Sentencing Children and Young People in Victoria

Sentencing Advisory Council
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Contributors

Authors
Hilary Little
Tal Karp

Statistical analysis
Dennis Byles

Sentencing Advisory Council

Chair
Arie Freiberg

Deputy-Chair
Thérèse McCarthy

Council Members
Carmel Arthur
Graham Ashton†
Peter Dikschei
Hugh de Kretser
David Grace QC
John Griffin‡
Ken Lay†
Jenny Morgan
Barbara Rozenes
Gavin Silbert SC
Lisa Ward
Kornelia Zimmer*

*Commenced 1 January 2012. Did not participate in any deliberations regarding this report.
†Commenced 21 February 2012. Did not participate in any deliberations regarding this report.
‡Resigned from the Council 21 November 2011.

Chief Executive Officer
Stephen Farrow

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Sentencing children and young people in Victoria
Executive summary

This report aims to fill the gap in publicly available data on the Children’s Court and the sentencing of young offenders (aged from 10 to 17 years) in Victoria. The report provides contextual material on the operation, functions and philosophy of the Criminal Division of the Children’s Court, with particular emphasis on the sentencing principles applicable under the Children, Youth and Families Act 2005 (Vic). It presents a statistical profile of offences heard and sentence outcomes, and identifies and analyses changes over a ten-year period (2000–09) in the types of offences sentenced by the court, demographics and sentence outcomes.

Children’s Court sentencing principles

The Criminal Division of the Children’s Court has jurisdiction to hear and determine summarily all criminal charges against children (apart from charges for fatal offences), including charges for indictable offences. With the enactment of the Children, Youth and Families Act 2005 (Vic), the jurisdiction of the court was expanded to include young offenders aged 17 at the time of offending. Previous to this, young offenders of this age were dealt with in the adult courts.

Sentencing in the Children’s Court is markedly different from sentencing in courts of adult jurisdiction. The Sentencing Act 1991 (Vic) instructs courts of adult jurisdiction that the purposes for which a sentence may be imposed are punishment, deterrence, rehabilitation, denunciation and protection of the community. The principles set out in the Children, Youth and Families Act 2005 (Vic), on the other hand, are all directed at an assessment of the particular offending behaviour and the needs of the offender. For example, in determining which sentence to impose on a child, the court must consider factors including 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 continue with education, training or employment, the need to minimise stigma to the child and the suitability of the sentence to the child.

Unlike in courts of adult jurisdiction, where rehabilitation is but one of five purposes for which a sentence may be imposed, in the Children’s Court rehabilitation is the overarching or core principle. However, in appropriate cases, the emphasis on rehabilitating the offender is qualified by the need to protect the community, to specifically deter offenders and to ensure that offenders are held accountable for their actions.
Young people and diversion

Much offending by young people is minor in nature, and there is research to say that many adolescents are likely to cease offending once they reach adulthood.

Due to the strong emphasis on diverting them from the criminal justice system, young people are under-represented compared with adults in court finalisation statistics. Nationwide, in 2009–10, 1,505 per 100,000 young people were adjudicated in Children’s Courts compared with 3,156 per 100,000 adults in Magistrates’ Courts. In 2009–10, Victorian police cautioned approximately 25% of all young alleged offenders (compared with only 2.7% of adult alleged offenders).

Young people, however, are over-represented compared with adults in alleged offending statistics (3,046 young offenders per 100,000 nationwide in 2009–10, compared with 1,790 adults per 100,000). Detected crime is a blunt measure of actual offending rates and various reasons have been posited for higher police apprehension rates for young people: young people are less experienced offenders, they often offend in groups (which makes their offending more visible) and their offending is mostly unplanned and opportunistic and occurs in public places, again making it more easily detectable.

The sentencing statistics in this report must be read in the context of the heavy emphasis on diversion for young people. Court-based sentencing statistics do not reflect the full range of dispositions utilised by the criminal justice system in relation to young offenders.
Offence distribution for Victorian young offenders, 2000 to 2009

Principal proven offence data were obtained from the Children’s Court for the ten-year period from 2000 to 2009. For the purpose of the statistical analysis, offences were grouped into five categories: property offences, offences against the person, driving offences, transit offences and ‘other’ offences.

