‘Crossover Kids’: Vulnerable Children in the Youth Justice System
Report 3: Sentencing Children Who Have Experienced Trauma
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‘Crossover Kids’: Vulnerable Children in the Youth Justice System

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Glossary

Accused
A person who is charged with a criminal offence.

Child
A person aged 10–17 inclusive at the time of an alleged offence and aged under 19 when a proceeding for the offence is commenced in the Children's Court: *Children, Youth and Families Act 2005* (Vic) s 3(1).

Child protection
The system for reporting and addressing concerns about a child's safety to the Victorian Child Protection Service. See *Child Protection Service (Victoria)*.

Child protection order
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 2005* (Vic): protection orders, interim accommodation orders, therapeutic treatment orders and permanent care orders.

Child protection report
A report to the Child Protection Service raising concerns that a child is in need of protection.

Child Protection Service (Victoria)
A service with functions including investigating reports that a child is at risk of harm and making a protection application to the Children's Court if it is believed that the child's safety cannot be ensured in parental care. The Child Protection Service is part of the Department of Health and Human Services.

'Crossover kid'
A child with involvement in both the criminal justice system and the child protection system. In this report, children are described as 'crossover kids', 'crossover children' or 'known to child protection' if they were sentenced or diverted from 1 January 2016 to 31 December 2017 and were the subject of at least one report to the Child Protection Service in their lifetime – whether before, at the time of or after their offence – even if their child protection and youth justice involvements were not concurrent.

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 *Children, Youth and Families Act 2005* (Vic) s 356D for the child to participate in and complete a diversion program.

Doli incapax
Someone presumed to be 'incapable of crime'. Children aged 10–13 (inclusive) at the time of an alleged offence are considered to be *doli incapax*, meaning 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.1

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

Known to child protection
A child who has been the subject of at least one report to the Child Protection Service, regardless of whether their child protection and youth justice involvements were concurrent. See also ‘Crossover kid’.

Offender
A person who has been found guilty of an offence or, in the case of youth diversion, has accepted responsibility for an offence.

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 (whereby the parent retains parental responsibility but places the child in out-of-home care). The term out-of-home care was in use in the study period for this report (2016 and 2017). In Victoria, this term is changing to care services.

Protection order
A final order made where the Children's Court has found a child to be in need of protection or a substantial and irreconcilable difference exists between the child and the person who has parental responsibility for the child: Children, Youth and Families Act 2005 (Vic) ss 274–275.

Residential care
Out-of-home care provided by paid staff, usually in a residential home accommodating up to four children.
Executive summary

This is the third and final of three reports by the Sentencing Advisory Council ("the Council") examining crossover children in Victoria. In this series of reports, the Council studied 5,063 children who were sentenced or diverted in the Children's Court of Victoria from 1 January 2016 to 31 December 2017 ("the study group") to identify the proportion who were the subject of at least one report to the Child Protection Service and the level of their child protection involvement. These children are considered to have dual involvement with the youth justice system and the child protection system; they are referred to in these reports as 'crossover children' or 'crossover kids'.

Aim

The Crossover Kids series explores the backgrounds of children sentenced or diverted in the Children's Court. It aims to understand how and why children become involved with the criminal justice system and particularly how the experience of trauma, which may be indicated by child protection involvement, can contribute to criminal justice involvement. Understanding the context of children's offending is vital to identifying opportunities for early intervention to prevent vulnerable children from entering the youth justice system. When such children do enter the youth justice system, just and effective sentencing requires that courts are equipped with sufficient information about the child and the context of the child's offending.

To that end, this report:

- examines the principles, as distilled from legislation and case law, that currently apply to sentencing children who have experienced trauma in Victoria;
- summarises the relevance of childhood trauma to childhood offending, based on research from scientific disciplines;
- considers the merits of legislated sentencing principles that relate to a child's experience of trauma and out-of-home care and provides examples of matters that could be included;
- examines the structure of the Children's Court and the effect of that structure on the framework for sentencing children who have experienced childhood trauma; and
- canvasses measures to support trauma-informed sentencing by strengthening the interface between the Family Division and the Criminal Division of the Children's Court of Victoria.

This report provides a summary of the sentencing policy issues that emerged from analysing and consulting on the findings of this project. The report does not make formal recommendations. Rather, it raises several suggestions for reform, subject to further investigation and consultation, in the context of discussing some of these policy issues.

Policy issues outside sentencing

The findings of Reports 1 and 2 of the Crossover Kids series have implications not only for sentencing but also for several policy issues beyond sentencing. Some examples of non-sentencing issues that were raised by stakeholders are noted in Chapter 1. For example, the findings about the particular vulnerabilities of children first sentenced aged 10–13 are relevant to considering calls to raise the age of criminal capacity. While this project focuses on sentencing matters, its findings may assist those tasked with developing policy in other areas.
The relevance of childhood trauma to sentencing children

There is now broad consensus that trauma can affect children’s neurological, psychological and even physical development. Children are particularly vulnerable to the effects of trauma: their brains are still developing, and trauma can interrupt or alter that process. In this context, trauma becomes a particularly relevant factor to consider in sentencing. It affects children’s culpability, their ability to comply with court-ordered conditions and their capacity to be rehabilitated, thus protecting the community in the long term. There is, however, currently limited guidance on how courts should take childhood trauma into account in sentencing children.

Existing guidance

The Children, Youth and Families Act 2005 (Vic) specifies particular matters – many of which are driven towards the sentencing goal of rehabilitation – that courts must take into account when sentencing children. There is, however, no specific reference to the relevance of childhood trauma or child protection involvement to sentencing. The Act requires courts to take into account the need to strengthen and preserve the child’s relationship with their family and the desirability of allowing the child to live at home; however, it is silent on how courts should do so if the child does not have a stable home or is not safe with their family. The Act is also silent on the importance of preserving child protection arrangements, such as out-of-home care placements, and the need to protect the child from further harm. The existing case law provides relatively little guidance on these issues. This is in large part because most children are sentenced in the Children’s Court, whereas most precedent about the relevance of childhood trauma to sentencing evolves in the context of the adult criminal jurisdiction, in which different sentencing purposes and factors apply.

Effects of trauma

Most children who experience serious trauma will also experience at least some psychological and neurological effects. Common consequences of trauma include:

- emotional dysregulation, such that a child may have difficulty recognising their own and others’ emotions and controlling their own;
- increased threat response, such that a child habituated to emotional or physical danger may be hypersensitive to risk, perceiving neutral or ambiguous situations as dangerous;
- altered reward sensitivity and attachment issues, which can affect a child’s experience of social interactions and expectation and experience of others’ approval, potentially resulting in the child’s isolation and difficulty reinforcing good behaviour in the child; and
- difficulties with executive functioning, which can reduce children’s ability to consider the consequences of their actions, control their impulses and follow instructions.

In addition to the negative effects of trauma itself, it can directly or indirectly cause or worsen diagnosable mental illnesses, neurological issues, developmental issues, fetal alcohol spectrum disorders, intellectual disabilities, traumatic brain injuries and hearing and communication difficulties. These complex issues, each of which can increase the likelihood of a child’s contact with the criminal justice system, do not have a merely additive effect; instead, they compound one another.
Developing a new Youth Justice Act: An opportunity for reform

In their 2017 review of Victoria’s youth justice system, Penny Armytage and James Ogloff recommended the development of a new Youth Justice Act. This provides an opportunity to legislatively recognise the relevance of a child’s past trauma and child protection history to sentencing. In addition to formally identifying rehabilitation as the primary purpose in sentencing children, the Act could include the following among the list of matters to which the court must have regard in sentencing a child:

- the context and background of the child’s offending;
- the child’s experience of trauma;
- child protection involvement;
- removal from family of origin, including siblings, extended family, culture and community;
- disruptions to the child’s living situation or education;
- the experience of out-of-home care;
- the need to protect the child from harm or the risk of harm;
- the involvement of an adult in the commission of the offence;
- mental illness, neurological difficulties and developmental issues, which may arise from, or be exacerbated by, experiences of trauma; and
- the child’s chronological and developmental age at the time of the offence and at sentencing.

Reports 1 and 2 found a concerning over-representation of Aboriginal and Torres Strait Islander children at the intersection of the child protection and youth justice systems. It is important that this over-representation be addressed, especially in light of the findings of Report 2 about the particular vulnerability of these children. A relevant sentencing consideration is that Aboriginal and Torres Strait Islander children often suffer from multiple disadvantages, including the consequences of trauma. As with other complex issues, these may have a compounding effect rather than a merely additive one. Additional considerations relevant to sentencing Aboriginal and Torres Strait Islander children are the consequences of intergenerational trauma, historical discriminatory policies, general and systemic racism and any relevant cultural factors, for example, culturally inappropriate responses that may have worsened the effect of trauma. The proposed new Youth Justice Act offers the opportunity to consider the inclusion of a legislative sentencing factor that focuses on how particular combinations of systemic, intergenerational and background factors might be relevant to sentencing Aboriginal and Torres Strait Islander children.

Barriers to trauma-informed sentencing

A court’s capacity to consider a child’s trauma and child protection history at sentencing depends on the court having access to all relevant information. Current barriers to the holistic consideration of children’s ‘needs’ and ‘deeds’ include the structural separation of the Children’s Court into two divisions, one dealing with child protection matters (the Family Division) and one dealing with criminal justice matters (the Criminal Division). While there are legitimate policy reasons for the separation, a consequence is that children’s youth justice and child protection matters may be heard by different judicial officers, and the child may be represented by different legal practitioners. For this reason, a court sentencing a child may not have access to all relevant information about the child’s protection history, and a court hearing a child protection matter may not have full information about relevant criminal proceedings.
This report suggests a number of possible measures to ‘bridge the gap’ between the two divisions, reduce the over-representation of crossover children in the Criminal Division, strengthen the capacity of sentencing courts to be fully appraised of a child’s protection history and experience of trauma, and facilitate a more holistic approach towards crossover children. Subject to further investigation and consultation, these measures include:

- resourcing the expansion of the fully specialised Children’s Court to regional areas, starting with regional headquarter court locations, and then extending to key metropolitan areas, with specialised Children’s Court locations operating as hubs for supports and services;
- introducing a ‘crossover list’ that holistically deals with the child protection and criminal matters of children who are involved with both systems;
- introducing pre-hearing youth justice family group conferencing to develop a plan for the child that integrates (where appropriate) child protection, health and justice responses to their offending, with provision for the conference to recommend against prosecution while putting in place supports to address the causes of the child’s offending. Integral to this suggestion is ensuring that children’s rights in criminal proceedings are protected, such as the protection from self-incrimination and the right to a trial, for example, through ensuring that conference discussions are private and disclosures cannot be used against a child if they exercise their right to plead not guilty;
- empowering the Children’s Court Criminal Division to compel case workers to attend court to provide information and/or support a child in cases where the Secretary to the Department of Health and Human Services has parental responsibility for the child, and resourcing the Child Protection Service to enable case workers to attend such hearings and visit and support children throughout the criminal justice process, including in custody;
- ensuring that sentencing courts are provided with adequate information about a child’s protection and trauma history, including strengthening information sharing between the Family Division and the Criminal Division of the Children’s Court and having dedicated child protection workers at court to facilitate access to reports about the child’s protection history; and
- continuing to improve access to specialised services, assessments and reports, including from allied-health professionals, particularly in regional areas.

In addressing the over-representation of Aboriginal and Torres Strait Islander children, an important consideration is ensuring that both systemic and local responses and services are designed, developed and led by Aboriginal people, for example, local Aboriginal Community Controlled Organisations and service providers, in keeping with the principle of self-determination. It is also vital that any systemic reforms, such as introducing a sentencing factor specific to Aboriginal and Torres Strait Islander children, are complemented by measures to ensure the availability of culturally appropriate specialist services and responses to children and their families, including in regional and remote areas of Victoria.

Each of the measures suggested in this report, or a combination of any or all of them, is intended to result in a more holistic response to offending by children who have experienced trauma. Many of these responses would also decrease the number of crossover children appearing in the Criminal Division by introducing earlier interventions aimed at addressing the causes of their offending. Ultimately, investment in responses that identify and address the trauma-related and other needs contributing to children’s offending will enhance community safety through more effective rehabilitation while also allowing abused, neglected and otherwise vulnerable children to recover from their trauma and to thrive.
1. Background

1.1 This report is the third and final in the Council’s Crossover Kids series, which examines the association between child protection backgrounds and criminal offending to better understand the pathways that lead children into contact with the criminal justice system. Throughout this series, the term crossover kid or crossover child is used to denote children with involvement in both the criminal justice and the child protection systems.2

1.2 This series of reports aims to:

- identify the proportion of sentenced and diverted children who are known to the Child Protection Service and the extent of their child protection history;
- examine associations between child protection and youth justice factors, including the level of child protection intervention and sentence type; and
- inform sentencing practice and policy by identifying the principles, purposes and factors relevant to sentencing children who have had contact with the child protection system.

1.3 This is the largest comprehensive study of its kind to date in Victoria; it includes all sentenced and diverted children over the study period (5,063 children), all the offences for which those children were sentenced or diverted in the study period, all Children’s Court locations in which they were sentenced and the full child protection history of all children in the study group, going back 22 years. The first two reports have a statistical focus.3 They examine the child protection backgrounds of all children who received a sentence or diversion in the Victorian Children’s Court in 2016 or 2017.

Aims of this report

1.4 This report focuses on sentencing, although it touches on broader policy issues. It builds on the findings of the first two reports, consultation on those findings and scientific evidence on the lasting effects of childhood trauma to explore policy issues regarding how courts sentence children who have experienced trauma, including and especially those who have had contact with the child protection system.

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2. These terms describe different cohorts in different studies. In this series of reports, the terms are used broadly to describe sentenced and diverted children who were the subject of at least one report to the Child Protection Service in their lifetime — whether before, at the time of or after their offence — even if their child protection and youth justice involvements were not concurrent. In the discussion of a ‘crossover list’ in Chapter 3, the cohort of children to whom the list would apply would be far narrower than the cohort in this series.

In this context, this report considers the sentencing policy implications of Reports 1 and 2 of the Crossover Kids series, aiming to contribute to broader policy discussions in relation to:

- the principles, as distilled from legislation and case law, that currently apply to sentencing children who have experienced trauma in Victoria;
- the relevance of childhood trauma to childhood offending, based on research from scientific disciplines;
- the merits of legislated sentencing principles that relate to a child’s experience of trauma and out-of-home care, along with examples of matters that could be included;
- the implications of the Children’s Court structure for sentencing children who have experienced childhood trauma; and
- possible measures to strengthen the interface between the Family Division and the Criminal Division of the Children’s Court to further support trauma-informed sentencing.

The report does not make formal recommendations. Rather it raises several suggestions for reform, subject to further investigation and consultation. These are intended to contribute to reducing the number of crossover children appearing in the Criminal Division, strengthening the current approach to sentencing children who have experienced trauma and extending the many strengths of the specialised Children’s Court in Melbourne to Children’s Court locations in regional areas.

### Policy issues outside sentencing

The findings in Reports 1 and 2 have implications for several broader non-sentencing policy issues, which were raised during consultation but are outside the scope of this report. These issues, and the way they interact to place children on a path to offending and into custody, are complex and interrelated. While this report focuses on sentencing policy, the project’s findings may assist those tasked with developing policy or advocating for reform in other areas to build an evidence base. Issues stakeholders considered particularly important included:

- a lack of family support services and early intervention supports for vulnerable families, particularly those in remote and regional areas. This may contribute to poor outcomes in those areas, including early child protection involvement and entry into the youth justice system;
- the particular vulnerability of children first sentenced aged 10–13 and their poor trajectories once they enter the youth justice system. Some stakeholders consulted for this project raised concerns about consistency in the application of the doli incapax test across the state. Stakeholders also noted the current campaign to raise the age of criminal responsibility to 14 years in Victoria.

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5. For example, the Council’s youth reoffending study found that “[t]he younger children were at their first sentence, the more likely they were to reoffend generally, reoffend violently, continue offending into the adult criminal jurisdiction, and be sentenced to adult imprisonment before their 22nd birthday”: Sentencing Advisory Council, Reoffending by Children and Young People in Victoria (2016) xiii. Report 2 in the Crossover Kids series found that ‘children first sentenced or diverted aged 10–13 generally had more child protection involvement – early entry, more child protection orders, out-of-home care, residential care, more placements and more carers – than older children’: Sentencing Advisory Council (2020), above n 3, 74.

• the over-representation of children who have experienced residential care in the youth justice system and among children sentenced for particular offence types. The Council notes stakeholder concerns that such children may sometimes be prosecuted for conduct that might not result in police involvement if the child was living in the family home. Such concerns were the impetus for the recently released Framework to Reduce Criminalisation of Young People in Residential Care, which aims to ‘reduce unnecessary and inappropriate police contact with young people in residential care’, where such contact is the result of ‘behaviours manifesting from childhood traumatic experiences’;11
• the possible association between bail-related offences, residential care, remand and custody. In particular, there may be a relationship between the use, and subsequent breach, of bail for trauma-related offences committed by children in residential care,8 remanding the child, the effect of remand on placement stability, the effect of placement instability on subsequent applications for bail and the eventual progression of the child onto a custodial sentence;9 and
• the use of intervention orders, and charging children with contravene intervention order offences, to respond to adolescent family violence – a system ‘developed to respond to intimate family violence but not articulated to the unique complexity of the situation confronting families dealing with adolescent violence in the home’.10 The approach to adolescent family violence is particularly complicated given evidence that many children who exhibit violent behaviour in the home have themselves previously been exposed to family violence and other trauma.11


8. While many different reactions are possible, children’s trauma reactions sometimes result in inappropriate or challenging behaviour. Some offence seem to be particularly common among children who have experienced out-of-home and residential care, many of whom have particularly serious trauma histories. For discussion of offences committed by children in out-of-home care, and particularly residential care, see Sentencing Advisory Council (2020), above n 3, 51–53, 57. For discussion of how trauma can contribute to offending, see particularly [2.28]–[2.43] below.


11. See Sentencing Advisory Council (2020), above n 3, 44–46, 57. In August 2018 (shortly after the study period of this project), the ‘RESTORE program’ commenced in the Children’s Court. The court-based program provides a ‘non-adversarial, restorative process to better meet the needs of adolescents using violence in the home, and their families … [the program] gives the young person the opportunity to accept responsibility for their violent behaviour; whilst putting practical strategies in place to keep family members safe’. Chambers (2019), above n 10, 8. See also Baidawi and Sheehan (2019), above n 4, 139–141.
1.8 The children in the study group have all engaged in some form of offending resulting in a sentence or diversion in the Children’s Court. It is important, however, to acknowledge that most children who experience trauma do not go on to offend. Most do, however, experience adverse consequences for their general psychological health. Criminal justice involvement is one marker among many of the effects of childhood trauma.

**Development of a new Youth Justice Act**

1.9 In their 2017 *Youth Justice Review*, Penny Armytage and James Ogloff observed that the ‘approach to sentencing and orders contained in the [Children, Youth and Families Act 2005 (Vic)] … is not a genuinely distinct response to the needs of adolescents’. They recommended that a new Youth Justice Act be created, separate from the *Children, Youth and Families Act 2005* (Vic), and that the new Act ‘provide a clear statement of the purpose, role and principles for Youth Justice’.

1.10 The creation of such an Act presents an opportunity to consider the ways in which youth sentencing legislation might better reflect the circumstances of children who have experienced trauma, including ensuring that the sentencing principles, purposes and factors reflect children’s experiences. In particular, a new Youth Justice Act could include measures to ensure sentencing courts are provided with relevant information about a child’s current or past experience of trauma and child protection involvement.

