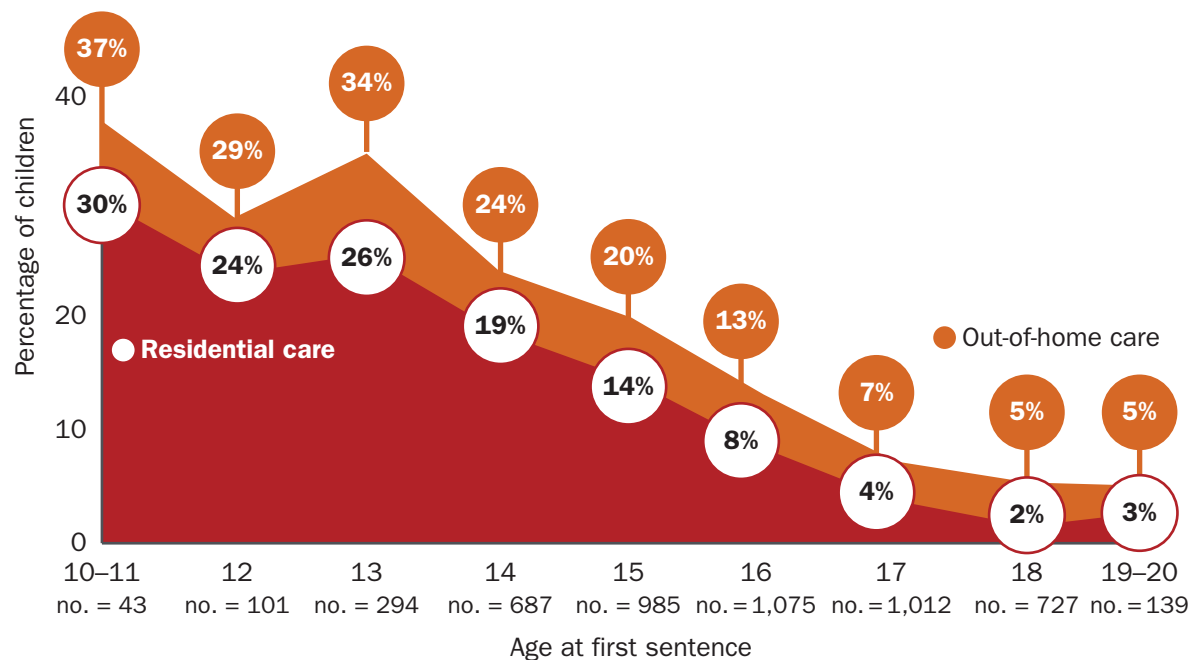
344. Australian Institute of Health and Welfare (2018), above n 52, 23.

345. Six children in the study group were first sentenced aged 10, and 37 children were first sentenced aged 11. Due to privacy concerns and the volatility of small numbers, these children were combined into one subgroup of 'aged 10–11' for the analysis in this chapter. The age shown in the graphs in this chapter is the child's age at first sentence, not, for example, their age at the time they experienced residential care, which could have been before, at the time of or after their first sentence date.

Younger children were more likely to experience out-of-home care

- 7.13 The younger children were at first sentence, the more likely they were to experience out-of-home care (Figures 27 and 30).³⁴⁶ Of children in the study group who were first sentenced age 10–13, around one-third had experienced out-of-home care in their lifetime (33% or 146 children).
- 7.14 Children first sentenced aged 10–13 were also far more likely than older children to have experienced residential care: 26% of children first sentenced aged 10–13 experienced residential care (112 children), but 9% of children first sentenced aged 14 or older experienced residential care (413 children) (Figure 30).

Figure 30: Age at first sentence and the prevalence of out-of-home care and residential care³⁴⁷



346. To be included in the count of out-of-home care, a child had to have experienced out-of-home care at least once in their lifetime, whether before, during or after their sentence date.

347. Six children in the study group were first sentenced aged 10, and 37 children were first sentenced aged 11. Due to privacy concerns and the volatility of small numbers, these children were combined into one subgroup of 'aged 10–11' for the analysis in this chapter.