One of the Council’s main findings is that the offences dealt with in the Criminal Division of the Children’s Court are mostly non-violent and many of them are minor. From 2000 to 2009, transit offences (ticketing and non-ticketing) accounted for 34.1% of all principal proven offences dealt with by the court, followed by property offences at 32.1% (with theft and burglary making up the majority of these, followed by criminal damage). Offences against the person accounted for 17% of all principal proven offences. Only a very small proportion of these were offences involving serious injury to the victim. The most frequent offences against the person dealt with by the Children’s Court were assaults and cause injury (non-serious) offences, which together accounted for 10.7% of all principal proven offences.

There has been, however, an increase over the 10 years in the rate of violent offences sentenced in the Children’s Court and a decrease in the rate of sentenced property offences.

Some of the other findings about offence distribution are as follows:

- Prior to the change in age jurisdiction to include 17 year olds, the Children’s Court finalised roughly 6,000 cases per annum. After 1 July 2005, there was an increase in the number of cases finalised per annum, and in 2009 the court finalised 8,476 cases.
- The vast majority of cases heard in the Children’s Court were proven, that is, the defendants either pleaded guilty (again the overwhelming majority) or were found guilty.
- Males greatly outnumbered females in the numbers and rates of cases finalised.
- For males, the most common offence types were property offences (35.1%) followed by transit offences – ticketing and non-ticketing (27%) and offences against the person (18.3%).
- For females, the most common offence types were transit offences – ticketing and non-ticketing (54.8%), property offences (23.3%) and offences against the person (13.3%).
- The most common age of young offenders sentenced in the Children’s Court was 16 years for both males and females, followed by 15 years then 17 years.
- Cases involving serious injuries or fatalities were very infrequent. Offences in which serious injury was inflicted accounted for only 1.3% of all principal proven offences dealt with by the Children’s Court. Over the 10 years, only nine young offenders had their cases heard in the County Court and 29 in the Supreme Court.
Sentence distribution for Victorian young offenders, 2000 to 2009

The sanctions set out in the Children, Youth and Families Act 2005 (Vic) are different from those of the Sentencing Act 1991 (Vic). They range from dismissal to supervision orders and youth detention orders.

Sentence outcomes over the 10 years were analysed in order to report on sentence distribution against different variables and any changes or trends over time. Sentence types were grouped into four categories: fines, undertakings/bonds, supervisory orders and youth detention.

The Council found that the majority of young offenders received only low-level sanctions. Excluding all transit offences (which tended to skew the data), 70.3% of cases were sentenced to undertakings, bonds or fines (51.4% undertakings/bonds, and 18.9% fines). Supervisory orders (probation, youth supervision or youth attendance orders), generally used for the more persistent or serious offenders, were the result in 25.6% of cases. Only 4.1% of cases were sentenced to youth detention.

There does not appear to be any major change in the distribution of sentence types in the Children’s Court between 2000 and 2009.

Other findings about sentence outcomes in the Children’s Court are:

- The most frequently used sanction for property offences was the good behaviour bond (44.3%), followed by accountable undertaking (17.8%) and probation (16.8%). For offences against the person, the most frequently used sanction was the good behaviour bond (34.8%), followed by probation (29.1%) and youth supervision order (12.7%). Driving offences were mostly sentenced with fines (50.5%), followed by good behaviour bonds (26.7%) or accountable undertakings (11.1%). For almost all cases involving transit (ticketing or non-ticketing) offences as the principal proven offence, fines were used as the sentencing option (96.7%) with a minority of cases receiving an accountable undertaking (1.7%) or a good behaviour bond (1.3%). Cases in which ‘other’ offences were the principal proven offence were mainly sentenced with fines (45.0%), followed by good behaviour bonds (26.3%) and accountable undertakings (11.2%).

- Victoria’s youth detention rates have consistently remained lower than those of other states and territories. The detention rates have been essentially stable over the 10 years from 2000 to 2009 – the rate for girls being consistently very low and the rate for boys fluctuating a little more but not showing any increase over the period.

- Males greatly outnumbered females in sentences of youth detention.

- The majority of youth detention sentences were imposed on young offenders who committed offences against the person as the principal proven offence (49.9%), followed by property offences (41.0%). From 2000 to 2002, however, the majority of youth detention sentences were imposed on those who had committed property offences. Custodial sentences were rarely imposed for the other offence categories.