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2. Relevance of childhood trauma to sentencing children

Overview

2.1 The principle of rehabilitation underpins the first four sentencing matters set out in section 362(1) of the *Children, Youth and Families Act 2005* (Vic): preserving the child’s relationship with their family, allowing the child to live at home, continuing the child’s education and employment and minimising stigma to the child. The focus on rehabilitation recognises the greater potential to divert children away from further (or escalated) offending by positively intervening to influence their development and address the factors that contributed to their offending. A focus on rehabilitation thereby serves both the child and the community by directing children away from a potentially lifelong pathway of antisocial conduct and criminal offending. Rehabilitation becomes especially relevant for children who have experienced trauma and neglect as they are at a particular risk of engaging in challenging behaviour and experiencing difficulty in complying with and responding to sentencing interventions. As the Commission for Children and Young People recently emphasised in their submission to the Royal Commission into Victoria's Mental Health System:

Children and young people subjected to child abuse or neglect are particularly vulnerable, and there is a clear association between childhood trauma and adverse mental health outcomes for children and young people … The connection between adverse childhood experiences and chronic diseases, mental ill-health and unhealthy behaviours such as offending and substance abuse in adulthood is now well established[.]

2.2 This chapter discusses the relevance of childhood trauma to sentencing children, in particular:

- legislation governing the sentencing of children, which does not expressly require courts to consider a child's experience of trauma, developmental issues, child protection background or experience of out-of-home care;
- case law on the relevance of childhood trauma to sentencing;
- specific ways a child's experience of trauma and neglect can affect their cognitive and emotional development, as these can increase their likelihood of contact with the youth justice system and affect the way they may respond to sentences and orders; and
- the desirability of legislative guidance for considering childhood trauma in sentencing children.

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What is childhood trauma?

2.3 Adverse childhood experiences that are likely to cause childhood trauma include:

• physical abuse;
• sexual abuse;
• emotional abuse;
• witnessing family violence towards another person (sometimes considered emotional abuse of the witness);
• neglect and deprivation (physical or emotional);
• exposure to a family member’s mental illness, substance abuse or criminal offending;
• experience of violence outside the household, such as violence in the community;
• serious childhood illness or injury;
• lack of a stable caregiver and attachment relationship (for example, experiencing multiple caregivers);
• removal from family of origin, including removal from siblings, extended family, community and culture;
• intergenerational trauma;
• exposure to conflict or harsh living conditions (for example, through living in a conflict zone or refugee camp); and
• death of a parent or other close family member.¹⁸

2.4 Some types of trauma are unlikely to lead to child protection involvement, such as exposure to a war zone or refugee camp, the death of a parent or close family member, experience as a victim of crime outside the family home (for example, sexual abuse) or severe childhood illness or injury. In these cases, the Child Protection Service would usually only receive a notification if there were additional concerns, for example, regarding the parent’s ability to care for or protect their child.¹⁹

2.5 Whether or not the Child Protection Service becomes involved, traumatic childhood experiences can affect a child’s neurological and psychological development and can contribute to neurological, psychological and behavioural issues. As this chapter describes, childhood trauma is likely to affect children’s overall functioning, their ability to interact positively with others and their risk of negative outcomes, including criminal justice involvement. There is evidence suggesting that the number of children experiencing multiple types of trauma is increasing and/or the level of reporting and intervention is increasing.

I’ve seen so many kids just get pushed from pillar to post without proper assessments identifying this is a disability, this is mental health – or a combination of all of these.

Roundtable 4 (12 December 2019)


¹⁹ A child is in need of protection if they have been abandoned, the child’s parents are dead or incapacitated and there is no other suitable carer; the child has suffered, or is likely to suffer, significant harm due to physical injury or sexual abuse and the child’s parents have not protected, or are unlikely to protect, the child from such harm; the child has suffered, or is likely to suffer, emotional or psychological harm of such a kind as to significantly damage, or risk damaging, the child’s emotional or intellectual development and the child’s parents have not protected, or are unlikely to protect, the child from such harm; or the child’s physical development or health has been, or is likely to be, significantly harmed and the child’s parents have not provided, or are unlikely to provide or allow, basic medical or remedial care. Children, Youth and Families Act 2005 (Vic) s 162(1). All these experiences are likely to be associated with trauma.
For example, the number of families seeking help from family services is increasing, as is the proportion of those families who have multiple complex issues such as family violence, mental illness, substance abuse and disability. So too is the number of children entering care.

In a sentencing context, childhood trauma is relevant in a number of ways, including a child’s culpability for an offence and their ability to comprehend, comply with and respond to their sentence.

**Existing guidance on childhood trauma and sentencing**

**Children, Youth and Families Act 2005 (Vic)**

Section 362 of the Children, Youth and Families Act 2005 (Vic) sets out the matters to be taken into account when sentencing a child. These matters include:

- the need to strengthen and preserve the relationship between the child and the child’s family;
- the desirability of allowing the child to live at home and to continue in education, training or employment without disturbance;
- the need to minimise stigma;
- the suitability of the sentence to the child; and
- if appropriate, the need to ensure the child is held responsible, to protect the community from violent or other wrongful acts of the child, and to deter the child from committing offences in remand centres, youth residential centres and youth justice centres.

The court is also permitted to have regard to ‘any report, submission or evidence … on behalf of the child who is to be sentenced’.

It is a legislative requirement that a sentencing court takes into account the need to strengthen and preserve a child’s relationship with their family and the desirability of allowing the child to live at home; however, the legislation provides little guidance on what to do if the child does not have a stable home or is not safe with their family. There is also no specific requirement for the court to consider the child’s experience of abuse, trauma, neglect, loss, removal from family or out-of-home care, nor how these circumstances might relate to the child’s offending, development, culpability or ability to understand and comply with their sentence. Neither is there a specific requirement that the court have regard to the child’s age or development at the time of the offending and at sentencing. Finally, the sentencing court is not expressly required to consider the need to protect the child from harm or the risk of harm, even if that harm or risk was directly relevant to the commission of the offence.

Instead, the Children, Youth and Families Act 2005 (Vic) only provides that a child’s appearance in the Family Division, including as a child in need of protection, should not be an aggravating factor in sentencing.

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20. Commission for Children and Young People, *Last, Not Forgotten: Inquiry into Children Who Died by Suicide and Were Known to Child Protection* (2019) 13. Reports to the Child Protection Service have tripled in the last 10 years. Further, in 2017–18, more than 80% of families who presented to the Child Family Information and Referral Support Team and more than 50% who received help from a family service were identified to have two or more complex issues. Ten years earlier, in 2007–08, those figures stood at 55% and 20%.


22. Children, Youth and Families Act 2005 (Vic) s 362(1). In all cases where the sentence is for a Category A serious youth offence or a Category B serious youth offence, the court must, as far as practicable, have regard to the need to protect the community, or any person, from the violent or other wrongful acts of the child: Children, Youth and Families Act 2005 (Vic) s 362(1)(g).

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

24. The Criminal Division can refer a matter to child protection (Children, Youth and Families Act 2005 (Vic) s 349), but this power is rarely used and infrequently results in a protection application: see further [3.12].

2.10 Most offending by children in Victoria is dealt with in the Children's Court. In the six years to 2015, 38 cases involving children were sentenced in the higher courts, while 22,663 were sentenced in the Children's Court.26 However, with precedent generally stemming from the higher courts, most case law on the relevance at sentencing of childhood abuse, neglect or disadvantage comes either from the small number of children whose offending was so serious that they were sentenced in the higher courts,27 or from the adult criminal jurisdiction, in which different sentencing principles apply.28 As noted by the President of the Children's Court of Victoria, Judge Amanda Chambers:

notions of just punishment, denunciation and general deterrence – that is, deterring the community more broadly by the sentence imposed on the individual – highly relevant sentencing considerations when sentencing adults have no role to play in the sentencing law that applies to children.29

2.11 For adult offenders, circumstances of disadvantage, including abuse or neglect in childhood, may be relevant to the sentencing court's assessment of their moral culpability (or 'criminality'),30 their prospects of rehabilitation,31 their suitability as a subject for general or specific deterrence,32 the need to protect the community from them,33 and as a mitigating factor.34

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27. On the circumstances in which a child's criminal proceedings must or may be uplifted to the adult jurisdiction, see the note at [3.3].
28. Cases involving adult offenders are governed by principles set out in section 5 of the Sentencing Act 1991 (Vic), which does not prioritise rehabilitation but instead requires that it be considered alongside other sentencing purposes including just punishment, community protection, denunciation and deterrence. Sub-section 5(2) provides a non-exhaustive list of sentencing factors, including the offenders culpability and degree of responsibility for the offence and ‘the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances’. Childhood trauma and disadvantage may be relevant to the consideration of both these sentencing factors. Different forms of disadvantage have been recognised as relevant to sentencing, including childhood sexual abuse, physical abuse, neglect and exposure to family violence and parental alcohol or drug abuse: Bugmy v The Queen [2013] HCA 37 (2 October 2013) [44]–[46]; R v Fuller-Cast [2002]VSCA 168 (24 October 2002) [60]; DPP v Heyfron [2019] VSCA 130 (14 June 2019) [54]–[56]; Johnson v The Queen [2013] VSCA 277 (23 September 2013) [18]; Hogarth v The Queen [2012] VSCA 302 (18 December 2012); [27]–[30]. See also Judicial College of Victoria, '6.3.3.1 – Childhood', Victorian Sentencing Manual (4th ed., Judicial College of Victoria, 2020) <https://resources.judicialcollege.vic.edu.au/article/692363/section/843536> at 14 April 2020. Additional guidance on the consideration of childhood trauma in sentencing children can be found in published Children's Court sentencing decisions, for example, DPP v S (2018) VChC 3 (14 March 2018), and decisions in applications for charges to be heard summarily in the Children's Court pursuant to the Children, Youth and Families Act 2005 (Vic) s 356(6). See for example, WB v DPP [2018] VCHC 1 (29 July 2019); JL v DPP [2019] VCHC 2 (29 July 2019). A useful resource for practitioners is the New South Wales Public Defenders' Bugmy Bar Book, which aims to provide evidence relating to the incidence and effects of disadvantage and deprivation to assist practitioners seeking to establish the application of the Bugmy principles: The Public Defenders, The Bugmy Bar Book (The Public Defenders, 2020) <https://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/bar-book.aspx> at 15 April 2020.
30. Peter Power; Chapter: 11: Criminal Division – Sentencing', Children's Court Research Materials (Children's Court of Victoria, 2020) <https://www.childrenscourt.vic.gov.au/legal/research/materials/sentencing> at 15 April 2020, 11.107–11.109; Bugmy v The Queen [2013] HCA 37 (2 October 2013) [37], [42]–[45]; R v Loveridge; R v AB [2013] NSWSC 1599 (1 November 2013) [43]. In the adult jurisdiction, the offender’s culpability is one of the factors to which the court must have regard in sentencing an offender: Sentencing Act 1991 (Vic) s 5(2)(d); see for example, R v AWF [2000] VSCA 172 (27 September 2000) [4]–[6], [34]; Berry v The Queen [2019] VSCA 291 (6 December 2019) [30].
31. Rehabilitation is one of the purposes of sentencing adult offenders, as set out in section 5(1)(c) of the Sentencing Act 1991 (Vic). For discussion of the effect of prior trauma and addiction on the consideration of an offender’s prospects of rehabilitation, see generally R v McKee [2003] VSCA 16 (27 February 2003). In some cases, the experience of childhood trauma – such as childhood sexual abuse – may also be relevant to sentencing through the application of Verdins principles, which govern the relevance of mental impairment as a sentencing factor: Beavers v The Queen [2016] VSCA 271 (17 November 2016) [47]; R v Verdins [2007] VSCA 102 (23 May 2007) [32]. See also Bugmy v The Queen [2013] HCA 37 (2 October 2013); R v AWF [2000] VSCA 172 (27 September 2000) [3], [34].
33. Bugmy v The Queen [2013] HCA 37 (2 October 2013) [44]. Community protection is one of the purposes of sentencing adult offenders under section 5(1)(c) of the Sentencing Act 1991 (Vic).
2.12 In *Bugmy v The Queen*, the High Court of Australia considered, among other things, the relevance of childhood trauma in assessing the moral culpability of an adult offender for sentencing purposes. The High Court noted that:

The circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way.

2.13 The High Court confirmed that the effects of childhood deprivation do not diminish with time and repeated offending:

The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person’s capacity to mature and to learn from experience. It is a feature of the person’s make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.

2.14 The High Court held that:

an offender’s childhood exposure to extreme violence and alcohol abuse may explain the offender’s recourse to violence when frustrated such that the offender’s moral culpability for the inability to control that impulse may be substantially reduced.

2.15 However, the High Court observed that the offender’s reduced culpability did not automatically result in a sentence reduction because there might be other countervailing sentencing purposes, such as the need to protect the community from the offender’s inability to control their violence. Countervailing sentencing purposes may be less likely to arise when sentencing children given that rehabilitation is usually the primary purpose of sentencing. Additionally, general deterrence is not relevant to sentencing children and specific deterrence and community protection are relevant to sentencing children only in particular circumstances.

35. *Bugmy v The Queen* [2013] HCA 37 (2 October 2013); See also *DPP v Tewksbury (A Pseudonym)* [2018] VSCA 38 (27 February 2018), in which the offender’s traumatic childhood history, including physical and emotional abuse by a parent and sexual abuse and bullying by a number of people while in care, was ‘a relevant mitigating factor in the circumstances of this case’ and this was ‘notwithstanding the absence of evidence of any link between the respondent’s “traumatic history” … and his offending’; *DPP v Tewksbury (A Pseudonym)* [2018] VSCA 38 (27 February 2018) [97].

36. The appellant, William Bugmy, an Aboriginal man from Wilcannia, New South Wales, had grown up in circumstances of serious deprivation in which he continued to live in adulthood. His childhood home had been severely violent, and he had been offending since the age of 12 and using drugs since the age of 13. As an adult, he was an alcoholic and remained unable to read or write. He also had a history of head injury, mental illness and suicidality. While on remand, he reacted to news that he would not be receiving a planned visit by threatening and assaulting correctional officers: *Bugmy v The Queen* [2013] HCA 37 (2 October 2013) [6]–[13].

37. *Bugmy v The Queen* [2013] HCA 37 (2 October 2013) [40].


39. *Bugmy v The Queen* [2013] HCA 37 [44].

40. *Bugmy v The Queen* [2013] HCA 37 [44]–[46]. The appellant also submitted that ‘sentencing courts should take into account the “unique circumstances of all Aboriginal offenders” as relevant to the moral culpability of an individual Aboriginal offender’. The High Court rejected this suggestion on the basis that to accept it would involve applying a different method of analysis for Aboriginal offenders and would be incompatible with individualised justice. Rather, the High Court found that an Aboriginal offender’s deprived background may mitigate the sentence that would otherwise be appropriate for the offence in the same way that the deprived background of a non-Aboriginal offender may mitigate that offender’s sentence: *Bugmy v The Queen* [2013] HCA 37 (2 October 2013) [25]–[37]. See also *Marrah v The Queen* [2014] VSCA 119 (18 June 2014) [16]; *Stewart v The Queen* (22 December 2015) [2015] VSCA 368.

2.16 In DPP v Green, the Victorian Court of Appeal applied Bugmy v The Queen in finding that significant trauma — in this case family dysfunction, physical abuse and sexual abuse — reduced an offender’s culpability for offences including armed robbery:

[T]he respondent was subjected to significant abuse and degradation during the important formative years of his life … the respondent’s subjective culpability for his offending could not be realistically equated with that of a person who committed the same offences, but who had had the advantage of a normal, stable and regular home environment, and who had not been subjected to sexual and physical abuse of the kind experienced by the respondent while in custody … In addition, and importantly, the abuse perpetrated on the respondent … explain[ed], at least in part, the respondent’s pattern of repeat offending over a period of more than two decades.43

2.17 The degree to which an offender’s experience of childhood trauma is a relevant sentencing factor depends on the circumstances of each case.44 An offender who seeks to rely on a history of trauma in mitigation bears the onus of establishing that history,45 which does not automatically lead to a reduction in sentence.46 The relevance of childhood trauma is a matter for the sentencing judge in the particular case, taking into account matters including the nature and extent of the disadvantage,47 the evidence of the disadvantage,48 and the relative importance of sentencing purposes such as rehabilitation and, where relevant, specific deterrence and community protection (and general deterrence for adults).49

Application of the principles when sentencing children

2.18 The approach to considering childhood trauma when sentencing adults also applies to sentencing children. A combination of legal and developmental factors may make childhood trauma particularly important when sentencing children.50

2.19 First, with a few limited exceptions, rehabilitation is recognised as the primary consideration when sentencing children, both because a child’s development presents a unique opportunity to change their behaviour and because the public benefits from early intervention to direct a child away from a potential lifetime of offending.51
The emphasis on rehabilitation implicitly requires sentencing courts to have an understanding of the causes of a child’s offending and the interventions best suited to addressing those causes.51 As a result, the Children’s Court must consider ‘the effect of the proposed sentence on the child … and impose a sentence which fits the young offender as much as – or perhaps even more than – it fits the crime’.52 A child’s experience of, and recovery from, trauma is therefore likely to be relevant to both their offending and their sentencing.53

2.20 Secondly, children are treated as less culpable, or blameworthy, than adults because they are ‘less mature … less able to form moral judgments, less capable of controlling impulses, less aware of the consequences of acts’, and they are less responsible in the sense of being less able to make wise, fully considered decisions.54 The developmental impacts of trauma can further exacerbate these attributes (see further [2.24]–[2.69]), and by extension can affect children’s decision-making and behaviour generally.

2.21 Thirdly, trauma and related developmental issues may be particularly relevant considerations for children who have spent time in highly conflictual, violent or abusive environments or family environments involving intergenerational criminal behaviour. Such environments may affect a child’s understanding of behavioural and moral norms and their capacity to control their behaviour due to the effect of trauma, mental health issues, and developmental or neurological issues.55 Children from homes with pervasive family violence or neglect, in particular, may not have had exposure to trusted role models who could demonstrate different moral norms and are unlikely to have had the psychological distance from the situation to enable them to fully establish their own moral schemas. Children often have little choice or control over their physical and social environment, the people with whom they reside and associate, the school they attend and the community in which they live.56 In the context of decisions about whether children have criminal capacity, the common law has established that for children aged 10–13:

[The 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.57]
2.22 A child's experience of abuse or violence is likely to be relevant to the extent to which they knew that their conduct was morally wrong, as opposed to childhood mischief or naughtiness. Similarly, a child's environment and experience of trauma are also particularly relevant to considering their culpability and prospects of rehabilitation at sentencing. Other matters, such as neurodisability, may also be relevant to this analysis.

2.23 Finally, in cases of offending by children, childhood trauma and related circumstances, such as out-of-home care, are likely to have occurred close in time to, or concurrently with, the offending. Therefore, the court may consider the extent of the child’s current experience of trauma at the time of offending and sentencing in addition to considering how past trauma may have affected the child’s development, culpability and capacity to avoid offending. For example, a child who is experiencing placement instability and estrangement from their family of origin at the time of offending or sentencing is likely to be in a current state of trauma as well as dealing with the effects of past trauma, such as physical abuse. Consequently, the child is unlikely to have had much, if any, chance to recover or distance themselves from their trauma. Even repeated offending behaviour may be symptomatic of unaddressed and ongoing trauma rather than entrenched offending patterns. Further, a child’s ability to understand and comply with the conditions of their sentence and respond to therapeutic interventions depends on how well they are supported to recover from their trauma. Thus, measures to support their recovery are likely to strengthen their prospects of rehabilitation.

How does childhood trauma contribute to offending behaviour and why is this relevant to sentencing?