Age at first sentence was also associated with care type

- 7.15 Age at first sentence was not only associated with the likelihood that a child experienced out-of-home care (Figure 30), but it was also associated with the *type* of out-of-home care experienced (Table 2). In this analysis children aged 12 were grouped together with children aged 10–11 due to relatively small numbers in out-of-home care. Of the 144 children in the study group who were aged 10–12 at first sentence, 45 children had experienced out-of-home care. Looking at children who had experienced out-of-home care, Table 2 shows the proportion of each age group who had experienced each care type.
- 7.16 The clearest association between age at first sentence and care type was seen for residential care. Around four in five of the 45 children in the care group who were first sentenced aged 10–12 experienced residential care, whether before, during or after their first sentence (82% or 37 children). Around three in four children in the care group who were first sentenced aged 13–15 experienced residential care (75% or 345 children), with the proportion decreasing with each year of age thereafter.
- 7.17 Secure welfare is a measure of last resort for the most at-risk and troubled children (see [2.16]). Children who were aged 13 and 14 at first sentence were more likely than both their younger and older counterparts to experience secure welfare. Of the children who had experienced out-of-home care:
- one in four children aged 13 at first sentence experienced secure welfare (25%);
 - one in five children aged 14 at first sentence experienced secure welfare (22%); and
 - around one in six children first sentenced aged 10–12 (17%) or aged 15 (16%) experienced secure welfare (Table 2).
- 7.18 The findings shown in Table 2 suggest that children first sentenced aged 10–15 who have experienced out-of-home care are likely to be a particularly troubled and traumatised group of children. Participants at both roundtables agreed.³⁴⁸
- 7.19 Participants at both roundtables also suggested that this was likely a cause and a consequence of these children's care history. Underlying risk factors often precipitated interventions, but some of those interventions, such as criminal justice responses to children in care, often contributed to offending. Therefore, a child's experience of out-of-home care was seen as highly relevant to sentencing.³⁴⁹
- 7.20 Participants emphasised the need to determine whether care interventions were effective, and to intervene earlier in order to address underlying risk factors and health issues, such as neuro-developmental disability. As one participant at Roundtable 2 pointed out:
- [a] lot of those children have been excluded from [a] education in primary school ... there's much earlier points at which support could be offered. A lot of those children would only have a disability diagnosed after they come into contact with the criminal justice system, another point of intervention. A lot of those children are excluded from mental health services because their issue is considered trauma-related, not mental health-related, another point where there's a failure of intervention.³⁵⁰

348. Roundtable 1: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (2 April 2019); Roundtable 2: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (4 April 2019).

349. Roundtable 1: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (2 April 2019); Roundtable 2: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (4 April 2019).

350. Roundtable 2: 'Crossover Kids' Stakeholder Roundtable Discussion Forum (4 April 2019).

7.21 Above all, participants warned against interpreting the data as showing that children in care were doomed to offend seriously, which would further entrench disadvantage.

Table 2: Age at first sentence and type of out-of-home care³⁵¹

Type of out-of-home care	Age						
	10–12	13	14	15	16	17	18–20
Foster care	64%	61%	59%	56%	56%	59%	63%
Permanent care	0%	2%	3%	3%	6%	5%	13%
Kinship care	62%	68%	58%	64%	61%	56%	65%
Residential care	82%	74%	78%	72%	64%	52%	33%
Secure welfare	17%	25%	22%	16%	10%	13%	2%
Other	4%	10%	2%	4%	6%	0%	2%
Total out-of-home care (number)	45	101	165	196	141	73	46
Total out-of-home care (%)	100%	100%	100%	100%	100%	100%	100%
Total (study group)	144	294	687	985	1,075	1,012	866

351. Care should be taken with the group aged 10–12, which had 45 children who had experienced out-of-home care, and the group aged 18–20, which had 46 people who had experienced out-of-home care. The relatively low number of people in those age groups can distort the overall percentages. As children who had experienced out-of-home care are likely to have experienced more than one care type, the categories in Table 2 overlap, and therefore the percentages do not add to 100%.

8. Concluding observations

Childhood trauma and out-of-home care

- 8.1 On any given day, the Criminal Division of the Children's Court is likely to sentence children who are known to the Victorian child protection service due to those children's experience of abuse, harm, neglect, trauma, parental death or incapacitation, or the risk of harm.
- 8.2 This report has found that children known to the child protection service are substantially over-represented among sentenced and diverted children. Children who have experienced out-of-home care, especially residential care, and Aboriginal and Torres Strait Islander children, especially girls, were particularly over-represented.
- 8.3 The highest rate of children with child protection involvement was found among children sentenced to custodial sentences and among children who were aged 10–13 at first sentence. The highest rate of over-representation of Aboriginal and Torres Strait Islander children was found at the intersection of the most severe sentence type (custodial orders) and the most serious end of the child protection system (child protection orders, out-of-home care and residential care).
- 8.4 Children in out-of-home care, particularly residential care, are some of the most vulnerable, traumatised and disadvantaged children in our community. As Victoria Legal Aid have observed:
- [a]cross Australia in recent years there has been a policy emphasis on keeping children with their families wherever possible. Out-of-home care is generally considered to be the placement of 'last resort', and is only used where the Children's Court deems that children are at significant risk of harm, abuse or neglect from their own families and cannot remain in the home.
- Children in out-of-home care are thus some of the most vulnerable in the State. This is particularly true of children in residential care, many of whom have complex needs that mean that they have been unable to be placed within a kinship or foster-care option, or such options have broken down.³⁵²
- 8.5 The Victorian Government has committed to reducing the use of residential care and 'transform[ing] it from a long-term placement option into a short-term "intensive trauma-informed behaviour support service"'.³⁵³ The government's *Roadmap for Reform* acknowledges that '[o]utcomes are poor for children who live in residential care' and when they leave care,³⁵⁴ and that '[v]ulnerable children deserve safe, comfortable and home-like environments where they can heal, recover and thrive'.³⁵⁵ The *Roadmap for Reform* identifies 'improving the quality of residential care and all forms of care services' as a priority.³⁵⁶
- 8.6 Arguably, one measure of success of residential care reform measures will be if the proportion of sentenced children who have experienced residential care, as found in this report, decreases over time. However, while children in out-of-home care, particularly residential care, continue to be over-represented in the youth justice system, it is essential that sentencing law and practice responds to this vulnerable group of children.

352. Victoria Legal Aid (2016), above n 7, 5.

353. Ibid 15.

354. Victorian Government (2016), above n 197, 8.

355. Victorian Government (2018), above n 197, 11.

356. Ibid.

Children first sentenced aged 10–13 are particularly vulnerable

8.7 The younger that children were at first sentence, the more likely they were to have a child protection background. Of children first sentenced aged 10–13, 54% were the subject of at least one child protection report (238 children), 38% were the subject of a child protection order (168 children) and 33% experienced out-of-home care (146 children). These findings are particularly troubling when considered alongside the findings in the Council's 2016 youth reoffending study that the younger children are at their first sentence, the more likely they are to reoffend generally, to reoffend violently and to receive a sentence of adult imprisonment before their 22nd birthday.³⁵⁷

Relevance of childhood trauma to sentencing a child

8.8 A child's experience of abuse and trauma can disrupt healthy brain development; it can 'damage the brain's crisis response system', resulting in a child 'remaining constantly in crisis mode, even when there is no threat'.³⁵⁸ Such a child 'remains hyper-vigilant and overreacts to minor events', and 'feeling constantly threatened [they] can engage in frequent fight or flight behaviors'.³⁵⁹ Maltreated adolescents who start 'acting out' may be 'less likely to receive sympathetic attention than younger children, and are more likely to run away, become homeless and engage in illegal and survival activities that bring them to the attention of police'.³⁶⁰

8.9 For children removed from their families into out-of-home care, this may also mean removal from their community, friends and school, and their experience of care can compound the trauma that they have already experienced. Previous research also suggests that children in care may be more likely to be prosecuted for behaviour that would usually be dealt with in the family home, contributing to their over-representation among sentenced and diverted children.