2.24 A person’s brain continues to develop throughout their life. Experiences and maturation cause ongoing remodelling of structures in the brain, a neurological phenomenon known as plasticity. During childhood, these changes happen particularly quickly, often with long-lasting effects. Although people always have the potential to grow and change psychologically, there is mounting evidence that childhood is particularly important to psychological development, and disruptions during childhood can have large effects on functioning well into adulthood as well as in childhood. The effect of trauma on psychological development roughly mirrors the effect on neurological development: a traumatic childhood environment can lead to psychological responses that are maladaptive outside the context of immediate self-preservation and thought patterns that can harm psychological functioning, damage the ability to build healthy relationships and lead to mental illness.

58. For example, in RP v The Queen [2016] HCA 53 (21 December 2016), aspects of the child’s conduct were strongly suggestive that he had been raised in an environment in which he was exposed to inappropriate sexually explicit material or was himself the subject of sexual interference, which was considered relevant to determining whether he had criminal capacity: RP v The Queen [2016] HCA 53 (21 December 2016) [34]. The question of doli incapax is binary – 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. In this sense, the High Court has recognised that ‘an offender’s childhood exposure to extreme violence and alcohol abuse may explain the offender’s recourse to violence when frustrated such that the offender’s moral culpability for the inability to control that impulse may be substantially reduced: Bugmy v The Queen [2013] HCA 37 (2 October 2013) [56]–[46].


2. Relevance of childhood trauma to sentencing children

2.25 As a result, children who have experienced trauma often experience mental illness and neurodisability. Even those who do not meet the criteria for a diagnosable disorder often experience a level of disordered psychological functioning.\(^6^3\) For example, trauma can cause emotional dysregulation, which may lead to both overreactions (for example, to threats) and underreactions (for example, to positive feedback or affection).

2.26 The exact effects of exposure to trauma on any child are unpredictable. Factors that can affect a child’s neurological response include gender, genetics and epigenetics; type and severity of trauma; and when the trauma occurs in relation to the child’s stage of neurological development, including the duration of the trauma.\(^6^4\) In addition to these factors, which are inherent to the trauma and the child, other factors can affect the impact of trauma, both during and after it is experienced. For example, the availability of positive relationships in the child’s life may mitigate the effects of trauma at the time.\(^6^5\) Later, outcomes may be improved by interventions like psychological treatment, counselling or other ways of teaching the child to process the trauma and manage their emotions and behaviours.\(^6^6\)

2.27 The effects of trauma on the brain and mind are often referred to as ‘damage’. However, the research suggests that this language, which may be stigmatising, is accurate only in certain contexts. Instead, it may be more accurate to think about post-traumatic neurological and psychological changes as being helpful in an abusive environment but harmful outside that setting.\(^6^7\) For example, a tendency to interpret ambiguous expressions and behaviour as threatening may be protective in an environment where an abuser can become aggressive with little warning but harmful in other social interactions where such ambiguity can contribute to anxiety and aggression.\(^6^8\)

Effects on emotional responses and behaviour

**Emotional dysregulation: difficulty recognising and regulating emotions**

2.28 Emotional dysregulation can be understood as difficulty in recognising, controlling and/or regulating emotions. It can lead children to react in unexpected and sometimes socially unacceptable ways. Some children who have experienced trauma may overreact to minor provocations, while others may underreact, showing blunted emotional reactions.\(^6^9\) In some cases, children may be unable to verbalise, or even recognise, their own emotions.\(^7^0\)

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\(^{65}\) Jaffee (2017), above n 64, 539–50; Dorthie Cross et al., ‘Neurobiological Development in the Context of Childhood Trauma’ (2017) 24(2) Clinical Psychology: Science and Practice 111, 117.

\(^{66}\) De Bellis and Zisk (2014), above n 63, 206; Cross et al. (2017), above n 65, 117.


\(^{68}\) Jaffee (2017), above n 64, 532–533.


\(^{70}\) Cross et al. (2017), above n 65, 115; McLean (2018), above n 69, 3; Jaffee (2017), above n 64, 533–534.
For example, an affected child may misrecognise sadness as anger and may respond to it in ways consistent with anger, for example, by having a tantrum, shouting or throwing objects. This may be one contributor to the high rates of charges of criminal damage among crossover children generally and children in out-of-home and residential care in particular.71

2.29 Some children with emotional dysregulation are able to control their emotions in many situations, but doing so consumes significant cognitive resources, lowering the child’s tolerance for other forms of mental effort and raising their risk of future mental illness.72

2.30 Children may also have difficulty recognising others’ emotions. For example, children who have experienced trauma may confuse sad or neutral expressions for fear or hostility, and they may attribute others’ actions to hostility (known as hostile attribution bias).73 Children who have difficulty recognising emotions also struggle to understand what causes those emotions.74 This increases the chance that they will repeat behaviours that cause negative reactions in others, or in themselves, and will therefore continue to receive those negative reactions without necessarily understanding why they are occurring or how to prevent them.75

2.31 Emotional dysregulation is also linked to a range of psychiatric disorders including anxiety, depression, conduct disorder and substance abuse disorders.76

**Increased threat response: hypervigilance and reacting with panic**

2.32 Children in traumatic environments often become more alert to potential threats in order to avoid severe physical and/or emotional harm. For example, for children whose parents are abusive, the home environment often involves ambiguous situations that could quickly become dangerous.77

2.33 As a result of repeated exposure to situations of immediate threat, children who have experienced trauma are often ‘primed’ or ‘sensitised’ to potential threats, so that they constantly remain alert and scan for danger.78 Because of this priming, such children may be selectively attentive to threat and anger cues, meaning that they interpret situations as being threatening more readily than children who have not experienced trauma, whether or not danger is actually present.79 This is referred to as selective attention to threat or threat bias.80

Many of them have come to child protection with family violence as a part of [their] history, and … that will certainly impact on how they feel they need to look after themselves. ***

[Residential care homes] are hotpots of traumatised young people who don’t have healthy coping mechanisms, and they fight. Things escalate …

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72. McLean (2018), above n 69, 3; McCrory et al. (2017), above n 61, 347–348.
74. Jaffee (2017), above n 64, 534.
75. Ibid.
76. McCrory et al. (2017), above n 61, 347.
77. Hein and Monk (2017), above n 73, 226; Jaffee (2017), above n 64, 531.
79. Jaffee (2017), above n 64, 531. Some research suggests that difficulties with emotion recognition correspond to the type of maltreatment that the child has received; for example, children with a history of physical abuse tend to misrecognise emotions as anger: ibid 534.
80. Hein and Monk (2017), above n 73, 226; Jaffee (2017), above n 64, 531; McLean (2018), above n 78, 3; McCrory et al. (2017), above n 61, 341. Some children may respond to stress by freezing and even dissociating: Cross et al. (2017), above n 65, 116.
2. Relevance of childhood trauma to sentencing children

and it has been observed in babies aged as young as 15 months.\textsuperscript{81} Threat bias can contribute to aggressive behaviour as children may believe that they need to act in self-defence or pre-emptively respond to a perceived threat.\textsuperscript{82}

2.34 Threat bias is related to, but not the same as, emotional dysregulation. Rather than overreacting due to an inability to control their emotions, children with an increased threat response may react proportionately to the perceived threat. This is an adaptive response to traumatic situations, as it can protect the child from unpredictable consequences.\textsuperscript{83} However, it is maladaptive in most social environments and daily interactions. This is particularly so when paired with hostile attribution bias, such that the child is more likely to perceive another person’s behaviour as hostile, and it may lead a child to react aggressively to behaviour that they perceive as a threat but is actually innocent.\textsuperscript{84} This may be one reason that children in out-of-home care are charged at disproportionate rates with offences against the person and offences involving resisting, hindering or assaulting police officers and other emergency workers.\textsuperscript{85}

2.35 Threat bias can also lead to socially anxious behaviour, which can limit a child’s ability to develop positive relationships. It is also associated with an increased risk of anxiety in general and developing an anxiety disorder.\textsuperscript{86}

\textit{Altered reward sensitivity and attachment issues: isolation and damaged trust in others}

2.36 Reward sensitivity refers to how much pleasure a positive event creates for a person. Children who have experienced trauma often tend to underreact to social rewards such as the approval of parents or carers.\textsuperscript{87} This underreaction appears to be particularly pronounced in relation to anticipated rewards, suggesting that these children may not trust that a promised reward will eventuate, and therefore they may not seek approval by behaving well.\textsuperscript{88} As well as affecting a child’s behaviour, altered reward sensitivity may influence the effectiveness of a child’s sentence, as approaches designed to reward a child for compliance and improvement may have less effect.

2.37 This may be because children who have experienced trauma may have experienced unpredictable treatment by their carers, such that they received inconsistent reinforcement for positive behaviours, whereas generally children can rely on their caregivers to show approval and reinforcement in response to good behaviour.\textsuperscript{89} It may be psychologically dangerous for a child experiencing maltreatment to rely on a parent for support and affection. Rather than hoping to gain approval for good behaviour, they may learn not to expect any social reward, and this becomes a defence mechanism against the frequent disappointment they would otherwise experience.\textsuperscript{90}

\textsuperscript{81} McCrory et al. (2017), above n 61, 341.
\textsuperscript{82} Jaffee (2017), above n 64, 533.
\textsuperscript{83} Hein and Monk (2017), above n 73, 226.
\textsuperscript{84} Jaffee (2017), above n 64, 532–533.
\textsuperscript{85} Ibid; Sentencing Advisory Council (2020), above n 3, 42, 54–55. The effects of threat bias may be exaggerated for children who associate trauma with police or emergency workers, for example, police may have been present when the child was placed in residential care. Flight reactions, as well as fight reactions, may be problematic, for example, by causing children to flee police and potentially be charged with resisting, hindering or assaulting police.
\textsuperscript{86} McCrory et al. (2017), above n 61, 352; Jaffee (2017), above n 64, 531–533.
\textsuperscript{88} Pechtel and Pizzagalli (2011), above n 64, 62–64; Jaffee (2017), above n 64, 535; McLean (2018), above n 87, 3–4; McCrory et al. (2017), above n 61, 345–346.
\textsuperscript{89} McLean (2018), above n 87, 4; McCrory et al. (2017), above n 61, 346.
\textsuperscript{90} McLean (2018), above n 87, 3; McCrory et al. (2017), above n 61, 346.
2.38 Social reward is an important mechanism both for establishing positive relationships and for reinforcing positive behaviour. Social reward is also linked to lower levels of mental illness later in life. Diminished responses to social reward may make it more difficult for carers to reinforce appropriate behaviour, as anticipation of approval is less powerful than it is for other children. Also, because these children are often still sensitive to punishment, there is a risk that they will perceive themselves as ‘bad’, which is relevant to the requirement that the sentencing court have regard to the ‘need to minimise the stigma to the child resulting from a court determination’. This may also be relevant to how sentencing courts, and the youth justice system more broadly, responds to children who breach orders.

2.39 Children who experience diminished social reward may also disengage from relationships that they perceive as being hurtful or psychologically unsafe. Where this occurs, there is a risk that the child will become disengaged from social relationships more generally. This can reinforce their perception that social relationships are unsafe, and they can become increasingly isolated. In severe cases, this difficulty in forming attachments can amount to reactive attachment disorder, while in less severe cases it can manifest subclinically in a group of patterns collectively known as insecure attachment styles.

2.40 Attachment difficulties appear to contribute to negative outcomes following trauma. Such difficulties are likely to be particularly common among children who experience out-of-home care and especially residential care. This is partly because of the severity of harm those children have already experienced, including the loss or absence of a normal parent–child relationship.

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91. Ibid.
92. Ibid.
93. Reward processing includes wanting the reward, liking it and learning from it. While most research, which is still in its early stages, focuses on the first two elements, it appears likely that all three are affected: Pechtel and Pizzagali (2011), above n 64, 62–64; Jaffee (2017), above n 64, 535; McLean (2018), above n 87, 3–4; McCrory et al. (2017), above n 61, 346.
95. McLean (2018), above n 87, 4.
96. American Psychiatric Association (2013), above n 18, 265–268. The symptoms of reactive attachment disorder include ‘inhibited, emotionally withdrawn behaviour’ towards adult caregivers, characterised by minimal tendency to seek comfort and minimal response to comfort when distressed; persistent social and emotional disturbance, characterised by minimal social and emotional responsiveness to others; limited positive affect; and episodes of irritability, sadness or fearfulness, even in non-threatening interactions with adult caregivers. The child must also have experienced a ‘pattern of extremes of insufficient care’. Reactive attachment disorder is relatively rare even in children who have experienced severe maltreatment or neglect; it is more common that a child will experience some of these difficulties but not meet all the diagnostic criteria: see Angela S. Breidenstine et al., ‘Attachment and Trauma in Early Childhood: A Review’ (2011) 4(4) Journal of Child and Adolescent Trauma 274.
It is partly because out-of-home care, and particularly residential care, tends to cater for children with the most severe difficulties, some of which may be symptomatic of mental illnesses including reactive attachment disorder. It is also partly because frequent changes in primary caregivers limit opportunities to form stable attachments, contributing to the pathology.\(^99\) Children who experience trauma unrelated to maltreatment, while separated from parental figures, may experience effects on attachment, resulting in increased psychological symptoms.\(^{100}\) This may be particularly harmful for children in out-of-home care, including residential care, who experience further harm while in care.

**Executive function difficulties: limitations in self-regulation and impulse control**

2.41 Executive functioning describes a range of abilities that enable people to perform complex tasks and use conscious thought to decide how to behave.\(^{101}\) These include working memory, which enables people to remember tasks or instructions; learning; and inhibitory control, which is associated with people’s abilities to consciously restrain their instincts or impulses, for example, by delaying gratification to obtain a reward later.\(^{102}\) Children who have experienced trauma often have difficulties with executive functioning.\(^{103}\)

2.42 Limitations in executive functioning can result in reduced impulse control, reduced ability to deal with change, difficulty following instructions and reduced ability to understand the consequences of decisions.\(^{104}\) These limitations can increase the risks that a child in care will react negatively to instability, be unable to understand or comply with the instructions of a carer or the requirements of court-ordered conditions, or overreact to real or perceived provocation by carers, police or other children. Reduced ability to learn from experience may mean that the child will repeat these mistakes. This may help explain the high rates of offences against the person, bail-related offences and breaches of intervention orders observed among children involved with the child protection system generally and children in the complex environments of out-of-home care and residential care in particular.\(^{105}\)

2.43 Executive functioning does not fully mature until a person’s early to mid-twenties, and it may continue to be limited where its development is affected by trauma.\(^{106}\) The lack of full maturation in executive functioning is one of the key reasons that young adults offend at higher rates than older adults, and why children and young adults may have their youth taken into account in sentencing.\(^{107}\) Mental illness is also associated with ongoing limitations in executive functioning.\(^{108}\)

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99. In fact, ‘frequent changes in foster care’ are specifically mentioned as one way in which a child may experience limited opportunities to form stable attachments and thereby meet the ‘insufficient care’ diagnostic criterion for reactive attachment disorder: American Psychiatric Association (2013), above n 18, 265–266.

100. This is in turn associated with post-traumatic stress symptoms: Bryant et al. (2017), above n 97.


102. Ibid; McCrory et al. (2017), above n 61, 348–349. Executive functioning is associated with evolutionarily new brain structures, which take a long time to develop, and the development of a network of connections between different areas of the brain. This may be part of the reason that executive functioning appears to be particularly affected by childhood trauma — the window in which normal development might be interrupted is relatively long: Pechtel and Pizzagalli (2011), above n 64, 61–62, 65.


105. Sentencing Advisory Council (2020), above n 3, 42.


108. McCrory et al. (2017), above n 61, 349.
Links to and effect on mental illness

2.44 Childhood and adolescent victimisation – particularly where that trauma is prolonged or involves multiple types of victimisation – is associated with large increases in the risk of developing many different mental illnesses. Children with a history of child protection involvement are two to three times more likely than other children to experience a mental health event (after adjusting for other risk factors). Research into childhood trauma more generally suggests that almost half of all mental illnesses may have roots in childhood trauma.

2.45 As a result of underlying changes to the brain and emotional processing, trauma appears to damage psychological functioning. These changes can lead to the child developing symptoms and attributes that are features of a variety of mental illnesses. Some people who experience childhood trauma may experience diagnosable mental illness. For others, the mental health consequences, while serious, may not result in a diagnosis of a specific mental illness.

2.46 Illnesses particularly prevalent among people who have experienced childhood trauma include:

- post-traumatic stress disorder;
- attention deficit hyperactivity disorder;
- major depressive disorder;
- anxiety disorders;
- schizophrenia; and
- borderline personality disorder.

2.47 Mental illness does not inherently cause offending; even mental illnesses labelled as ‘externalising’ disorders usually cause harm primarily to the sufferer rather than others. When an association can be found between mental illness and offending, it is often difficult to determine causality. There is a significant amount of overlap between the causes of mental illness and the causes of offending.

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109. Schaefer et al. (2018), above n 61, 338. Childhood and adolescent victimisation each appear to separately contribute to risk for adverse mental health outcomes, with the effect increasing where people have been victimised in multiple ways, with physical and sexual abuse and neglect showing the greatest effects: ibid 358–359, 365. While ethical considerations prevent the development of a study that can conclusively show causation, the design of this study ruled out the most pertinent potential confounding factors.


111. Miriam J. Maclean et al., ‘Role of Pre-Existing Adversity and Child Maltreatment on Mental Health Outcomes for Children Involved in Child Protection: Population-Based Data Linkage Study’ (2019) 9(7) e029675, e029677. In this Australian study, ‘mental health event’ encompassed inpatient and outpatient mental health-related contact with the health system. The risk levels increased with increasing levels of care involvement, ranging from 4.46 times for children with unsubstantiated reports to child protection involving multiple types of victimisation to 10.90 times for children who had ever entered care. These results were consistent with earlier research in New South Wales: Michael Tarren-Sweeney and Philip Hazell, ‘Mental Health of Children in Foster and Kinship Care in New South Wales, Australia’ (2006) 42(3) Journal of Paediatrics and Child Health 91–96.

112. De Bellis and Zisk (2014), above n 63, 207; Jaffee (2017), above n 64, 528; Teicher and Samson (2016), above n 62, 241. Some studies have suggested that more than half of depression and anxiety cases worldwide may be attributable to childhood maltreatment: M. Li et al., ‘Maltreatment in Childhood Substantially Increases the Risk of Adult Depression and Anxiety in Prospective Cohort Studies: Systematic Review, Meta-Analysis, and Proportional Attributable Fractions’ (2016) 46(4) Psychological Medicine 717, 726.

113. Schaefer et al. (2018), above n 61, 358. As with neurological responses, the psychological responses with trauma vary with age: ibid 365.

114. Jaffee (2017), above n 64, 527–529; Hein and Monk (2017), above n 73, 226. This is not an exhaustive list.

115. Possible exceptions include conduct disorder and oppositional defiant disorder; as the diagnostic criteria for these disorders include aggression and/or offending: American Psychiatric Association (2013), above n 18, 461–475.

116. For example, attention deficit/hyperactivity disorder has been associated with offending, but recent research suggests that the association is indirect and mediated by other factors; in fact, the two issues may share causality rather than one leading to the other.
However, some mental illnesses can lead to reduced tolerance for stress, a tendency to overreact to triggers and difficulties negotiating positive outcomes in challenging situations. Mental illness can also affect people’s ability to cope with adversity. Many mental illnesses affect children differently from adults; in some illnesses, children’s symptoms might tend towards irritability and outbursts whereas adults might display internalising symptoms.

Table 1 presents an overview, based on research from the United Kingdom, of mental illness among young people. It shows that mental illness is many times more common among young people involved with the youth justice system than young people in the general population.

<table>
<thead>
<tr>
<th>Type of disorder</th>
<th>Reported prevalence rates (young people)</th>
<th>Reported prevalence rates (correctional sample)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Psychotic disorder</td>
<td>0.4%</td>
<td>1–3%</td>
</tr>
<tr>
<td>Depressive disorder</td>
<td>0.2–3%</td>
<td>8–29%</td>
</tr>
<tr>
<td>Anxiety disorder</td>
<td>3%</td>
<td>9–21%</td>
</tr>
<tr>
<td>Post-traumatic stress disorder</td>
<td>0.4%</td>
<td>11–25%</td>
</tr>
<tr>
<td>Substance misuse disorder</td>
<td>7%</td>
<td>37–55%</td>
</tr>
</tbody>
</table>

Recent evidence suggests that people with a history of childhood trauma who develop mental illness may experience more severe symptoms than those without a trauma history. Their mental illnesses may also be more difficult to treat. This means that children who have experienced trauma and who develop mental illnesses may suffer from more severe and treatment-resistant conditions than other children with the same diagnoses.

For example, people with post-traumatic stress disorder may display outsize responses when triggered and/or avoid triggers to a pathological degree: American Psychiatric Association (2013), above n 18, 275–276. Attention-deficit hyperactivity disorder is associated with low frustration tolerance: ibid 61. And schizophrenia is associated with negative symptoms that can affect executive functioning and social cognition, limiting patients’ ability to interact positively with others and raising impulsivity: ibid 101.

This possibility is recognisable in Victorian sentencing case law: in imposing a sentence on an offender with a relevant mental impairment, the court must consider the possibility that that impairment may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health: R v Verdins [2007] VSCA 102 (23 May 2007) [32].

For example, major depressive disorder in adults is typically characterised by low mood, but children and adults may instead be irritable: American Psychiatric Association (2013), above n 18, 163. Young children with post-traumatic stress disorder sometimes re-enact their trauma during play: ibid 277. Childhood-onset schizophrenia resembles poor-outcome adult cases: ibid 103.

Chitsabesan and Hughes (2016), above n 116, 110.

Teicher and Khan (2019), above n 67, 5. Trauma can affect the manifestation of particular symptoms in addition to overall severity. For example, there is some evidence that people with psychotic illnesses who have experienced childhood trauma may be more likely to be violent than people with psychotic illnesses but who have not experienced childhood trauma. This is possible because they experience more hostile or persecutory themes in their hallucinations or delusions: Kathleen Green et al., ‘The Relationship between Childhood Maltreatment and Violence to Others in Individuals with Psychosis: A Systematic Review and Meta-Analysis’ (2019) 20(3) Trauma, Violence and Abuse 358, 367.

Links to a range of neurodisabilities

2.50 Childhood trauma and child protection involvement are associated with elevated rates of neurodisability; fetal alcohol spectrum disorder (FASD), intellectual disability, traumatic brain injury and communication deficits are particularly common. The causes of each of these issues are complex, but childhood trauma can often be a contributing factor:

Childhood neurodisability occurs when there is a compromise of the central or peripheral nervous system due to factors such as genetic vulnerability, birth trauma or brain injury in childhood. It is often the result of a complex mix of influences, including biological factors, such as genetics, and environmental factors, such as trauma, nutritional and emotional deprivation. Such compromises can lead to a wide range of specific neurodevelopmental disorders, with common symptoms including cognitive delay, communication difficulties, and problems with emotional and behavioural control and social functioning.

2.51 Populations of children and young adults in custody show high rates of neurodisabilities, both in Victoria and elsewhere. For example, the Youth Parole Board has found that, of young people in youth justice centres in Victoria, over one-third presented with cognitive difficulties that affected their daily functioning.

Table 2 presents the prevalence of different neurodevelopmental conditions among young offenders in the United Kingdom, compared to the general population of young people.

<table>
<thead>
<tr>
<th>Type of disorder</th>
<th>Reported prevalence rates (young people)</th>
<th>Reported prevalence rates (correctional sample)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Learning (intellectual) disabilities</td>
<td>2–4%</td>
<td>23–32%</td>
</tr>
<tr>
<td>Communication disorders</td>
<td>5–7%</td>
<td>60–65%</td>
</tr>
<tr>
<td>Attention deficit hyperactive disorder</td>
<td>3–9%</td>
<td>11.7–18.5%</td>
</tr>
<tr>
<td>Autism spectrum disorder</td>
<td>0.6–1.2%</td>
<td>15%</td>
</tr>
<tr>
<td>Traumatic brain injury</td>
<td>24–31.6%</td>
<td>65%</td>
</tr>
</tbody>
</table>

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123. International research has found that children in care have far higher risk of FASD than other children: see Svetlana Popova et al., ‘Prevalence of Fetal Alcohol Spectrum Disorder among Special Subpopulations: A Systematic Review and Meta-Analysis’ (2019) 114(7) Addiction 1150, 1153, 1167–1168.


127. Baidawi and Sheehan (2019), above n 110, 9. Further analysis found that crossover children with neurodisability experienced greater cumulative maltreatment and adversity, earlier entry to out-of-home care and earlier onset of offending, more caregiver relinquishment and residential care placement, and a greater volume of charges. They were also more likely than other crossover children to have charges related to criminal damage and motor vehicle theft, but no more likely to have violent charges; Susan Baidawi and Alex R. Piquero, ‘Neurodisability among Children at the Nexus of the Child Welfare and Youth Justice System’ (2020) Journal of Youth and Adolescence (DOI 10.1007/s10964-020-01234-w) <https://link.springer.com/article/10.1007%2Fs10964-020-01234-w> at 20 April 2020.

128. Estimates of the rates of traumatic brain injury in Table 2 are high; this is mostly attributable to high rates of mild traumatic brain injury, often defined as any head injury leading to a loss of consciousness. For a discussion of differences in the prevalence of brain injuries of varying severity, see Nathan Hughes et al., ‘The Prevalence of Traumatic Brain Injury among Young Offenders in Custody: A Systematic Review’ (2015) 30(2) Journal of Head Trauma Rehabilitation 94. As discussed at [2.57]–[2.62], even mild traumatic brain injury may have ongoing effects.

129. Chitsabesan and Hughes (2016), above n 116, 110. This table presents the results of many different studies, meaning that the age groups and precise types of correctional populations vary, but the focus is on older teenagers in correctional facilities.
2. Relevance of childhood trauma to sentencing children

Like mental illnesses, these disorders are many times more common among young people in the youth justice system than those in the general population, which suggests there may be a common causal factor, or a relationship, between these difficulties and offending behaviour.

2.52 The situation is compounded because many children with mental illness or neurological disability experience multiple issues as well as other effects of trauma, each of which may then exacerbate the effects of the other.130

**Fetal alcohol spectrum disorders and intellectual disabilities can affect understanding and decision-making**

2.53 Fetal alcohol spectrum disorders (collectively referred to as FASD) are a collection of neurodevelopmental disorders related to maternal consumption of alcohol during pregnancy.131 FASD causes a number of physical abnormalities and affects the brain. Neurological symptoms of FASD include:

- poor coordination;
- reduced IQ;
- impairment in executive functioning and working memory;
- poor memory;
- poor reasoning and decision-making skills; and
- learning and attention difficulties, including difficulties learning from past experiences.132

2.54 FASD is also strongly associated with a range of co-occurring psychological conditions. These include conduct disorder, which affects FASD sufferers at 10 times the rate seen in the general population, and substance abuse, which occurs at 20 times the rate in the general population.133 The diagnostic criteria for both these disorders involve behaviour that often amounts to criminal offending.134 FASD is also associated with a number of other physical and developmental difficulties. People with FASD may also be highly suggestible, which can make them susceptible to peer pressure and may mean they are particularly vulnerable during police interviews and at trial.135

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130. For example, people with strong executive functioning are less likely to develop post-traumatic stress disorder after experiencing trauma, and children who are resilient to maltreatment have high ego control, among other factors; Rosanne op den Kelder et al., ‘Executive Function as a Mediator in the Link between Single or Complex Trauma and Posttraumatic Stress in Children and Adolescents’ (2017) 26(7) Quality of Life Research 1687, 1693; Jaffee (2017), above n 64, 539. However, many mental illnesses, including post-traumatic stress disorder, diminish executive functioning; ibid 528. Similarly, FASD and traumatic brain injury are associated with very high rates of mental illness, which in turn can worsen the effects of the underlying disorder or injury; Svetlana Popova et al., ‘Comorbidity of Fetal Alcohol Spectrum Disorder: A Systematic Review and Meta-Analysis’ (2016) 397(10022) The Lancet 978, 984; Amir Sariaslan et al., ‘Long-Term Outcomes Associated with Traumatic Brain Injury in Childhood and Adolescence: A Nationwide Swedish Cohort Study of a Wide Range of Medical and Social Outcomes’ (2016) 13(8) PLoS Medicine e356, e367–e370; Carol Bower et al., ‘Fetal Alcohol Spectrum Disorder and Youth Justice: A Prevalence Study among Young People Sentenced to Detention in Western Australia’ (2018) 8(2) BMJ Open (DOI 10.1136/bmjopen-2017-019605) <https://bmjopen.bmj.com/content/8/2/e019605.abstract> at 14 April 2020.


132. Ibid; Bower et al. (2018), above n 130, 6–7.

133. Popova et al. (2016), above n 130, 984.

134. American Psychiatric Association (2013), above n 13, 469–470, 481–591. For instance, substance use disorders often involve the consumption of illicit drugs or the consumption of legal drugs in quantities and in circumstances that are problematic, such as drink-driving. Similarly, the diagnostic criteria for conduct disorder can include aggression towards people and animals, destruction of property, deceitfulness or theft, and serious violations of rules.

2.55 Where intellectual and adaptive functioning is very low, it constitutes intellectual disability, a separately diagnosable disorder that can occur on its own or in conjunction with other issues, including FASD.\textsuperscript{136} Symptoms of intellectual disability, particularly in severe cases, can be similar to those of FASD, and people with intellectual disability experience other psychological and neurodevelopmental conditions too.\textsuperscript{137} The DSM-5 captures the ways in which these vulnerabilities can contribute to justice involvement:

There may be associated difficulties with social judgement; assessment of risk; self-management of behaviour, emotions, or interpersonal relationships; or motivation in school or work environments. Lack of communication skills may predispose to disruptive and aggressive behaviours. Gullibility is often a feature, including naivety in social situations, and a tendency for being easily led by others. Gullibility and lack of awareness of risk may result in exploitation by others and possible victimisation, fraud, unintentional criminal involvement, false confessions, and risk for physical and sexual abuse.\textsuperscript{138}

2.56 FASD and intellectual disability are both common among prison and youth justice populations.\textsuperscript{139} FASD also occurs at higher rates among Aboriginal and Torres Strait Islander populations than in the general Australian population,\textsuperscript{140} and it is likely to be disproportionately common among children involved with the child protection system.\textsuperscript{141}

**Traumatic brain injury can contribute to emotionality and challenging behaviour**

2.57 Traumatic brain injury is a type of acquired brain injury caused by physical trauma to the head.\textsuperscript{142} It has been found to be particularly common among children with both child protection involvement and criminal justice involvement.\textsuperscript{143} Despite ongoing underdiagnosis, it is well recognised as a common consequence of family violence.\textsuperscript{144}

2.58 The symptoms of acquired brain injury can vary from person to person, depending on factors like the severity of the injury and the area of the brain affected. They often include:

- sensory disturbances, including vision and hearing disturbance and speech impairment;
- fatigue; and
- problems with elements of executive functioning – including memory, concentration, learning new information and learning from mistakes – goal-setting, planning, making decisions and coping with environmental changes.\textsuperscript{145}

2.59 Children with traumatic brain injury are prone to emotional outbursts and tantrums, while adults with traumatic brain injury may experience unstable emotions.\textsuperscript{146}

\textsuperscript{136} Intellectual disability is also known as intellectual developmental disorder: American Psychiatric Association (2013), above n 18, 33–41.

\textsuperscript{137} Ibid 33–38, 40.

\textsuperscript{138} Ibid 38.

\textsuperscript{139} Chitsabesan and Hughes (2016), above n 116, 114–115; Sara McLean and Stewart McDougall, *Fetal Alcohol Spectrum Disorders: Current Issues in Awareness, Prevention and Intervention*, CFCA Paper no. 29 (2014) 4. A recent Australian study found that 36% of young people assessed in a Western Australian youth justice facility had diagnosable FASD; the estimated prevalence in the general Australian population is usually less than 2%: Bower et al. (2018), above n 130, 7–8.

\textsuperscript{140} Popova et al. (2019), above n 123, 116–1164; McLean and McDougall (2014), above n 139, 4. See also DPP v Moore [2009] VSCA 264; AH v Western Australia [2014] WASCA 228.


\textsuperscript{142} Brain Injury Australia (2018), above n 124, 2.

\textsuperscript{143} Chitsabesan et al. (2015), above n 124. Of 93 males aged 15–18 admitted to a secure facility in the United Kingdom during the study period, 82% had experienced at least one traumatic brain injury, more than half had experienced multiple traumatic brain injuries, and 48% had ongoing neuropsychological symptoms as a result. About two-thirds of those with at least one traumatic brain injury had experienced state care prior to their sentence, whereas the rate of state care for young offenders generally was half that (37%).

\textsuperscript{144} Brain Injury Australia (2018), above n 124, 5–7, 25–26, 31–32.

\textsuperscript{145} Ibid 5–6.

\textsuperscript{146} Ibid 28.
More than half of adults and children with a history of traumatic brain injury exhibit ‘challenging behaviours’, including aggression, self-harm or inappropriate social behaviour.\(^{147}\) Children and families with particular vulnerabilities (such as poverty, family adjustment issues and lack of access to supports) and Aboriginal and Torres Strait Islander people appear to display worse symptoms.\(^{148}\)

2.60 In the longer term, traumatic brain injury is associated with a number of negative lifetime outcomes, including psychiatric illness and hospitalisation, disability, low education and premature mortality.\(^{149}\) Number and severity of injuries are associated with worse outcomes;\(^{150}\) the number of injuries has a particularly large effect on rates of psychiatric visits and hospitalisations.\(^{151}\)

2.61 Traumatic brain injury is seen at very high rates among adult and child arrestees, offenders and prisoners;\(^{152}\) and it is associated with increased offending rates and severity.\(^{153}\) Perpetrators of family violence also have higher rates of traumatic brain injury than the general population.\(^{154}\) Many of the challenging behaviours associated with traumatic brain injury could, in the wrong circumstances, constitute or contribute to criminal offending, for example, by ‘eroding the capacity for self-regulation and socialisation’.\(^{155}\)

2.62 Recent research suggests that even subconcussion injuries can have serious effects on neurological health. Such injuries may be associated with deficits in functioning and a range of adverse social and health outcomes.\(^{156}\) This suggests that the effects of traumatic brain injury may affect more people than previously known. There is also evidence that the behaviour of people with traumatic brain injury can be misconstrued when those dealing with them are unaware of their brain injury.\(^{157}\) People with traumatic brain injuries can also experience significant hardship in custody.\(^{158}\)


\(^{150}\) Sariaslan et al. (2016), above n 130, e366–e367.

\(^{151}\) Ibid e367.


\(^{153}\) Brain Injury Australia (2018), above n 124, 6.

\(^{154}\) Ibid 19–22.

\(^{155}\) Williams et al. (2018), above n 149, 838. Some studies have suggested that high rates of moderate to serious traumatic brain injury among offenders may relate to a common cause of both traumatic brain injury and offending such as increased risk-taking, rather than a contribution of traumatic brain injury to offending; see Chitsabesan et al. (2015), above n 124, 107. However, even if the traumatic brain injury is indeed caused by risky behaviour, it is still likely to exacerbate that type of behaviour following the injury; ibid 110, 113.


\(^{158}\) Such hardships can include ‘limited service access, becoming victims of assaults, or receiving penalties for impulsive behaviour’: ibid.
Hearing and communication difficulties can contribute to outbursts and perceived disobedience

2.63 Hearing and communication difficulties are common among children who have contact with the child protection system, and such difficulties tend to exacerbate contact with the criminal justice system as well.\(^{159}\) Hearing, speech and language limitations can severely limit sufferers’ ability to express themselves, which may lead to frustration that the sufferer cannot express verbally. This can contribute to physical expressions of emotion.\(^ {160}\) Similarly, a hearing or language-processing deficit, combined with deficits in working memory that make it psychologically difficult to follow instructions, may lead to behaviour that is perceived by others as disobedient, causing further frustration for the child. If this exceeds the child’s ability to self-regulate, challenging and aggressive behaviours may result.\(^ {161}\)

2.64 Hearing and communication difficulties can also affect children’s abilities to understand questions, evidence, legal processes, conditions and sentences. This can, in turn, affect their perceived compliance, which can contribute to arrest, difficulty defending or explaining their behaviour, difficulty engaging with restorative justice processes and breaches of orders. All this can exacerbate involvement with the criminal justice system.\(^ {162}\) Provision of communication assistance can mitigate these difficulties by helping children and other parties understand one another.\(^ {163}\)

2.65 Hearing and communication difficulties often arise from neurodisability. In particular, almost all FASD sufferers have some sort of speech or language limitation.\(^ {164}\) Traumatic brain injury can also cause or contribute to communication issues.

Removal from family and community may compound the effects of trauma

2.66 Ideally, child protection involvement prevents a child from being exposed to ongoing trauma. However, even in cases where it is required, child protection involvement can itself be a source of trauma and contribute to an increased likelihood of contact with the criminal justice system, particularly for children in out-of-home care.

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159. Roundtable 3 (10 December 2019); Roundtable 4 (12 December 2019); see also Stavroola Anderson et al., ‘Language Impairments among Youth Offenders: A Systematic Review’ (2016) 65 Children and Youth Services Review 195.

160. Similar issues may also ensue for individuals with non-FASD communication difficulties, such as those caused by autism: Chitsabesan and Hughes (2016), above n 116, 117.


164. These include developmental/processing limitations and physical limitations such as hearing deficits: Popova et al. (2016), above n 130, 984.
2. Relevance of childhood trauma to sentencing children

2.67 Removal may occur against a background of police involvement related to parents’ alleged offending and/or alleged abuse. Removal may also occur in the context of a parent’s health crisis.\(^{165}\) This can lead children to associate people like police, other emergency services staff and doctors with the trauma of removal. In turn, this may influence children’s subsequent reactions to those people in highly charged situations.\(^{166}\)

2.68 Further, many children experience removal as a loss of, or disconnection from, family members to whom they are deeply attached, despite the dysfunction that may have led to child protection involvement.\(^{167}\) Where there are siblings in a household, this loss can be compounded if they are not housed together.\(^{168}\) A recent investigation by the Commission for Children and Young People found that 41% of children in care were not placed with all their siblings, and 25% were placed apart from all their siblings. For children in residential care, almost three-quarters were placed alone.\(^{169}\) The evidence suggests that contact with family, and particularly siblings, is an important protective factor.\(^{170}\)

2.69 There appears to be a relationship between family violence committed by children, often in the context of their own experience of violence and trauma, the use of intervention orders and out-of-home care. Some children end up in out-of-home care when they are unable to live in the family home due to their own violence.\(^{171}\) However, their violence cannot be viewed in isolation. Research suggests that most children who exhibit violence in their home are likely to have themselves been victims of family violence, either directly or as witnesses, and a partner of their mother is usually the perpetrator.\(^{172}\)

The merits of legislative recognition of the relevance of childhood trauma to sentencing children

2.70 At present, there is a lack of legislative and judicial guidance on the relevance of trauma to sentencing children. In particular, trauma is not among the sentencing matters listed in the Children, Youth and Families Act 2005 (Vic), and almost all the available case law comes either from cases involving adults or from cases involving serious offending by older teenagers. Given the centrality of childhood trauma to sentencing children, there is a symbolic importance in expressly recognising it in the legislative framework that governs the sentencing of children. Further, the lack of express recognition of trauma and related factors among the matters in the Act that must be considered when sentencing children may undermine the principle of transparency in sentencing and risk inconsistency in the consideration of these matters.