8.10 Childhood trauma is, therefore, clearly relevant to sentencing a child, particularly when there is a nexus between the trauma and a child's offending. The focus on rehabilitation in the Children's Court requires an understanding of the context of a child's offending and the role played by circumstances such as abuse, separation from family and the experience of out-of-home care. Less clear is the legal framework that sits behind the consideration of a child's background at sentencing.

8.11 The Court of Appeal has specified that the matters to be taken into account in sentencing a child under section 362 of the *Children, Youth and Families Act 2005* (Vic) ('CYF Act') require the sentencing court to consider 'the effect of the proposed sentence on the child ... and to impose a sentence which fits the young offender as much as – or perhaps even more than – it fits the crime'.³⁶¹ Section 362 includes the need to strengthen the relationship between the child and the child's family and the desirability of allowing the child to live at home.³⁶²

357. Sentencing Advisory Council (2016), above n 19, 52.

358. Griffin and Sallen (2013), above n 164, 9–10.

359. Ibid 10.

360. Cashmore (2011), above n 38, 34.

361. *CNK v The Queen* [2011] 32 VR 641, [4]–[16].

362. *Children, Youth and Families Act 2005* (Vic) ss 362(1)(a)–(b).

However, the section is silent in relation to a child who currently is not safe with their family and who cannot live at home. There is no requirement in section 362 for the court to take into account:

- the child's experience of abuse, trauma, neglect, loss, removal from family or out-of-home care and how these circumstances relate to the child's offending;
- the need to ensure that the child has a safe, stable and secure place to live; or
- the need to protect the child from harm or the risk of harm.³⁶³

- 8.12 The court may have regard to 'any report, submission or evidence ... on behalf of the child who is to be sentenced',³⁶⁴ which would allow the court to consider submissions about the context of the offending as well as aggravating and mitigating factors.
- 8.13 Unlike the *Sentencing Act 1991* (Vic), which lists the sentencing factors applicable to adults, the CYF Act does not expressly list the sentencing factors that the court must have regard to when sentencing a child. For the most part, these factors are derived from the common law. However, common law principles about the relevance to sentencing of childhood abuse, neglect or trauma mainly relate to adult offenders³⁶⁵ or to older children whose offending is serious enough to bring them into the adult jurisdiction.³⁶⁶ Childhood disadvantage is clearly very relevant to sentencing in the Children's Court. However, little in the way of case law or academic discussion sets out principles about the relevance of childhood trauma to sentencing in cases where the offender is still a child and the trauma is proximate and related to their offending. Similarly, there is little guidance in the legislation, case law or academic discussion as to how common law principles relating to the relevance of childhood abuse and trauma interact with the sentencing matters in the CYF Act.
- 8.14 In the context of decisions about *doli incapax* (whether a child aged 10–13 has criminal capacity), the common law has established that a child's experience of abuse or neglect is relevant to the consideration of whether they have criminal capacity (see further [3.30]). If a child aged under 14 at the time of an offence has been raised in an environment that includes violence, dishonesty, sexual abuse or other forms of criminal behaviour, this environment is directly relevant to whether the child was aware that their conduct is morally wrong. This in turn is relevant to whether the child is criminally responsible for the offence.³⁶⁷ In terms of a child's criminal capacity, the question of *doli incapax* is a binary consideration – the child either had capacity and is culpable or did not have capacity and is not culpable. In contrast, at the sentencing stage, questions of moral culpability are a matter of degree. A background of abuse that has relevance to the child's offending – for example, abuse affecting the child's understanding of what is morally wrong – is arguably relevant to the assessment of the child's culpability for a related offence.

363. The list of reports and other matters to be taken into account by a court in sentencing a child is set out in Part 5.2, Division 5 of the *Children, Youth and Families Act 2005* (Vic).

364. *Children, Youth and Families Act 2005* (Vic) s 358(c).

365. See for example, *Bugmy v The Queen* (2013) 249 CLR 571; *R v AWF* [2000] 2 VR 1; *DPP v Walsh (A Pseudonym)* [2018] VSCA 172 (17 July 2018) [26]–[34]; *R v McKee & Brooks* (2003) 138 A Crim R 88, 92, 94; *R v Maschoe* [2000] VSCA 193 (11 October 2000) [4]; *DPP v Wilson* [2002] VSC 299 (24 July 2002) [23]–[24]; *R v Fuller-Cust* [2002] 6 VR 496, 515, 531–533; *DPP v Tewksbury (A Pseudonym)* [2018] VSCA 38 (27 February 2018); *R v Reynolds* (Unreported, 7 December 1998, SW Court of Criminal Appeal) 2; Freiberg (2014), above n 111, 310 [4.105].

366. *AH v The State of Western Australia* [2014] WASCA 228 (10 December 2014) [125]; *R v 'DP' (A Child)* [2003] WASCA 92 (6 May 2003) [56], [61]; *DBW (A Child) v The State of Western Australia* [2011] WASCA 206 (30 September 2011) [57], [60]–[61]; *DPP v Anderson* [2013] VSCA 45 (7 March 2013) [3], [59], citing *Hogarth v The Queen* [2012] 37 VR 658, 666 [30]–[31].

367. *RP v The Queen* (2016) 259 CLR 641 [8], [9].

- 8.15 The lack of a legislative or common law framework for considering child protection issues in sentencing children may undermine the principle of transparency in sentencing and may risk inconsistency in the consideration of these matters, despite their centrality to the offending of many children.
- 8.16 The equivalent to the Victorian CYF Act in England and Wales, the *Children and Young Persons Act 1933* (UK), requires the sentencing court to have regard to child welfare considerations. These include securing proper provision for education and training, removing the child or young person from undesirable surroundings,³⁶⁸ and recognising the 'need to choose the best option for the child or young person taking account of the circumstances of the offence'.³⁶⁹ Critically, this provision is augmented by a definitive guideline on sentencing children and young people, which provides that, '[i]n having regard to the welfare of the child or young person, a court should ensure that it is alert to [among other factors] ... the effect on children and young people of experiences of loss and neglect and/or abuse'.³⁷⁰ Further, the list of mitigating factors provided in the definitive guideline includes:
- Unstable upbringing including but not limited to:
- time spent looked after [in out-of-home care]
 - lack of familial presence or support
 - disrupted experiences in accommodation or education
 - exposure to drug/alcohol abuse, familial criminal behaviour or domestic abuse
 - victim of neglect or abuse, or exposure to neglect or abuse of others
 - experiences of trauma or loss.³⁷¹
- 8.17 In their recent youth justice review, Penny Armytage and Professor James Ogloff AM observed that the 'approach to sentencing and orders contained in the [CYF Act] ... is not a genuinely distinct response to the needs of adolescents'.³⁷² The reviewers recommended the creation of a new Youth Justice Act, separate from the CYF Act, and that the Act 'provide[s] a clear statement of the purpose, role and principles for Youth Justice'.³⁷³ In light of the prevalence of children with child protection backgrounds among children in the youth justice system, the creation of a new Act may provide an opportunity to review the principles and purposes of sentencing children. It may also provide an opportunity to consider whether the sentencing framework would be strengthened by the inclusion of a non-exhaustive list of sentencing factors applicable to sentencing children.
- 8.18 The Council's second report for this project will further examine the characteristics of children at the nexus of the child protection and youth justice systems and the principles that are relevant to sentencing children with child protection backgrounds.

368. *Children and Young Persons Act 1933* (UK) s 44.

369. Sentencing Council for England and Wales (2017), above n 163, 5 [1.11].

370. *Ibid* 5–6 [1.12].

371. *Ibid* (2017) 16.

372. Armytage and Ogloff (2017), above n 132, 3.

373. *Ibid* vol. 2, 5 (Recommendation 6.1). The government has announced that it accepts, or accepts in principle, all of the recommendations in the report: Premier of Victoria, 'Building a Modern Youth Justice System', Media Release (5 August 2017) <<https://www.premier.vic.gov.au/building-a-modern-youth-justice-system/>> at 4 March 2019.