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165. Roundtable 2 (4 April 2019). For instance, a child could experience out-of-home care after a parent is sent to a hospital or a psychiatric ward and the child is placed with other family or another out-of-home care placement like foster care in the interim.
166. Increased police presence and trauma-related non-compliance are likely to contribute to disproportionate rates of resisting/assaulting police offences among children in out-of-home care: Sentencing Advisory Council (2020), above n 3, 55–58.
169. Commission for Children and Young People (2019), above n 18, 302. Similar results were found in a national survey for which 40% of Victorian children in care were found to have been placed with siblings; McDowall (2018), above n 167, 67–68. This was higher than the national average of 27%. Nationally, figures were worse for children in residential care or independent arrangements than for those in kinship or permanent care: ibid 68–69. Around half of Victorian children wanted more contact with their siblings: ibid 71.
170. Commission for Children and Young People (2019), above n 18, 183, 190–192, 203–205. For Aboriginal children, separation from siblings may also entail separation from culture. This occurs at concerning levels, especially for children on care by Secretary orders: ibid 91. Research has found that children agree that contact with siblings is important and helpful; see for example, McDowall (2018), above n 167, 156.
As a recent study of crossover kids by Monash University researchers found:

Participants – particularly lawyers and Youth Justice professionals – also noted a degree of inconsistency in Magistrates’ responses to cross-over children across various suburban Court locations, especially in regard to sentencing. This was attributed to the lack of Children’s Court specialisation among some Magistrates, and in some instances, their lack of familiarity with the Child Protection system or Family Division matters.173

2.71 As noted at [1.9], in their 2017 Youth Justice Review, Armytage and Ogloff recommended the creation of a new Youth Justice Act, separate from the Children, Youth and Families Act 2005 (Vic), which would ‘provide a clear statement of the purpose, role and principles for Youth Justice’.174 Developing a new Act provides an opportunity to review the factors applicable to sentencing children, including the ways in which trauma and disadvantage should be considered.

2.72 Sentencing principles have been implemented elsewhere requiring the sentencing court to have regard to child welfare considerations. The Children and Young Persons Act 1933 (UK), for example, recognises the importance of securing proper provision for education and training as well as removing the child or young person from undesirable surroundings.175 Those principles are then 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 … the effect on children and young people of experiences of loss and neglect and/or abuse’ as well as ‘the need to choose the best option for the child or young person taking account of the circumstances of the offence’.176 The list of mitigating factors provided in the definitive guideline includes an:

- 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.177

2.73 Given the findings of the Council’s Crossover Kids series of reports, along with research in the fields of child development, psychology, neurology, social services and criminology, it is evident that childhood trauma is a key contributor to many children becoming involved in the criminal justice system. The constellation of childhood trauma, the negative outcomes associated with such trauma, neurodisability, out-of-home care placement and the number of such placements are all factors that not only increase the chances of a child experiencing more than one of those complex issues but also compound the effects of each on the other. A child with a traumatic brain injury, a history of trauma and a placement in residential care is, for instance, likely to experience more significant difficulties with executive functioning than a child experiencing just one of those issues.

175. Children and Young Persons Act 1933 (UK) s 44.
177. Ibid 16.
2.74 These various difficulties can reduce children’s ability to cope with difficult situations and temper their responses in emotional settings, and they can affect their ability to understand or comply with instructions from carers and police or in court orders. Further, the nature of the social vulnerability and damage to relationships associated with many types of childhood trauma, including care history, is likely to further affect children’s resilience and access to interventions.

2.75 In effect then, trauma can lead to an increased risk of contact with the criminal justice system. Importantly, there are numerous reasons for this: it is not simply a matter of traumatised children being more predisposed to criminality. Instead, it is related to a combination of behavioural factors, such as misbehaviour; whether wilful or a trauma response; environmental factors, such as more frequent exposure to police; and systemic factors, such as the reporting of behaviour in residential care homes that might not have been reported to police if it occurred in the family home. These factors combined increase the odds that children who have experienced trauma will become and stay involved with the criminal justice system. Such offending behaviour can be seen as externalised consequences of neurological or psychological adaptations that may have helped the individual survive childhood but can cause immense harm outside situations of necessity.

2.76 Ideally, a child’s trauma should be addressed and the child should be supported to recover long before their behaviour brings them into contact with the youth justice system. In addition, support should be intensified if the child’s behaviour continues to become more problematic. If traumatised children do enter the youth justice system, however, just and effective sentencing requires that courts are equipped with sufficient information about the child’s trauma and protection history, and its relevance to the child’s offending, their prospects of rehabilitation and their ability to understand and comply with the sentence imposed. Addressing the causes of children’s offending, including the effects of trauma, is also a key component of rehabilitation and, as a result, the long-term protection of the community.

Rehabilitation as the primary purpose of sentencing children

2.77 The courts have long recognised the primary importance of rehabilitation in sentencing children. This includes the opportunity afforded by a child’s capacity for rapid change during youth to positively influence their development, address the factors contributing to their offending and reduce their risk of reoffending.\(^{178}\) A focus on rehabilitation thereby serves both the child and the community by directing children away from a potentially lifelong pathway of antisocial conduct and criminal offending.\(^{179}\) The importance of rehabilitation is also recognised in the Victorian Charter of Human Rights and Responsibilities, which provides that ‘[a] child charged with a criminal offence has the right to a procedure that takes account of … the desirability of promoting the child’s rehabilitation.’\(^{180}\)

2.78 Rehabilitation underpins the first four of eight matters in the Children, Youth and Families Act 2005 (Vic) that the court must take into account when sentencing children (see [2.1]–[2.7]). In many cases, rehabilitation will be an important aspect of the remaining four matters. However, the Act does not specifically mention rehabilitation as a purpose of sentencing in the Children’s Court.

2.79 The development of a new Youth Justice Act presents an opportunity to expressly provide that rehabilitation is the primary purpose of sentencing children in Victoria.

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178. See for example, Webster (A Pseudonym) v The Queen [2016] VSCA 66 (11 April 2016) [8].


**Sentencing factors relating to trauma, child protection involvement, age and development**

2.80 The creation of a new Youth Justice Act proposed by Armytage and Ogloff provides an opportunity to consider whether the sentencing framework could be strengthened by the inclusion of a non-exhaustive list of sentencing factors applicable to sentencing children. This is in light of this study's findings about the prevalence of children with child protection backgrounds among sentenced and diverted children.

2.81 There are a number of factors relating to childhood trauma that might be considered for inclusion in a new Youth Justice Act. These are based on the factors identified in Report 2 as being associated with children's early entry into the youth justice system and on the sentencing guidelines relevant to children in other jurisdictions. Such factors include the following:

- **The context and background of the child's offending.**
- **The child's experience of trauma.** This includes consideration of the type, severity and duration of trauma, the child's age at the time and the effect of the trauma on the child's development and capacity to avoid offending behaviour. Examples of adverse childhood experiences that are likely to cause childhood trauma are set out at [2.3], including abuse, neglect, loss or deprivation and intergenerational trauma.
- **Child protection involvement.** This includes the number of reports made to the Child Protection Service about the child, the harm or risk reported and the result of those reports, for example, the making of a protection application.
- **Removal from family of origin.** In addition to removal from parents, this includes removal from siblings, extended family, culture and community.
- **Disruptions to the child's living situation or education.** This includes moving around frequently, being informally cared for by people other than parents, and the lack of a stable caregiver and attachment relationship, such as for children who experience multiple foster care situations or an unsafe or unstable primary caregiver.
- **The experience of out-of-home care.** This includes the circumstances of the child's removal, their age at first removal, the amount of time spent in care, the level of stability (or instability) and disruption, the need to ensure that the child has a safe, stable and secure place to live, the number of placements and carers, the type of placement, for example, residential care, and any further exposure to trauma while in out-of-home care. It also includes the possibility that offending may be care-related and that portions of the child's prior criminal record may involve offences that were care-related, including prior breaches of bail, as well as the likely effect of any custodial order on a child's care placement.
- **The need to protect the child from harm or the risk of harm.**
- **The involvement of an adult in the commission of the offence.** This particularly includes parents or carers, authority figures or adults capable of exercising influence over the child.

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184. This includes physical or sexual abuse against the child directly; emotional abuse or neglect; exposure to family violence against another person in the home; exposure to a parent, caregiver or other family members’ drug or alcohol abuse, serious physical illness, mental illness or criminal offending; experience of violence outside the household; the incarceration of a parent; the death of a parent; serious childhood injury; exposure to conflict, war or harsh living conditions; and mental illness or developmental issues.
185. In **CNK v The Queen** [2011] VSCA 228 (10 August 2011), the Court of Appeal found it particularly significant that the offender, who had just turned 15 at the time of the offending, was involved in offending with his mother and uncle, as well as others.
2. Relevance of childhood trauma to sentencing children

- Mental illness, neurological difficulties and developmental issues and their relationship to trauma. This includes mental illness, neurological difficulties and developmental issues that may arise from, or be exacerbated by, experiences of trauma and the potential interaction between such difficulties, trauma and the child’s offending.

- The child’s chronological and developmental age at the time of the offence and at sentencing. The child’s age is relevant to the assessment of culpability, the impact of many of the factors listed above and the appropriateness of a particular sentence as a response to the offending behaviour.186 This consideration encompasses understanding childhood development generally as well as specific developmental issues experienced by the child, including the effect of trauma and disruption on the child’s development and capacity to avoid offending behaviour.

2.82 It is also important to address the concerning over-representation of Aboriginal and Torres Strait Islander children, given the findings of Reports 1 and 2 of the Crossover Kids series as to their particular vulnerability.187 A relevant sentencing consideration is that Aboriginal and Torres Strait Islander children often suffer from multiple disadvantages, including the consequences of trauma, and these may have a compounding effect, rather than a merely additive one. Other considerations that are relevant to sentencing Aboriginal and Torres Strait Islander children include the consequences of intergenerational trauma, historical discriminatory policies, general and systemic racism, and any relevant cultural factors, for example, culturally inappropriate responses that may have worsened the effect of trauma. The proposed Youth Justice Act offers the opportunity to consider how particular combinations of systemic and background factors affecting Aboriginal and Torres Strait Islander children might be relevant to their sentencing.

2.83 The ability of the Children’s Court to properly consider the effects of trauma on a child, and its relevance to the child’s offending behaviour and sentence, relies on the information provided to the Children’s Court. This includes information about the child’s protection history, engagement with support services and other relevant circumstances, and submissions as to the effects of trauma on the particular child along with appropriate supporting evidence.

2.84 In cases that raise sentencing factors relating to trauma, submissions would need to address the possible effects of trauma and associated factors on the child. This might vary depending on the type, severity and duration of the trauma; the child’s age at the time of the trauma and at the time of the offending or sentence; the child’s resilience; and other supports available. In this context, submissions and evidence may need to cover the course of normal childhood development as well as the possibility that behaviours like outbursts, tantrums and overreactions may indicate a history of trauma or neurological, developmental or psychological issues.188

The Court of Appeal referred to the sentencing judge’s finding that: ‘it is significant that you offended in the presence of two adults, who were more than twice your age. It is even more significant that one of those adults was your own mother, and the other was your uncle. While you were foolish to follow their leadership, nevertheless the inescapable fact is that you were under the influence of two mature aged persons, to whom you are closely related: CNK v The Queen [2011] VSCA 228 (10 August 2011) [63]. The Court of Appeal held that ‘the culpability of a young offender who, like the applicant, gets drawn into something on which his mother and another close adult relative are embarking is very different from that of a young offender who, alone or in company, initiates a course of unlawful, violent activity. In this … respect … his culpability is materially reduced: CNK v The Queen [2011] VSCA 228 (10 August 2011) [63], [73].

186. JL v DPP [2019] VChC 2 (29 July 2019) [35], [39].
188. For more information on the effects of trauma, see [2.24]–[2.69].
The administration of sentences

2.85 A trauma-informed approach is relevant not only to the decision about which sentence to impose but also to sentence administration. Sentences should be administered in a way that is congruent with the child’s abilities and limitations. For example, the Children’s Court is required to ensure that the child understands the nature of the proceedings and the meaning of the sentence. Relevant considerations include:

- ensuring that any conditional orders are explained to the child, are expressed in language, or pictures where necessary, that the child can comprehend and are feasible and practical;
- considering the number of different orders to which a child is already subject, and the cumulative complexity of all orders that would be in force, when making a conditional order; and
- considering whether the child may require additional assistance or therapeutic intervention to understand and comply with the sentence and/or to address their offending behaviour.

2.86 Research suggests that a feeling of psychological safety, or at least removal from an actively traumatic environment, is an important prerequisite for improving outcomes for children who have experienced trauma. Psychological safety is not compatible with threatening or overwhelming situations. Even if children are in fact safe, they are unlikely to feel safe in an unstable situation or in a placement where they do not feel at home. The need for psychological safety to promote recovery means that children may be unable to engage with even therapeutic conditions of a sentencing order if they are still experiencing the effects of trauma, rendering that order less effective. It is therefore crucial to ensure that courts are resourced with sufficient specialised staff to assist in assessing children and ensuring that children understand their sentences. It is also important that children in out-of-home care who are serving a sentence have their placement stability and security prioritised to support their compliance with, and ability to respond to, their sentencing order.

Conclusion

2.87 The strength of the association between childhood trauma and criminal justice involvement suggests that meaningful rehabilitation during childhood offers a unique opportunity to mitigate or prevent offending over the course of a child’s lifetime. Report 2 notes that trauma, abuse and distress may contribute to some children offending prolifically, violently and seriously, with their behaviour causing considerable harm to members of the community. Effective rehabilitation requires an understanding of the reasons for offending and a criminal justice response that addresses those reasons, whether personal to the child, systemic or both. Effectively addressing childhood trauma early, increasing support when children enter out-of-home care and ensuring that rehabilitation is the key purpose of sentencing children are all key components of an effective crime prevention strategy that may stop traumatised children from developing into prolific and/or violent offenders.

189. The Children’s Court is required to ensure that the child understands the nature of the proceeding and explain the meaning of any order as simply as possible: Children, Youth and Families Act 2005 (Vic) ss 522(1)(b), 527.


3. Barriers to trauma-informed sentencing

Overview

3.1 The Children's Court of Victoria is legislatively structured to separate child protection matters from criminal matters. There are also differences in the availability of specialist Children's Court facilities, practitioners and services in regional locations. This chapter examines how the legislative structure of the Children's Court and differences in regional Children's Court locations affect the sentencing of children who are known to child protection. The chapter flags for consideration possible reforms that could ‘bridge the gap’ between the Criminal and Family Divisions and strengthen the capacity for sentencing courts to be fully appraised of a child’s protection and trauma history.

Criminal and family matters are dealt with separately in the Children's Court

3.2 Under the Children, Youth and Families Act 2005 (Vic), the Children's Court of Victoria has two divisions that deal with children and young people:193

- The **Family Division** hears child protection applications relating to children at risk194 and applications for intervention orders.

- The **Criminal Division** hears and determines charges against children if the alleged offending was committed on or after the child’s 10th birthday but before their 18th birthday. Children aged under 10 are, at law, not criminally responsible and cannot be prosecuted for their behaviour. Children aged 10–13 (inclusive) are considered to be *doli incapax*, that is, by default they are not criminally responsible unless the prosecution can prove the child knew their conduct was morally wrong, as opposed to childish naughtiness or mischief.195 Children aged 19 by the time the case commences in the Children's Court must have their case transferred to the Magistrates' Court.196

3.3 The Criminal Division must hear and determine all summary (less serious) offences alleged to have been committed by children and most indictable (more serious) offences alleged to have been committed by children, unless certain criteria are met that require the case to be heard in the adult jurisdiction.197

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193. Parts 7.1–7.2 of the Children, Youth and Families Act 2005 (Vic) outline the structure, constitution and jurisdiction of the Children's Court.

194. 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 that 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 (see above n 19).


197. In particular, certain fatal offences must be heard in the Supreme Court, although the Children's Court may conduct committal proceedings: Children, Youth and Families Act 2005 (Vic) ss 516(3)(b)–(e). Further, some offences are classified as Category A or B serious youth offences and may be uplifted: Sentencing Advisory Council, Guide to Sentencing Schemes 2019 (2020) 6. The child may object to the matter being heard summarily in the Children's Court: Children, Youth and Families Act 2005 (Vic) s 356(3)(a). Or the court may consider the case unsuitable to be heard and determined summarily due to exceptional circumstances, usually because of the seriousness of the alleged offending: Children, Youth and Families Act 2005 (Vic) ss 356(3)(b), 356A.
3.4 The Children’s Koori Court is a sentencing court that determines criminal offences, other than sexual offences, committed by Aboriginal children,\(^\text{198}\) provided the child consents to appear before the Koori Court and accepts responsibility for the offence if suitable for diversion, pleads guilty to the offence or is found guilty of the offence.

3.5 As noted in Reports 1 and 2 of the Crossover Kids series, the modern structure of the Children's Court—a specialist Children’s Court with separate Family and Criminal Divisions—stems from a review by the Child Welfare Practice and Legislation Review Committee, which was established in 1982 by the Victorian Government.\(^\text{199}\) The Committee’s final report from 1984 recommended changes to the structure and jurisdiction of the Children's Court, including a clear distinction between child protection and criminal matters.\(^\text{200}\) Previously, the system had failed to distinguish between children in need of protection and children 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.\(^\text{201}\)

### Implications of separate divisions for crossover children

3.6 The separation of the Children’s Court’s criminal and family (child protection) jurisdictions was an important step in changing the legal approach to protecting vulnerable children and ending the criminalisation of a child’s need for protection. In practice, however, it can result in an artificial divide for children caught up in both systems:

> Over the past 25 years there has been a widespread trend (particularly by government and government agencies) to view these two jurisdictions of Children's Courts as quite separate and distinct. However, they are not separate and distinct. There is a considerable overlap between the two jurisdictions because many young offenders who come before the Children's Court in its criminal jurisdiction have a history of being in care. We also see in our criminal jurisdiction young offenders who should have had interventions from the child protection agency but 'have slipped through the cracks' in the child protection system.\(^\text{202}\)

3.7 A difficulty of a separated system is that ‘the complex challenges and needs of crossover youth often prove too much for each system alone to address’.\(^\text{203}\) Indeed, the experience of many of these children demonstrates a ‘distinct correlation’ between a history of child protection interventions and criminal offending.\(^\text{204}\)

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\(^{198}\) ‘Aboriginal person’ is defined in Children, Youth and Families Act 2005 (Vic) s 3(1).


\(^{200}\) For further discussion, see Sentencing Advisory Council (2019), above n 3, 17–30.


\(^{202}\) 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) 5.


Welfare and justice responses may differ

3.8 For children involved in both the criminal justice and the child protection systems, particularly children in out-of-home care, separate divisions may create barriers to holistically addressing the child’s ‘needs’ and ‘deeds’. This is particularly problematic where the child’s offending arises from a background of trauma or occurs in the context of an out-of-home care placement. A child’s antisocial or criminal behaviour is not itself a ground for finding a child in need of protection, although it may indicate that other child protection grounds are present.205 For example, children who behave aggressively or display sexually inappropriate behaviour may themselves be experiencing physical or sexual abuse.206 Stakeholders raised examples of very young children being drawn into the criminal offending of older family members; once the children reached age 10, this same behaviour was then dealt with criminally.207 Baidawi and Sheehan illustrate this with an example of ‘a boy with an intellectual disability [who] was being reportedly forced and threatened by his uncle to engage in mobile phone thefts’.208

3.9 If a child has dual criminal and child protection matters, the child protection matter is prioritised and must be dealt with before charges in the Criminal Division proceed, unless the court orders otherwise.209 This provision has been described as recognising that ‘protective issues could have an impact on children’s behaviour so … these issues should be clarified before deciding on the appropriate way to deal with the child’s charges’.210 While the Family Division outcome is likely to be relevant to the Criminal Division matter, the two matters are heard separately, often by separate judicial officers and/or with the child represented by a different legal practitioner at each hearing. Consequently, the Criminal Division may have insufficient information on the protective concerns about the child and the extent to which the criminal behaviour relates to those concerns.211 As a consequence, the legal responses to the child’s circumstances and behaviour may be fragmented or contradictory. Where criminal behaviour is strongly related to trauma, welfare issues or out-of-home care, a live question in Victoria is whether it might be more effective in some circumstances to address the child’s behaviour with a welfare, rather than a justice, approach.

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205. Section 162 of the Children, Youth and Families Act 2005 (Vic) sets out the grounds for finding a child in need of protection (see above n 19). Anti-social or offending behaviour by the child is not among the listed grounds. Some jurisdictions do explicitly recognise that offending may be a signal that a child is in need of protection. For example, one of the grounds for finding a child in need of care or protection in New Zealand is where ‘the child has committed an offence or offences of sufficient number, nature, or magnitude to cause serious concern for the well-being of the child’ Oranga Tamariki Act 1989 (NZ) s 14(1)(e).


207. Roundtable 3 (10 December 2019). This was a particular concern in rural areas, where authorities knew particular families and children, and fewer support services were accessible.


211. Ibid.
3.10 While discussing a policy shift to increased separation between criminal and family matters in New South Wales in 2012, the then-President of the New South Wales Children's Court commented:

A 13 year old who has left the family home and is living on the streets because of ongoing domestic violence and/or drug and alcohol abuse by their parents is very likely to become involved in offending behaviour in order to survive or because they are associating with a peer group which engages in offending behaviour. But does this ‘offending behaviour’ by the 13-year-old require a response within the criminal justice system (with the consequent stigmatising of the young person and the possible prejudicing of their future employment prospects) or should the child be dealt with within the child welfare system? Is there a risk in ‘criminalising’ the behaviour of a young person with serious welfare needs? 212

3.11 Currently, the separation between the Criminal and Family Divisions of the Children's Court could be described as jurisdiction focused, that is, a specific issue is looked at through either a criminal or a child protection lens, rather than child focused, that is, the child’s situation, issues, behaviour and needs are put at the forefront and the child’s circumstances and behaviour are addressed in a holistic way, drawing on aspects of both systems where appropriate.

There are limited avenues for considering child protection and criminal matters holistically, even if they are directly related

3.12 Once a child’s criminal matter reaches the Children’s Court, if there is prima facie evidence that grounds exist for making a protection application in respect of the child, the Children’s Court may refer the matter to the Secretary to the Department of Health and Human Services to investigate whether there are grounds for a protection application.213 In practice, however, this power is infrequently used and rarely results in child protection involvement or the making of a protection application.214 In the period from 1 January 2016 to 15 May 2019, 49 referrals were made. Of these, 10 resulted in a new child protection proceeding, two of which were applications for therapeutic treatment orders, and 11 related to cases where there was already an existing child protection proceeding. In the remaining 28, the referral did not lead to a child protection proceeding, although the Child Protection Service may have worked with the family or referred them to appropriate supports (this is not reflected in the data).215 To put the number of referrals in context, the Criminal Division made over 7,000 findings of guilt in the same period.216

3.13 Where a section 349 referral from the Criminal Division results in a new child protection proceeding, the application does not end the child’s Criminal Division involvement; it is heard separately from the Criminal Division hearing of the child’s offences, even if the two were related.217 Yet where offending relates to neglect or maltreatment resulting in a referral to the Family Division, those circumstances may be highly relevant to the child’s culpability and mitigation, perhaps sometimes to such a degree that a welfare-focused approach to the child’s behaviour would be more effective and appropriate than a justice response.

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213. Children, Youth and Families Act 2005 (Vic) s 349.
215. Children’s Court unpublished data.
217. In contrast, the Youth Court in New Zealand has, alongside its power to refer, a power to end the criminal hearing, except for the most serious charges such as murder and manslaughter: Oranga Tamariki Act 1989 (NZ) ss 258, 280, 282. See further [3.30].
3. Barriers to trauma-informed sentencing

3.14 One example of a holistic, therapeutic response to offending behaviour in Victoria is the scheme for addressing sexually abusive behaviour by children. This provides for a child to be discharged from criminal proceedings if they attend and participate in a therapeutic treatment program.\(^{218}\) If a therapeutic treatment order is made in relation to a child who is facing criminal proceedings, the Children's Court must adjourn the criminal proceedings. If it is satisfied that the child has attended and participated in the program, the Children’s Court must discharge the child without any further hearing of the criminal proceedings.\(^{219}\) However, as noted in Report 1 of the Crossover Kids series, such orders are not common: 11 therapeutic treatment orders were made in Victoria in 2016–17, 14 were made in 2017–18 and 11 were made in 2018–19.\(^{220}\)

3.15 Trauma-based therapeutic interventions benefit the child by addressing the causes of their offending behaviour. Beyond the benefit to the child and their family, such interventions are also a crucial crime prevention tool. In practice, however, with the limited exception of the scheme for sexually abusive behaviour, once a child has been charged and is before the Criminal Division, the only avenue for addressing their behaviour is a youth justice response such as a sentence or diversion, even if the child’s charged conduct appears to indicate trauma, unmet needs, developmental issues or developmentally inappropriate behaviour. If the child is found to be \textit{doli incapax}, ending the criminal prosecution, there may be no mechanism for the court to intervene to address concerns about the child.

3.16 In contrast to the approach in Victoria, the approaches in Scotland and New Zealand involve more flexible responses to offending behaviour by children. They provide for a welfare response, rather than a justice response, in certain circumstances, as discussed next.

The integrated approach to children’s offending in Scotland and New Zealand

Scotland: a welfare-based approach

3.17 Scotland has a predominantly welfare-based approach to offending by children. Anyone concerned about a child can refer that child to the Scottish Children’s Reporter Administration,\(^{221}\) which employs children’s reporters who decide whether there are legal grounds for referring the child to a children’s hearing.\(^{222}\) Any or all of the following can constitute legal grounds for bringing a child to a children’s hearing: offending by the child, offending against the child, abuse, harm and neglect.\(^{223}\)

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\(^{218}\) Section 244 of the \textit{Children, Youth and Families Act 2005} (Vic) provides for therapeutic treatment for children who have exhibited sexually abusive behaviour: Any person who believes on reasonable grounds that a child aged 10–17 inclusive is in need of therapeutic treatment may report that belief and the grounds for it to the Department of Health and Human Services: \textit{Children, Youth and Families Act 2005} (Vic) s 185.

\(^{219}\) \textit{Children, Youth and Families Act 2005} (Vic) ss 352–354.

\(^{220}\) Sentencing Advisory Council (2019), above n 3, 20; \textit{Children’s Court of Victoria} (2019), above n 216, 41.


\(^{223}\) \textit{Children’s Hearings (Scotland) Act 2011} (Scot) s 67(2). Children aged 16–18 are not considered children in most cases, meaning that their offending is dealt with by the criminal courts: \textit{Children’s Hearings (Scotland) Act 2011} (Scot) s 199 (definition of ‘child’).
Police officers have a legislated duty to provide information to the authorities where they consider that a child is in need of protection, guidance, treatment or control and a compulsory supervision order might need to be made in relation to the child. This includes circumstances where the concern arises from the child’s criminal offending.224

3.18 Decisions at children’s hearings are made by members of the Children’s Panel, who are specially trained layperson volunteers from the local community.225 Hearings are private; certain specified persons are allowed to attend, and the child and their parents or caregivers are required to attend.226 At the children’s hearing, a decision is made about whether compulsory supervision is required to help the child. Compulsory supervision orders specify matters such as where the child or young person is to live, for example, with foster carers or a relative, and who the child should see and when. More stringent orders, including secure accommodation conditions, are also available in certain circumstances.227

3.19 The age of criminal capacity in Scotland is 12 years, meaning that no child aged under 12 can be found guilty of a criminal act; instead, these children are dealt with by the children’s hearing system.228 There is also a presumption that, for most offences, children aged under 16 are referred to the children’s reporter and dealt with under the children’s hearing system, rather than prosecuted.229 Further, “[n]o child under 16 years will be prosecuted in summary proceedings unless the Lord Advocate has instructed the prosecution.”230

3.20 For some serious alleged offences, the police are required to jointly report the offence to the prosecution service (the ‘Procurator Fiscal’) and the children’s reporter.231 If the alleged offence involves a young person aged 16 or over, the Procurator Fiscal is likely to deal with the case.232 Such cases may be dealt with via diversion or a direct measure such as a fine or warning, or the Procurator Fiscal may decide that the matter should proceed through the criminal courts.233

227. Children’s Hearings (Scotland) Act 2011 (Scot) s 83. Among other conditions, secure accommodation conditions are only available where the child has previously absconded and is likely to abscond again and, if the child were to abscond, it is likely that the child’s physical, mental or moral welfare would be at risk; the child is likely to engage in self-harming conduct; or the child is likely to cause injury to another person: Children’s Hearings (Scotland) Act 2011 (Scot) sub-s (6).
228. The age of criminal responsibility was recently raised from 8 years to 12 years: Age of Criminal Responsibility (Scotland) Act 2019 (Scot).
230. Ibid 8. ‘In deciding whether to prosecute a child who has been jointly reported, the overriding consideration for [the Crown Office and Procurator Fiscal Service] is whether it is in the public interest to prosecute the child (if there is sufficient evidence to do so). A range of factors are relevant to the decision, such as the gravity of the offence, a pattern of serious offending, whether services within the Children’s Hearings System currently are working, or could work, with the child in relation to the child’s offending behaviour or offending-related needs; and any health or development issues (e.g. that the child has ADHD or learning difficulties) that may indicate that the child’s needs and behaviour would be best addressed within the Children’s Hearing system’: ibid 8–9. See also Centre for Youth and Criminal Justice, A Guide to Youth Justice in Scotland Policy, Practice and Legislation (2018) 40.
231. Frank Mulholland, Lord Advocate’s Guidelines to the Chief Constable on the Reporting to Procurators Fiscal of Offences Alleged to Have Been Committed by Children (2014); Centre for Youth and Criminal Justice (2018), above n 230, 40, 95.
232. Where the child is already involved with the Scottish Children’s Reporter Administration (with a current compulsory supervision order or an open child protection matter), the matter must also be referred to the children’s reporter: Children’s Hearings (Scotland) Act 2011 (Scot) s 199 (definition of ‘child’); Crown Office and Procurator Fiscal Service and Scottish Children’s Reporter Administration (2019), above n 229, 4–5. If COPFS consider that this matter would better be pursued by the CHS because it is deemed to be in the public interest not to prosecute the child, factors including the gravity of offence, frequency of offending, and whether the behaviour or needs of the young person could be best addressed through the CHS should be considered: Centre for Youth and Criminal Justice (2018), above n 230, 40.
3. Barriers to trauma-informed sentencing

3.21 The Scottish approach places a heavy emphasis on welfare and has a high threshold before restrictive measures or criminal prosecutions are pursued. The Scottish Centre for Youth and Criminal Justice explains that:

Children and young people who are involved in offending behaviour are first and foremost, children. Their welfare and potential need for protection must be the paramount concern for all agencies involved with the child and their family. Young people who offend are more likely than the general population to have experienced child abuse and to have been in local authority care. The Edinburgh Study of Youth Transitions and Crime has identified that young people involved in violent offences are more likely than non-violent youths to have been victims of crime and adult harassment and have more problematic family backgrounds. Research has also revealed that 88% of children under the age of 12 who are referred to the Scottish Children’s Reporter Administration due to a pattern of offending, have parents who pose a risk to them. These findings suggest that if the emotional, physical, developmental and social needs of children are met and they are protected from abuse and neglect, they are less likely to offend.

The National Guidance for Child Protection in Scotland reinforces the need to assess children holistically, placing a responsibility on professionals to consider all aspects of a child and family’s circumstances, including offending behaviour, in determining whether a child is at risk of significant harm and therefore in need of child protection measures. The guidance makes clear ‘… a young person involved in offending behaviour is often a young person in need of care and protection’.234

New Zealand: a flexible, group conference-based approach

3.22 In New Zealand, youth justice and care and protection are governed by the Oranga Tamariki Act 1989 (NZ). Section 208 of that Act sets out the principles guiding the youth justice system. There is some overlap between the Victorian and New Zealand principles. However, the New Zealand system has additional protections. In particular, the principles specifically state that, unless the public interest requires it:

• criminal proceedings should not be instituted against a child or young person if there is an alternative way of dealing with the matter; and

• measures for dealing with a child should address the causes of the offending, promote the child’s development within their family and tribal structure and take the least restrictive form appropriate in the circumstances.

3.23 Further, ‘criminal proceedings should not be instituted against a child or young person in order to provide any assistance or services needed to advance the well-being of the child or young person, or their … family group’.235 Children aged under 14 receive further protection because, with limited exceptions, they cannot be held criminally liable.236 Their matters are dealt with in the Family Court as a care and protection matter, rather than the Youth Court, which handles criminal matters involving children.237

234. Centre for Youth and Criminal Justice (2018), above n 230, 3 (citations omitted).
236. Oranga Tamariki Act 1989 (NZ) ss 150, 272. Children aged 10 or 11 can be prosecuted for murder or manslaughter, while children aged 12 or 13 can be prosecuted for very serious offences. As in Victoria, in New Zealand sentencing courts have a power to refer children who are subject to criminal liability to child protection: Children, Youth and Families Act 2005 (Vic) s 349; Oranga Tamariki Act 1989 (NZ) s 280. Even where exceptions apply, in proving a charge against a child who was aged under 14 at the time of the offence, it is a requirement that the child knew that the offending behaviour was either wrong or illegal: Crimes Act 1961 (NZ) s 22. In contrast to Victoria, in New Zealand the Youth Court’s power to refer a child to care and protection is supplemented by a power to discharge the charge(s), bringing the criminal proceeding to an end, after an inquiry into the circumstances of the case: see further [3.30]–[3.33].
237. The grounds for finding a child in need of care and protection include where ‘the child has committed an offence or offences of sufficient number, nature, or magnitude to cause serious concern for the well-being of the child’: Oranga Tamariki Act 1989 (NZ) s 14(1). Even though the child is not subject to formal criminal liability, a family group conference for care and protection must be convened to consider alternative ways of dealing with the offending, including possible restorative justice outcomes: Oranga Tamariki Act 1989 (NZ) s 258.
3.24 Like the Children, Youth and Families Act 2005 (Vic), the New Zealand Act has a parallel structure: care and protection issues are set out in Part 2 of the Act, and youth justice issues are set out in Part 4.

Youth justice family group conferences

3.25 In New Zealand, family group conferences operate in both the youth justice and care and protection contexts to agree on a plan for the child’s wellbeing. A youth justice family group conference ‘is a decision making forum, convened to find a response to a young person’s offending which will hold the young person accountable, address the victim’s views and needs, and prevent future offending.’ As a general rule, a family group conference must be held before a child can be tried for an offence and before a child aged 10–13 can be charged. As around 75% of offending by children in New Zealand is dealt with by police in the community, rather than by a court, family group conferences are generally used for mid-range to serious offending, with the exception of murder and manslaughter.

Stages of a youth justice family group conference

1. Getting the facts. The police summary of facts is read out, and if the child agrees with the summary, the discussion commences. If the child does not agree with the summary, the family group conference ends and the police or the court decides what to do next.

2. Group discussion. Participants discuss the circumstances of the offence and its impact on the victim and the child’s family. The victim shares their views about how the child can make things right.

3. Family only time. The child and their family come up with a clear, realistic plan to take back to others at the family group conference.

4. The plan. The plan is discussed with the wider group, and if everyone can agree, a legally binding plan is created and must be completed. This relies on family and professionals providing ongoing support, working together and keeping each other informed about progress and problems. If things go off track, the youth justice coordinator or social worker will talk to the family about what they can do to stick more closely to the plan. If the conference is unable to agree on a plan, the matter is referred back to the police or the Youth Court. This may result in a further family group conference or the court making decisions about the offending.


240. Oranga Tamariki Act 1989 (NZ) s 247. Family group conferences are not required in certain cases: Oranga Tamariki Act 1989 (NZ) s 248.
241. Around 70 to 80% of children who offend are dealt with by police through warnings or a referral to Police Youth Aid for ‘Alternative Action’: Youth Court of New Zealand (Te Kōti Taioh o Aotearoa), Information about the Court for Young People (2019).
3.26 Youth justice family group conferences are either:
- ‘intention to charge’ family group conferences initiated by police when they are considering charging the child but have not yet done so. These conferences may result in a decision that the child does not attend court. Police may also initiate youth justice family group conferences when they believe a child aged 10–13 ‘needs care and protection because there is serious concern for his or her wellbeing due to the number, nature and magnitude’ of the child’s offending; or
- court ordered, after a child has been charged but prior to their prosecution. The agreed plan is provided to the Youth Court for approval or modification, and the child has to attend court to ensure that the plan is completed.

3.27 Attendees at youth justice family group conferences include the child; the child’s family; the child’s carer and/or child protection worker if the state is the child’s guardian or has custody of the child; the victim if there is one; the child’s youth justice coordinator; the police; and other people involved with the child’s case, such as the child’s teacher; social worker; doctor; other care and protection workers or social service agency representatives.

3.28 Plans are made by consensus. The agreement of the prosecutor or enforcement agency is required before the plan is finalised. The family group conference must consider whether the public interest requires criminal proceedings, whether the offending can be dealt with another way and whether the child is in need of care and protection. Where the child has admitted an offence or the offence has been proven, the conference must consider how the child should be dealt with for that offence and make a recommendation to the court accordingly.