Appendix 1: Consultation

Meeting	Date
Meeting with representatives of the Crime Statistics Agency	27 February 2018
Meeting with representatives of the Department of Health and Human Services	13 March 2018
Meeting with Dr Susan Baidawi and Professor Rosemary Sheehan, Monash University	29 March 2018
Meeting with representatives of the Children's Court of Victoria	15 May 2018
Meeting with representatives of the Department of Health and Human Services	29 May 2018
Meeting with Superintendent Richard Watkins, Victoria Police, Eastern Region, Division 1, and Dr Renee O'Donnell, Monash University	7 August 2019
Meeting with representatives of Jesuit Social Services	21 September 2018
Meeting with representatives of Victoria Legal Aid	24 September 2019
Observer at Community around the Child Forum (Victoria Police, Residential Care Staff, Department of Health and Human Services and Department of Justice and Community Safety)	8 November 2018
Meeting with Dr Kath McFarlane, Kath McFarlane Consulting	4 December 2018
Meeting with representatives of the Department of Health and Human Services	1 April 2019
Roundtable 1: 'Crossover Kids' Stakeholder Roundtable Discussion Forum	2 April 2019
Meeting with representatives of the Children's Court of Victoria	3 April 2019
Roundtable 2: 'Crossover Kids' Stakeholder Roundtable Discussion Forum	4 April 2019

Appendix 2: Methodology

Data

The 5,063 children in the study group were drawn from the Children's Court Courtlink database.³⁷⁴

Data linkage

The research project required linkage between Children's Court data held on Courtlink and child protection data held by the Department of Health and Human Services. To facilitate the data linkage process, the Council, the Children's Court, and the Department of Health and Human Services signed a deed of confidentiality that would govern how data would be shared and used in order to answer the research questions for this project.

The project drew on 22 years of child protection data going back to 18 June 1996 (the date of the earliest report about a child in the study group) and extending to the date of the data extraction (3 September 2018, although the most recent record was dated 1 September 2018). This data was matched with sentencing data from the Children's Court Courtlink database and the Council's own reoffending database, both of which have data from July 2004 to June 2018.

For the purposes of the research project, the Council prepared a dataset ('the Council's dataset') using data extracts from the Courtlink case management system. The extracts are provided to the Council on a quarterly basis as part of a separate agreement between the Council and the Children's Court.

The Council's dataset contained records for approximately 5,000 people sentenced or diverted in the Children's Court in 2016 and 2017, including the name, gender and date of birth of each person sentenced, as well as a case identifier, list of offences and charges and sentence outcomes for each charge and overall case.

A new dataset ('the Linkage dataset') was created from the Council's dataset. The Linkage dataset contained only the names, gender and dates of birth of people sentenced in the Children's Court in 2016 and 2017. The Linkage dataset did not contain offences, charges, sentence outcomes or case identifiers. Each record in the Linkage dataset was assigned a serial number in place of the Courtlink number. This was to allow the child protection data to be linked back into the Council's dataset.

The Council provided the Linkage dataset to the Department of Health and Human Services (DHHS). The DHHS conducted the data linkage process, which involved identifying records in the child protection dataset (the Client Relationship Information System (CRIS)) that related to records of people in the Linkage dataset and extracting the data. The DHHS created a new dataset ('the DHHS linked dataset') that contained the relevant child protection information for each matched person in the Linkage dataset. On completion of the data linkage process, the Department of Health and Human Services provided the DHHS linked dataset to the Council.

The Council integrated records of children in the DHHS linked dataset into the Council's dataset. This became the dataset used for the project. The Council also performed data-cleaning and quality assurance checks to ensure the linkage operation was successful, and to address other issues such as inconsistencies and missing data (for example, checking to make sure that each unique person only had one date of birth recorded).

374. Four times a year, Court Services Victoria sends the Council extracts from the Courtlink case management system containing sentencing data from the Criminal Division of the Children's Court. The Council has sentencing data from July 2004 onwards.