243. Ibid.
244. Oranga Tamariki Act 1989 (NZ) s 251. See also Oranga Tamariki (Ministry for Children), ‘Youth Justice Family Group Conferences’ (orangatamariki.govt.nz, 2020) <https://www.orangatamariki.govt.nz/youth-justice/family-group-conferences/> at 3 April 2020; Oranga Tamariki (Ministry for Children), Youth Justice Family Group Conferences (2019). Those entitled to attend the family group conference include the child; parents, guardians and extended family (whānau); the youth justice coordinator; the prosecutor and/or police officer; the victim or representative; the lawyer or lay advocate for the child; any probation officer of the child; any social worker or statutory guardian of the child; any representative of a variety of support or service organisations; and any other person the family wishes to be present: Oranga Tamariki Act 1989 (NZ) s 251. The conference must be scheduled with the wishes of the family group in mind, and the coordinator must ascertain the wishes of any person who has advised that they are unable to attend: Oranga Tamariki Act 1989 (NZ) ss 250, 254. See further Oranga Tamariki (Ministry for Children), ‘Social Worker Entitlement at a Youth Justice Family Group Conference – s251(h)’ (practice.orangatamariki.govt.nz, n.d.) <https://practice.orangatamariki.govt.nz/previous-practice-centre/policy/convening-the-youth-justice-family-group-conference/resources/social-worker-entitlement-at-a-youth-justice-family-group-conference/> at 14 April 2020.
245. Oranga Tamariki Act 1989 (NZ) s 263. In some circumstances, the relevant person may be an enforcement agent other than a police officer; or the court itself. If these parties do not agree to the plan, the matter is remitted to a new family group conference or to the Youth Court for a new plan to be made: Oranga Tamariki Act 1989 (NZ) s 264.
247. Oranga Tamariki Act 1989 (NZ) s 258(1)(e). Plans must be in plain English. They are usually accepted by the Youth Court, which also investigates non-adherence and makes further orders, reconvening the family group conference to do so: Alison Cleland and Kylee Quince, Youth Justice in New Zealand (2014) 142; Oranga Tamariki Act 1989 (NZ) ss 270, 283. Cleland and Quince give an example of a typical plan: Jimmy will live with his mother Annette and continue to attend Akarana High School. He will complete 50 hours of community work, with 5 hours being completed per week. Jimmy’s mother will arrange for this work to start within 2 weeks at the local Salvation Army Rest Home. The Salvation Army Rest Home manager will send a letter to the youth justice coordinator, as a monitor of this plan, at the conclusion of Jimmy’s community work. The monitor will forward copies of the letter to the victims as verification that Jimmy has completed his plan: Cleland and Quince, Youth Justice in New Zealand (2014) 142–143. Plans are recorded and communicated to relevant people and organisations, and enforcement agencies must abide by them unless they are impracticable, unreasonable or clearly inconsistent with the principles guiding the exercise of powers under the Act: Oranga Tamariki Act 1989 (NZ) ss 260–267. Funding can be provided by the relevant department in order to carry out the plan: Oranga Tamariki Act 1989 (NZ) s 269. In New Zealand, that department is responsible both for youth justice and child protection matters.
Child protection principles apply to criminal hearings

3.29 In New Zealand, the legislated child protection principles also apply to youth justice matters. 248 Youth justice family group conferences, like those convened purely for care and protection, must consider matters relating to the care or protection of the child. If the child is in need of care and protection, the conference must make plans, decisions and recommendations accordingly. 249 The Youth Court must have regard to these plans. 250

Youth Court power to refer matters to child protection and discharge charges

3.30 As is the case in Victoria, in New Zealand the Youth Court may refer the case back to the New Zealand equivalent of the Child Protection Service at any point in criminal proceedings against a child. The case is then dealt with as a care and protection matter under Part 2 of the Act, and the criminal proceedings are adjourned pending the outcome of that reference. 251

3.31 In contrast to Victoria, in New Zealand the Youth Court’s power to refer a child to care and protection is supplemented by a power to discharge the charge(s), bringing the criminal proceeding to an end, after an inquiry into the circumstances of the case. 252 The power to discharge operates as an alternative or in addition to the referral power. The effect of such a discharge is that the charge is deemed never to have existed. 253

3.32 The power to discharge was used in New Zealand Police/Oranga Tamariki v LV, 254 where the court recognised the relevance of the child’s trauma to her offending behaviour, dismissing several charges, some of which were serious. The court found that the care system had failed to look after the child’s best interests, enable a stable relationship with her immediate and extended family and wider tribal community, and adequately address her offending behaviour in family group conferences. These failures, and the fact that the child had spent four months on remand, seriously affected her wellbeing. The judge commented:

L is here today … in the crossover list. I have both her Youth Court and her Family Court care and protection files before me. My job in relation to her Youth Court case is to decide what orders to make to resolve the 13 charges she has admitted … [A]ll charges will be discharged under s 282 of the Oranga Tamariki Act and L knows that means she will leave here today with no record of having committed those offences … [T]he s 282 order makes it seem as if the charges had never been brought to Court in the first place.

I had two options regarding disposition: The first was to feel concerned about the time [L] spent on remand in custody … but punish her anyway by attaching the label ‘youth offender’ to her, knowing the impact that will have on her future and knowing it would increase the risk of her re-offending … When I have regard to [L]’s well-being and best interests, the public interest, and the fact that she was held accountable in a substantial way, I did not think stigmatizing her was appropriate …

249. Oranga Tamariki Act 1989 (NZ) ss 258(1)(a), 261.
250. Oranga Tamariki Act 1989 (NZ) s 279.
252. Oranga Tamariki Act 1989 (NZ) s 258, 280, 282. Section 280 further provides that where a matter is adjourned for care and protection proceedings, the court may discharge charges pursuant to section 282 but is not required to do so. This power applies to the vast majority of offences: those in category 1, 2 or 3. It does not extend to murder and manslaughter or, in most cases, to the few other category 4 offences such as treason or piracy: Oranga Tamariki Act 1989 (NZ) ss 272(1), 272A(1)(e), 282(1); see also Criminal Procedure Act 2011 (NZ) sch 1.
253. Oranga Tamariki Act 1989 (NZ) s 282. Nevertheless, the Youth Court retains powers to make orders in relation to the payment of costs and restitution, and in relation to the forfeiture of property, including motor vehicles: Oranga Tamariki Act 1989 (NZ) s 283.
3. Barriers to trauma-informed sentencing

Granting [L] the s 282 order on all charges goes some way toward reducing disparity and gives a young woman who has never had a fair chance in life the opportunity for a different future. Although her past places her at risk of further offending, that need not be her destiny if she now receives the care and protection she deserves which must include restoring her to where she belongs in the world and nurturing her special interests and talents.255

3.33 The New Zealand system explicitly recognises that offending by children and care and protection issues are linked. It mobilises the resources of the child protection system, the criminal justice system and the child’s own networks to create an integrated plan that deals with both the offending and the child’s care and protection needs. Even where there is no criminal justice response, measures are nonetheless taken in relation to offending and its causes. Therefore, cases can be diverted away from the courts and the criminal justice system.

Measures to bridge the gap between child protection and youth justice responses in Victoria

Integrated youth justice family group conferencing

3.34 In New Zealand, family group conferences early in the youth justice process provide a welfare response to children’s offending by integrating criminal justice and child protection responses (where relevant) with other system supports. A purpose of family group conferences is to formulate a plan to address the child’s needs and behaviour without criminal prosecution (in appropriate cases). In contrast, once a child is charged in Victoria, the matter proceeds by way of a prosecution in the Criminal Division of the Children’s Court; the separation between the Criminal and Family Divisions limits the courts’ ability to provide a welfare-based response to issues arising in the criminal jurisdiction. The closest Victorian equivalent, group conferences, are explicitly justice processes. They take place after a finding of guilt where the court is considering imposing a particular sentence, and attendance by health and support services is on a case-by-case basis.256

3.35 In the Victorian context, it may be worth considering the merits of introducing youth justice family group conferencing into the youth justice system, to provide a responsive, integrated, welfare-based response to children’s offending earlier in the process, involving the Child Protection Service where appropriate. A youth justice family group conferencing approach, with conferences occurring pre-charge and/or before prosecution of the child commenced or continued,257 would arguably complement and strengthen the current Victorian youth justice system with its emphasis on rehabilitation. The focus of youth justice family group conferencing would be principally therapeutic, aimed at holistically addressing the underlying causes of offending behaviour, using the resources of the youth justice system and, where appropriate, child protection, education, family support, health and other service systems.


256. The Victorian group conferencing scheme operates post-plea or after a finding of guilt for children who have been found guilty of offences that warrant a sentence supervised by the youth justice service. It aims to help divert them from further or more serious offending. Children participate in a conference with people affected by their offending, including the victim, and their sentence is adjourned while they complete an outcome plan agreed at the conference. While this does not cease the prosecution of the child, it may result in a reduced sentence: Children, Youth and Families Act 2005 (Vic) s 415; Freiberg (2014), above n 16, [16.120]; Children’s Court of Victoria, ‘Youth Justice Group Conferencing: Information for Legal Representatives’ (2019); Department of Justice and Community Safety, ‘Youth Justice Group Conferencing’ (justice.vic.gov.au, 2020) <https://www.justice.vic.gov.au/justice-system/youth-justice/youth-justice-group-conferencing> at 1 April 2020.

257. In New Zealand, a family group conference must be held before a child may be prosecuted: Oranga Tamariki Act 1989 (NZ) ss 245–247.
An advantage of this approach is that, by virtue of being a pre-trial process, it would provide an early, coordinated and systemic response to a child’s offending behaviour. This is in contrast to the time taken for a criminal prosecution — and sentence or diversion in relevant cases — to run its course. A family group conferencing approach would be able to be more responsive to offending behaviour by children and ideally keep vulnerable children with complex needs away from the youth justice system, and further offending, by tackling the causes of their behaviour early and holistically.

3.36 Considerations for the family group conference could include whether the public interest requires criminal proceedings, whether the offending can be dealt with another way and whether the child is in need of care and protection, warranting a referral to the Child Protection Service. Under the New Zealand model, where the child has admitted an offence or the offence has been proven, a function of the family group conference is to consider how the child should be dealt with for that offence and to make a recommendation to the court accordingly.

3.37 Youth justice family group conferencing is one possible means of strengthening the interface between the Criminal Division and the Family Division by facilitating an early, therapeutic response to children’s trauma-related behaviour that involves police, victims and child protection workers where relevant without necessarily requiring a criminal prosecution. Youth justice family group conferencing would be consistent with the existing principles articulated in the Children, Youth and Families Act 2005 (Vic), including that children should be diverted away from the criminal justice system where appropriate, stigma arising from contact with the court should be minimised, and any sanction imposed should be the least intrusive available under the circumstances. The introduction of youth justice family group conferencing would also be consistent with a range of existing Victorian youth justice approaches that emphasise referral, treatment and support over prosecution in appropriate cases. Such approaches include pre-court police cautioning, the scheme for addressing sexually abusive behaviour by children (see further [3.14]) and the new Framework to Reduce Criminalisation of Young People in Residential Care. Youth justice family group conferencing would also be consistent with the right of Victorian children charged with a criminal offence to a procedure that takes account of the desirability of their rehabilitation.

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258. Oranga Tamariki Act 1989 (NZ) s 258.
259. Oranga Tamariki Act 1989 (NZ) s 258(1)(e). See above n 247 for further information about plans made under this approach.
264. Guiding Principle 8 of the new Framework to Reduce Criminalisation of Young People in Residential Care provides that ‘[c]riminal charges will not be pursued if there’s a viable alternative’ and ‘[d]iscretion will be exercised when police intervention is required’. Signatories to the Framework include Victoria Police, who hold the discretion as to whether to charge a child called to a residential home. The Framework aims to ‘reduce unnecessary and inappropriate police contact with young people in residential care’ where such contact is the result of ‘behaviours manifesting from childhood traumatic experiences’. Department of Health and Human Services (2020), above n 7, 8–9, 19. See also Commission for Children and Young People (2019), above n 18, 27; Victorian Aboriginal Child Care Agency, ‘New Framework to Reduce Criminalisation of Young People in Residential Care Will Help Stem the Levels of Incarceration of Indigenous Young People’, Media Release (13 February 2020) <http://www.medianet.com.au/releases/release-details.aspx?id=927913> at 14 February 2020.
3.38 In considering how to implement youth justice family group conferencing in Victoria, matters that would need to be addressed include:

- whether to include a mechanism for the group conferencing coordinators to refer a child to the Child Protection Service if there were grounds to do so and/or refer the child and their family to other support services in place of further youth justice involvement;\(^{266}\)
- whether conferences should be limited to offences heard in the Children's Court jurisdiction, excluding those that must be heard in the higher courts;
- whether, and if so how, this model will be integrated with the existing pre-plea youth diversion scheme and post-guilt group conference scheme in Victoria;\(^{267}\)
- how to ensure that children’s rights in criminal proceedings are protected under the scheme, for example, protection from self-incrimination such as ensuring that conference discussions are private and disclosures cannot be used against a child if they ultimately exercise their right to plead not guilty; and
- whether additional principles should be included in the proposed Youth Justice Act to guide family group conferencing decisions. For example, principles in the equivalent New Zealand Act stipulate that, unless the public interest requires it, criminal proceedings should not be instituted against a child or young person if there is an alternative way of dealing with the matter and measures for dealing with a child should address the causes of the offending, promote the child’s development within their family and tribal structure, and take the least restrictive form appropriate in the circumstances.\(^{268}\)

3.39 Youth justice family group conferencing is likely to have flow-on effects such as minimising stigma to the child, reducing the time between a child’s offending and its consequence and reducing the workload of the courts, allowing their resources to be prioritised for the most serious and entrenched offending. Most importantly, youth justice family group conferencing is intended to protect the community in the long term by addressing the causes of children’s offending quickly and effectively before they become further entrenched in the youth justice system. For this reason, youth justice family group conferencing may be particularly important for children aged 10–13, who are more likely to be known to child protection, have poorer outcomes than their older counterparts\(^ {269}\) and, under the current Victorian approach, may not receive any systemic response to their offending behaviour if they are found to be *doli incapax.*

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\(^{266}\) See section 260 of the Oranga Tamariki Act 1989 (NZ), which lists the youth justice responses a family group conference may make. Section 261 stipulates that a family group conference convened due to youth justice issues may, with some limitations, make decisions, recommendations and plans relating to care or protection of the child. Sections 280 and 282 set out the Youth Court’s powers to refer a matter to child protection and to discharge a young person, respectively. As noted at [3.24], police/prosecution agreement is required for a family group conference plan to be finalised, meaning the prosecuting agency must agree to the prosecution being ended. See further Oranga Tamariki (Ministry for Children) (n.d.), above n 246; Oranga Tamariki (Ministry for Children), ‘Convening the Youth Justice Family Group Conference’ (practice.orangatamariki.govt.nz, 2017) <https://practice.orangatamariki.govt.nz/previous-practice-centre/policy/convening-the-youth-justice-family-group-conference/> at 14 April 2020.

\(^{267}\) Group conferences are provided for under Children, Youth and Families Act 2005 (Vic) s 415.

\(^{268}\) Oranga Tamariki Act 1989 (NZ) s 208. This language is consistent with the Charter of Human Rights and Responsibilities Act 2006 (Vic), section 7(2) of which provides that ‘a human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including … any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve’ (emphasis added). Where a legal framework has the potential to result in a child’s imprisonment, it is arguable that measures should be put in place to achieve the purpose (the child’s rehabilitation) in the least restrictive way reasonably available. A family group conferencing approach with a mechanism for referring a child to support services and/or the Family Division as an alternative to prosecution and possible incarceration is arguably consistent with this requirement, as well as with the right of a child charged with a criminal offence to ‘a procedure that takes account of … the desirability of promoting the child’s rehabilitation’: Charter of Human Rights and Responsibilities Act 2006 (Vic) s 25(3).

\(^{269}\) For example, the Council’s youth reoffending study found that “[t]he younger children were at their first sentence, the more likely they were to reoffend generally, reoffend violently, continue offending into the adult criminal jurisdiction, and be sentenced to adult imprisonment before their 22nd birthday”: Sentencing Advisory Council (2016), above n 5, xiii.
Fully specialised Children's Court facilities in regional areas

3.40 The Child Welfare Practice and Legislation Review Committee’s final report in 1984 recommended that a specialist Children's Court be introduced in Melbourne before being regionalised throughout the state. In the long term, there should be ‘provision for separate facilities for Children’s Court hearings independent of adult Magistrates’ courts’:

[In] the long-term, no adult Magistrates’ Court [should] be used as a Children’s Court. Plans for provision of separate facilities should commence immediately. In the interim, adult courts may be used by the Children’s Court sitting in its criminal jurisdiction. Children’s Court sessions, however, must be held on different days from adult hearings.

3.41 Although the Committee’s recommendations laid the foundations for the modern Children’s Court, the Children’s Court in Melbourne remains the only separate Children’s Court facility that has been established. It operates as a fully specialised Children’s Court with separate Family and Criminal Divisions, and it is the only venue of the court that sits daily in both divisions. All other Children’s Court locations are based in metropolitan and regional Magistrates’ Court facilities.

As a result, in many Children’s Court locations around Victoria, children are sentenced by magistrates who may more commonly hear adult criminal matters and may less frequently hear matters relating to children, whether child protection or Criminal Division matters. In contrast, magistrates who sit exclusively in the Melbourne Children's Court may have a greater opportunity to develop specialist knowledge in, for example, child development and the availability of child, youth and family services. Similarly, unlike metropolitan practitioners who appear in the Children’s Court in Melbourne, regional practitioners may be less likely to practice exclusively in the Children’s Court.

3.42 Report 2 of the Council’s Crossover Kids series found that a far higher proportion of children were aged 10–13 at first sentence or diversion in regional courts than courts in metropolitan Melbourne.

During consultation, stakeholders expressed varying views as to the extent of differences between regional and metropolitan courts in the approach to doli incapax hearings and whether this was a contributing factor to the over-representation of children first sentenced or diverted aged 10–13 in regional areas.

3.43 Regional courts also sentenced and diverted more children known to child protection, including children with out-of-home care backgrounds. A higher proportion of crossover children in regional courts were Aboriginal and Torres Strait Islander children, with their over-representation not fully explained by population differences.


271. Ibid Recommendation 257.


274. In the Mooroobin Justice Centre, Magistrates who sit in the Family Division also sit in the Criminal Division in cases where the child has pleaded guilty. In the Geelong Court, two magistrates preside over child-related cases (all child protection and Children’s Court cases in Geelong). This is ‘a first for the region aimed at fast-tracking children through the courts and reducing reoffending … following success of a similar practice at Latrobe Valley and Bendigo courts’: Chad Van Estrop, ‘Two Magistrates to Take Charge of all Child Protection and Children’s Court Cases in Geelong’, Geelong Advertiser (Victoria) 12 February 2020.


3.44 In consultation, stakeholders suggested that the lack of a fully specialised Children’s Court in regional areas may contribute to differences in outcomes between metropolitan and regional areas. The Children’s Court in Melbourne is seen as being an important hub not only because of its legislated function but also because it supports the development of a community of practice that can, in turn, reinforce expertise in dealing with the complexities of crossover children’s matters.\textsuperscript{278} Magistrates who sit exclusively in the Children’s Court have a greater opportunity to develop specialist knowledge in areas including child development.\textsuperscript{279} Another important feature of the specialised Children’s Court is that children who offend are physically separated in other buildings from adult offenders.\textsuperscript{280}

3.45 Stakeholders identified the Children’s Court Clinic as a key resource that supports the provision of services, such as psychological and neurological diagnoses, and associated reports when ordered by a judge or magistrate.\textsuperscript{281} Baidawi and Sheehan similarly found that ‘the work of the Children’s Court Clinic was widely respected in relation to the provision of assessments which support the Court’s decision-making’ with lawyers ‘[holding] these reports to be influential in Magistrates’ decision-making and court outcomes’.\textsuperscript{282} The Children’s Court Clinic provides services such as assessments to children from all locations in Victoria, but these are usually conducted on site in Melbourne. Staff usually only travel where there is a ‘special need’ to do so, raised with the magistrate or judge before an order is made.\textsuperscript{283} In practical terms, the requirement to travel in order to access the Children’s Court Clinic is likely to affect accessibility for children in remote and regional locations. Stakeholders commented on the barriers to the availability of reports and Children’s Court Clinic assessments for children sentenced in regional and remote areas.\textsuperscript{284} Similarly, in their crossover children review, Baidawi and Sheehan found that ‘children [appearing] before the regional Court had significantly lower contact with the Children’s Court Clinic’, with 15% of regional children receiving a Children’s Court Clinic assessment compared with 32.9% of children in the two Melbourne courts in the study.\textsuperscript{285}

3.46 Stakeholders also suggested that the higher rates of children known to child protection and children entering the youth justice system aged 10–13 in regional areas were partly attributable to comparatively poor access, in terms of both availability and distance, to services that support early intervention, parenting, family and specialist education. Without these services, behaviour by children with developmental, mental health and other issues may continue to worsen, eventually leading to early youth justice involvement.\textsuperscript{286} Stakeholders commented that some children were only able to access services as a result of entering the youth justice system, particularly in regional areas.

\begin{footnotesize}
\begin{enumerate}
\item Roundtable 3 (10 December 2019); Roundtable 4 (12 December 2019).
\item Roundtable 3 (10 December 2019); Roundtable 4 (12 December 2019). See also Borowski and Sheehan (2012), above n 279, 384.
\item Roundtable 3 (10 December 2019); Roundtable 4 (12 December 2019). The Children’s Court Clinic conducts psychological and psychiatric assessments of children and families for the Children’s Court of Victoria. In some cases, limited treatment is also provided. The Clinic also conducts assessments relating to the impact of drug use on a young person and may make recommendations about appropriate treatment: Children’s Court of Victoria, ‘Children’s Court Clinic’ (childrenscourt.vic.gov.au, 2020) <https://www.childrenscourt.vic.gov.au/jurisdictions/criminal/childrens-court-clinic> at 28 January 2020. See also Baidawi and Sheehan (2019), above n 172, 186.
\item Baidawi and Sheehan (2019), above n 172, 186.
\item Roundtable 3 (10 December 2019); Roundtable 4 (12 December 2019).
\item Baidawi and Sheehan (2019), above n 172, 127.
\item Roundtable 3 (10 December 2019); Roundtable 4 (12 December 2019).
\end{enumerate}
\end{footnotesize}
A lack of services, particularly early family support services, was perceived by stakeholders as a contributing factor to early and recidivist criminal justice involvement by children in regional areas and the escalation of subsequent criminal justice outcomes.  

3.47 Metropolitan and regional Magistrates’ Court locations are often situated in or near disadvantaged areas, including regional centres like Shepparton and Morwell and metropolitan hubs like Dandenong, Broadmeadows and Sunshine. Given the strong support among stakeholders for the Children’s Court Clinic in metropolitan Melbourne, these locations might have a valuable function not only as locations for specialised Children’s Courts but also as hubs for supports and services. 

3.48 Therefore, a key measure for consideration – in response to the higher proportions of crossover children in regional areas as well as other indicators of disadvantage – is to resource the expansion of the fully specialised Children’s Court to regional areas, starting with headquarter court locations and then extending to key metropolitan areas, with specialised Children’s Court locations operating as regional hubs for supports and services. 

A ‘crossover list’ in the Children’s Court 

3.49 In Victoria, there have been calls for a ‘crossover list’ in the Children’s Court, similar to the crossover list available in some New Zealand courts, in response to the increased understanding of the phenomenon of crossover children. 

3.50 The New Zealand crossover list is a judge-led initiative in the Youth Court. In courts with an operational crossover list, young people with a care and protection matter in the Family Court are identified when they enter the Youth Court, which handles children’s criminal offending. Identification is made through an information-sharing protocol between the two courts or by a child protection worker in the Youth Court.
A request for Family Court information, including views from authors of reports presented to the court, is then made, and a family group conference is held to consider child protection matters in conjunction with criminal matters. The Youth Court then reviews the plan made at the family group conference. Once a plan is approved or other orders are made, a further review is scheduled to coincide with the conclusion of any Youth Court orders or outcomes. In this way, the New Zealand crossover list detects children with dual involvement and determines the complexity of their needs, it gives the Youth Court information about the potential causes of offending and it facilitates greater coordination of outcomes. It also allows the Youth Court to make further orders in respect of any remaining underlying care and protection or therapeutic needs without unnecessarily extending the child’s involvement with the youth justice system.

The introduction of a crossover list in Victoria would be likely to require further information sharing between the Criminal and Family Divisions of the Children’s Court. For example, access to child protection information would be needed in respect of children whose criminal matters were scheduled for hearing. This would enable coordinated criminal and child protection responses in relation to the one child, and it might help to facilitate other administrative matters, such as expert reports and referrals. Another advantage of a dedicated list is that the hearings of children with dual child protection and criminal matters would be grouped together, rather than being mixed with general criminal matters. This would strengthen the practice of identifying and considering issues relating to child protection and a trauma history. Given the higher rate of children known to child protection among children first sentenced aged 10–13 and their particular vulnerabilities and poor outcomes, it might be worth considering this cohort as a priority group if the crossover list is piloted.

If a crossover list is introduced in Victoria, consideration would need to be given to matters such as the scope of the list, the location (Melbourne only or an extension to regional courts), accessibility and privacy.

The suggested crossover list, on its own or in conjunction with youth justice family group conferencing, is intended to bridge the gap between the Family and Criminal Divisions of the Children’s Court. It would provide courts with a more holistic view of a child’s history and current circumstances and would potentially provide a broader suite of options for responding to offending behaviour. The need for such a list also highlights systemic issues that may require broader reform. Unless it was made available statewide, its effectiveness would be restricted to venues of the Children’s Court at which it was conducted. Depending on the eligibility criteria adopted for matters to be included, the crossover list may not include children whose protection proceedings have been finalised. It also would not capture children who have a trauma history but no child protection involvement or no protection applications made to the court.

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291. New Zealand Youth Court, ‘The Crossover List’ (2020); see 3.22–3.33.
292. New Zealand Youth Court (2020), above n 291.
293. Fitzgerald (2018), above n 290, 16–17, 19–20. Crossover children’s needs often include neurological or developmental issues and communication difficulties.
Notwithstanding these potential limitations, for children who did fall within its ambit, a crossover list would overcome some of the current challenges, such as children’s matters being listed before multiple judicial officers and having different legal representatives in each division of the court. A crossover list is likely to strengthen the court’s ability to more holistically address the causes of the child’s offending and to provide the opportunity for services to more effectively collaborate to assist and support a child’s rehabilitation.

**Access to information relating to a child’s trauma history and support at sentencing**

3.54 Other responses are also worth considering to facilitate information sharing and strengthen the current approach to crossover children. These include:

- ensuring that judicial officers in criminal hearings have ready access to information about the child protection background of any child or young person before the court, including information about previous or concurrent protection applications in the Family Division. Measures to achieve this include strengthening information sharing between the Family Division and the Criminal Division and providing dedicated child protection workers in the Criminal Division to facilitate access to reports about a child’s protection history;

- further educating judicial officers on children’s development generally as well as the effects of trauma and out-of-home care on a child’s development and behaviour, and providing opportunities for further specialisation for those sitting in the Children’s Court, including in courts outside Melbourne;

- continuing to improve access to specialist services, assessments and reports, particularly in regional areas. This includes providing neuropsychological reports and assessments and reports from allied-health professionals such as speech pathologists, strengthening the capacity of the Children’s Court Clinic to provide locally based assessments and reports, for example, through Children’s Court Clinic satellite hubs attached to headquarter court locations (see further [3.40]–[3.48]), and continuing to consider how non-clinical reports about a child’s background, experience of disadvantage and trauma history may contribute to understanding a child’s background; and

- providing a specific power for the Criminal Division to compel the child’s case worker or another representative of the Department of Health and Human Services to attend court other than as witnesses in cases where the Secretary to the Department has parental responsibility for the child, for example, to support the child, act as a parent advocate and engage in the sentencing conversation.

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296. For example, New Zealand hearings include cultural reports, where an offender may request the court hear any person the offender calls to speak on their personal, family, whānau, community and cultural background. People may also speak on the ways that the offender’s background may have related to the commission of the offence or may be relevant to sentencing; any processes that can be used to resolve issues relating to the offence between the offender, family or community and victim; and how family or community support may help prevent further offending. Sentencing Act 2002 (NZ) s 27. These reports are now increasingly being used to demonstrate to sentencing courts the relevance of disadvantage and intergenerational trauma, particularly to Māori offenders: Tiana Epati, ‘Criminal Law – Cultural Context and Background in Sentencing’ (Paper presented at Hui-a-Tau Conference (Annual Conference), Te Hunga Rōia Māori o Aotearoa (New Zealand Māori Law Society), Rotorua, October 2018); Solicitor-General v Heta [2018] NZHC 2453 (18 September 2018). Similar reports are currently being considered for Aboriginal offenders in Victoria as part of the Victorian Aboriginal Justice Agreement: Victorian Aboriginal Justice Agreement, ‘Aboriginal Community Justice Reports’ (aboriginaljustice.vic.gov.au, 2020) <https://www.aboriginaljustice.vic.gov.au/the-agreement/aboriginal-justice-outcomes-framework/goal-21-aboriginal-people-are-not-D> at 15 April 2020.

297. The power to compel attendance of a witness is already provided for: Children, Youth and Families Act 2005 (Vic) s 532. New South Wales achieves a similar aim by imposing a legislated expectation of attendance by a person with parental authority over a child, bolstered by a power to adjourn proceedings to facilitate their attendance: Children’s Court Rule 2000 (NSW) cl 32.
The introduction of such a provision in Victoria would require the Department of Health and Human Services to be resourced to enable children’s case workers to attend court in support of the child. Ideally, such resourcing would also increase the viability of children in out-of-home care continuing to be supported by their case worker when they become involved in the youth justice system. This includes the case worker attending court, appointments, assessments and meetings, advocating for the child and ensuring that they understand what is happening, and continuing visits and support for children sentenced to custodial sentences.

Culturally responsive approaches to Aboriginal and Torres Strait Islander children

3.55 The Council’s Crossover Kids series has found a substantial over-representation of Aboriginal and Torres Strait Islander children among crossover children, particularly children sentenced to custodial orders while also the subject of a child protection order. The Council also found that Aboriginal and Torres Strait Islander crossover children, particularly girls, were among the most likely to be younger when they first became known to child protection. They were also more likely to experience higher levels of child protection intervention, to be younger at first sentence and to have more carers.

3.56 The reasons for the over-representation of Aboriginal and Torres Strait Islander children are complex. They involve the impact of intergenerational trauma and the intersection of numerous vulnerabilities, such as poverty, mental illness and neurodisability, which are compounded when children live in regional areas where services may be less accessible. Each layer of complexity further entrenches the disadvantage that children experience. This means that an effective response to the issues experienced by Aboriginal and Torres Strait Islander children must be integrated enough to address multiple layers of complexity. In keeping with the principle of self-determination, such a response should also be designed, led and managed by Aboriginal people or organisations, such as local Aboriginal Community Controlled Organisations, and it should be centred around culture.

3.57 The Children’s Koori Court is the gateway to many specialist responses for Aboriginal and Torres Strait Islander children who have contact with the youth justice system, including formal sentencing responses that are culturally mediated. The Koori Court is available for Aboriginal and Torres Strait Islander children who plead guilty, intend to plead guilty or are found guilty of non-sexual offences eligible for determination in the Criminal Division of the Children’s Court. It aims to provide a culturally responsive venue by, among other things, involving Aboriginal Elders and other Indigenous community figures in the sentencing process. Elders and members of the community can give cultural advice to the magistrate or judge in respect of the child’s situation, and they can talk to the child or young person about their circumstances and why they are in court. Youth justice diversion is also available in the Koori Court.

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300. Children, Youth and Families Act 2005 (Vic) s 519.
301. Children, Youth and Families Act 2005 (Vic) s 518A(c)(iv).
3.58 A number of programs also aim to provide additional support to reduce offending, including the Koori Youth Justice Program, which provides support to young Koori people who are at risk of offending, and the Koori Intensive Bail Support Program, which provides support to young Koori people on bail orders or deferred sentences. The Family Division of the Children’s Court at Broadmeadows operates a Koori Hearing Day, which aims to provide culturally responsive hearings for Aboriginal and Torres Strait Islander families involved in child protection cases.

3.59 The structure of the Koori Court ensures a cultural conversation can take place, something not routinely available in criminal hearings at the mainstream Magistrates’ Court or Children’s Court. The Koori Hearing Day offers an example of how the Koori Court initiative could be expanded to respond to children in the child protection system who may not have had contact with the criminal justice system. However, the Koori Court is not available in all regional court locations that sentence Aboriginal and Torres Strait Islander children, and the Koori Hearing Day is currently only in Broadmeadows.

3.60 Concerns about the vulnerabilities of children aged 10–13 in the criminal justice system and considerations of the relevance of trauma to sentencing, are particularly relevant to the sentencing of Aboriginal and Torres Strait Islander crossover children. This is due to their early contact with both the child protection system and the youth justice system, and the evidence of the systemic needs and barriers they face. As discussed at [2.82], the recommended creation of a new Youth Justice Act provides an opportunity to reflect on how the principles, purposes and factors that guide the sentencing of children can better reflect and address the unique circumstances of Aboriginal trauma. It is also critical that system reforms and local responses and services aimed at addressing the over-representation of Aboriginal and Torres Strait Islander children are designed, developed and led by Aboriginal people, in keeping with the principle of self-determination.

3.61 Given the complexity of factors linked to Aboriginal and Torres Strait Islander children’s vulnerability, especially in regional areas, it is important that responses from the child protection system, the youth justice system, such as the Children’s Koori Court, and related services are available, accessible and culturally appropriate.

304. For example, one in five (22%) crossover children sentenced or diverted in Horsham and Wodonga were Aboriginal and Torres Strait Islander children (albeit this amounted to around 10 crossover children in each location), but neither of these courts has a Children's Koori Court. The Children's Koori Court currently sits at Melbourne, Heidelberg, Dandenong, Mildura, Latrobe Valley (Morwell), Bairnsdale, Warrnambool, Portland, Hamilton, Geelong, Swan Hill and Shepparton: Children's Court of Victoria, ‘Koori Court’ (childrenscourt.vic.gov.au, 2019) <https://www.childrenscourt.vic.gov.au/jurisdictions/koori-court> at 9 December 2019.
305. Report 2 of the Crossover Kids series found that the proportion of Aboriginal and Torres Strait Islander crossover children first sentenced or diverted aged 10–13 (23%) was more than double the proportion of non-Aboriginal and Torres Strait Islander crossover children (11%): Sentencing Advisory Council (2020), above n 3, 75.
3. Barriers to trauma-informed sentencing

3.62 This chapter has described the current structure of the Children’s Court of Victoria, in particular, the separation of child protection and criminal matters, and the fully specialised Children’s Court in Melbourne. In this context, it has explored the potential value of measures to ‘bridge the gap’ between the two divisions of the court. Such measures would acknowledge the extent to which many children’s offending behaviour relates to trauma and to circumstances associated with child protection involvement, such as removal from family and placement in out-of-home care.

3.63 The measures suggested in this chapter are intended to reduce the over-representation of crossover children and facilitate a more holistic approach towards them. Subject to further investigation and consultation, measures include:

- resourcing the expansion of the fully specialised Children’s Court to regional areas, starting with headquarter court locations and then extending to key metropolitan and regional areas, with specialised Children’s Court locations operating as hubs for supports and services;
- introducing a crossover list that holistically deals with the child protection matters and the criminal matters of children who have involvement with both systems;
- introducing pre-hearing youth justice family group conferencing to develop a plan for the child that integrates child protection, health and justice responses to their offending, where appropriate, with provision for the conference to recommend against prosecution while putting in place supports to address the causes of the child’s offending. Integral to this suggestion is ensuring that children’s rights in criminal proceedings are protected, such as protection from self-incrimination, through, for example, ensuring that conference discussions are private and disclosures cannot be used against a child if the child exercises their right to plead not guilty;
- empowering the Criminal Division to compel case workers to attend court to provide information and/or support a child in cases where the Secretary to the Department of Health and Human Services has parental responsibility for a child, while also resourcing the Child Protection Service to enable case workers to attend such hearings and to visit and support children throughout the criminal justice process, including supporting them in custody;
- ensuring that sentencing courts are provided with adequate information about a child’s protection and trauma history, including through strengthening information sharing between the Family Division and the Criminal Division of the Children’s Court, and providing dedicated child protection workers in the Criminal Division to facilitate access to reports about a child’s protection history; and
- continuing to improve access to specialised services, assessments and reports, including from allied-health professionals, particularly in regional areas.
Aboriginal and Torres Strait Islander children are substantially over-represented in all categories of child protection and youth justice involvement. A central tenet of addressing this over-representation is ensuring that both systemic and local responses and services are designed, developed and led by Aboriginal people, for example, by local Aboriginal Community Controlled Organisations and service providers, in keeping with the principle of self-determination. It is also important that any systemic reforms, such as introducing a sentencing factor specific to Aboriginal and Torres Strait Islander children, are complemented by measures that ensure the availability of culturally appropriate specialist services and responses to Aboriginal and Torres Strait Islander children and their families, including in regional and remote areas of Victoria.
4. Final observations

4.1 This report has drawn on the findings of the first two reports from the Council’s Crossover Kids series, and scientific evidence on the lasting effects of childhood trauma, to explore the legal framework for sentencing children who have experienced trauma, especially children who have had contact with the child protection system. Trauma impacts children’s behaviour and contributes to offending that can cause considerable harm to the community. This means that the just and effective sentencing of children requires trauma to be addressed.

4.2 This report has suggested a number of measures that aim to strengthen the mechanisms for holistically addressing the causes of children’s offending, both at formal sentencing hearings and at earlier stages of contact with the youth justice system. While these measures would require further exploration and consultation, they are intended to contribute to improving the interface between the Family and Criminal Divisions of the Children’s Court and strengthening the current framework for sentencing children who have experienced trauma. Measures discussed include:

• legislated sentencing principles that explicitly identify rehabilitation as the paramount purpose of sentencing children and recognise the relevance to sentencing children of factors such as childhood trauma, child protection involvement, out-of-home care, the unique characteristics of Aboriginal trauma and chronological and developmental age;
• resourcing the expansion of the fully specialised Children’s Court to regional areas, starting with headquarter court locations and then extending to key metropolitan and regional areas, with specialised Children’s Court locations operating as hubs for supports and services;
• strengthening the capacity of sentencing courts to be fully appraised of a child’s protection history and experience of trauma, including introducing a crossover list in the Children’s Court, strengthening information sharing between the Family Division and the Criminal Division of the Children’s Court, providing dedicated child protection workers in the Criminal Division to facilitate access to reports about a child’s protection history, and empowering the Criminal Division to compel case workers to attend court and/or support a child in cases where the Secretary to the Department of Health and Human Services has parental responsibility for the child;
• introducing pre-trial youth justice family group conferencing with the authority to recommend against commencing or continuing a child’s prosecution while putting in place supports to address the causes of a child’s offending; and
• ensuring that system reforms to address the substantial over-representation of Aboriginal and Torres Strait Islander children in the youth justice system are designed, developed and led by Aboriginal people in keeping with the principle of self-determination and continuing to improve access to culturally appropriate specialised assessments, reports, services and responses for Aboriginal and Torres Strait Islander children and their families throughout Victoria, particularly in regional areas.
4.3 Each of the measures suggested in this report, or a combination of any or all of them, is intended to result in a more holistic response to offending by children who have experienced trauma. By introducing earlier interventions aimed at addressing the causes of offending, many of these responses will also decrease the number of crossover children appearing in the Criminal Division. Ultimately, investment in responses that identify and address the trauma-related and other needs contributing to children's offending will enhance community safety through more effective rehabilitation while also allowing abused, neglected and otherwise vulnerable children to recover from their trauma and to thrive.
Appendix: consultation

The Council consulted key youth justice and child protection stakeholders to discuss the project and its findings, including hosting four roundtable consultation forums (two in April 2019 and two in December 2019). Stakeholders consulted included representatives of the Department of Justice and Community Safety (Youth Justice), the Department of Health and Human Services, the Children’s Court of Victoria, Victoria Police, Victoria Legal Aid, Victorian Aboriginal Legal Service, the Commission for Children and Young People, the Victims of Crime Commissioner, the Crime Statistics Agency, Jesuit Social Services, the Centre for Excellence in Child and Family Welfare, the Centre for Multicultural Youth, Dr Kath McFarlane, Dr Susan Baidawi, Professor Rosemary Sheehan, CREATE Foundation, the Human Rights Law Centre, the Law Institute of Victoria, Monash University (Department of Social Work), the Children’s Court Bar Association, the Justice-involved Young People Network, The University of Melbourne, Whitelion, Youth Law, and Youth Support and Advocacy Service.

The Council also visited the Parkville Youth Justice Centre to observe first-hand how children are managed in custody and discuss some of the issues faced by children with child protection backgrounds.

Consultation meetings

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**International**

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