Matching child protection and sentencing data allowed the Council to determine the prevalence (and level) of child protection involvement for sentenced and diverted children. It also allowed the Council to analyse the backgrounds of children at the nexus of the two systems, examine their offending patterns and sentences and compare the offending profiles of children who were, or were not, known to child protection.

The child protection data also included information about the Aboriginal and Torres Strait Islander status of children who had been the subject of a report to the child protection service. The Council did not have data on Aboriginal and Torres Strait Islander status for children who were not known to child protection.

Exclusions

The Council did not have data on remand,³⁷⁵ education factors, mental health or impairment, disability, culturally and linguistically diverse (CALD) backgrounds, or the rate at which charges were withdrawn or struck out due to submissions relating to *doli incapax* (see further [3.30]). The data on gender was restricted to the two categories of 'male' and 'female'. Data on non-binary gender categories is not currently available.

Number of out-of-home-care placements

The Council calculated the number of unique out-of-home care placements for each child in the care group. The number of placements was calculated by counting separate 'Placement IDs' in the child protection dataset. Each Placement ID represents a new placement for the dates specified on the placement record. For example, in the case of a child who was first placed with their maternal grandmother then placed with an aunt and then moved back to their maternal grandmother, each placement would have its own unique Placement ID, even though two of the placements were with the same person, namely the maternal grandmother. This is because the two placements with the maternal grandmother occur on different dates. So for this child, the data would show three out-of-home care placements. Therefore, while each new placement represents the child changing placements, it does not necessarily represent a *new carer*. The separate placement IDs in the data:

- include respite care placements (temporary short-term placements) that occur between other longer-term placements; and
- do not include respite care placements that occur within, or parallel to, longer term placements (for example, where a child's primary out-of-home care placement is supported by them being periodically looked after by a second set of carers). Respite care placements that occurred within the course of a longer-term placement were excluded from the data.

Care should be taken when using data about the number of out-of-home care placements experienced by a child where those placements occurred before 2008–09. Prior to the operation from 2008–09 of CRIS as an integrated and standardised child protection and out-of-home care client and case management system, data about out-of-home care placements was recorded in a decentralised system named FACTS that was separate from the child protection system. Recording of out-of-home care placements in FACTS had few business and data entry rules applied. Consequently, data entry practice was variable from one care provider to another. In some instances, this resulted in an overstatement of the number of placements experienced by a child when compared to placements in CRIS which since 2008–09 have been subject to rigorous and uniform business and data entry rules.

375. The Council will be examining the use of remand for children in a separate report.

In this report, the Council limited the analysis to two questions: (1) what proportion of children in the care group had more than one out-of-home care placement? And (2) what proportion of children in the care group had five or more out-of-home care placements? The findings on the proportion of out-of-home care placements described at [5.87] remained consistent even when the number of placements pre-2008–09 were re-coded to 0 (for children with no placements) or 1 (for children with one or more pre-2008–09 placements). During consultation on the findings, stakeholders also queried what influence respite care placements had on the overall number of placements for each child. As the data in relation to the number of placements is complex, further analysis is required to provide more detailed findings on the number of placements. The Council will investigate the number of placements further in Report 2, including the number of unique carers and the proportion of placements that were respite care placements.

Consultation

The Council met separately with a number of youth justice stakeholders to discuss the project, including representatives of the Department of Health and Human Services, the Victorian Children's Court, Victoria Legal Aid and Jesuit Social Services (Appendix I).

The Council again met with representatives of the Department of Health and Human Services and the Victorian Children's Court to discuss findings from the data and conducted two roundtable consultation meetings to discuss findings with key youth justice and child protection stakeholders. Roundtable participants included representatives of Charles Sturt University (Centre for Law and Justice), the Commission for Children and Young People; CREATE Foundation, the Department of Health and Human Services, the Human Rights Law Centre, Jesuit Social Services, the Law Institute of Victoria, Monash University (Social Work Department), the Children's Court Bar Association, the Justice-involved Young People Network (University of Melbourne), Victoria Police, Victoria Legal Aid, Whitelion, Youth Justice (Department of Justice and Community Safety), Youth Law and Youth Support and Advocacy Service (YSAS).

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