- Principal proven offences against the person had the highest median custodial sentence length (six months), while other offence categories had a median length of three months.
Sentencing young offenders in the higher courts

The Criminal Division of the Children’s Court does not have jurisdiction to hear and determine seven specified fatal offences. It may also exclude its own jurisdiction to hear indictable offences summarily when it considers a case ‘unsuitable’ to be heard summarily due to the existence of ‘exceptional circumstances’. As such, a small number of cases involving children are heard and sentenced in the County Court or the Supreme Court.

Under the Sentencing Act 1991 (Vic), a child may be sentenced to imprisonment in an adult facility (although case law says that such a sanction should be imposed on a child only in exceptional circumstances) or to youth detention, along with the full range of other sanctions set out in that Act. The majority of cases involving children in the higher courts are sentenced under the Sentencing Act 1991 (Vic); however, the courts also have the authority to sentence a child for an indictable offence under the Children, Youth and Families Act 2005 (Vic).

All cases from 2000 to 2009 in which young offenders were sentenced in the County and Supreme Courts were examined. The main findings are as follows:

- From 2000 to 2009, 29 young offenders were sentenced in the Supreme Court and nine were sentenced in the County Court. Of the children sentenced, 32 were male and the remaining six were female.
- Manslaughter was the principal proven offence for almost half (47.4%) of all cases, followed by murder and intentionally causing serious injury (10.5% each).
- Seventy-one percent of young offenders sentenced in the higher courts received adult imprisonment or youth detention (47.4% imprisonment and 23.7% youth detention).

‘Dual track’

Under Victoria’s unique ‘dual track’ system, adult courts can, in certain circumstances, sentence young offenders (defined in the Sentencing Act 1991 (Vic) as those aged under 21 years at the time of sentencing) to serve a custodial sentence in a youth detention facility rather than an adult prison. The system is intended to prevent vulnerable young offenders from entering the adult prison system at a young age.

The Council analysed Magistrates’ Court and County Court data from 2005 to 2009 and found that approximately half of offenders aged from 18 to 20 years for whom a custodial sentence was deemed appropriate were sent to a youth detention facility rather than an adult prison.

Once sentenced, the young person falls within the jurisdiction of either the Adult Parole Board or the Youth Parole Board, which have power to transfer the person either to or from adult prison.
Chapter 1
Introduction

We have a Children’s Court because we accept, as a community, that young offenders should be dealt with differently to adults.¹

The Children’s Court of Victoria was established in 1906 and is the court in which the vast majority of young offenders are dealt with. It is an independent court that is split into Criminal and Family Divisions. The Criminal Division has jurisdiction to hear and determine summarily all criminal charges against children, including those for indictable offences.² The legislation governing the court today is the Children, Youth and Families Act 2005 (Vic) (‘CYF Act’).

There are no comprehensive accounts of the work of the Victorian Children’s Court in relation to the sentencing of young offenders. Some limited information about the court’s sentencing practices can be found in various publications.³

This report provides information about the history and operation of the Criminal Division of the Children’s Court of Victoria and a detailed statistical sentencing profile for that court.

¹ R v P and ors [2007] VChC 3 (5 November 2007) [20] (Judge Grant).
² Seven fatal offences are excluded from the Children’s Court jurisdiction: Children, Youth and Families Act 2005 (Vic) s 516(1)(b).
The statistical analysis is based on a ten-year data set obtained from the court (2000–09) and includes:

- a demographic profile of offenders sentenced by the court (limited by data availability to age and gender);
- an examination of the most frequent principal proven offences sentenced in the court;
- an analysis of the sentencing trends over the ten-year period, in relation to both the types of offences sentenced and the dispositions imposed by the court; and
- a discussion of the possible reasons for the data outcomes.

The report discusses pre-court diversionary measures, which are integral to the approach to juvenile justice in Victoria. It examines the sentencing of child offenders by the County and Supreme Courts for offences such as murder, manslaughter and defensive homicide, offences that are specifically excluded from the jurisdiction of the Children’s Court.4

Also included is an analysis of the sentencing of young offenders under the ‘dual track’ system. Under this system, adult courts can sentence 18 to 20 year olds in particular circumstances to serve their custodial sentence in a youth justice centre as a direct alternative to imprisonment.

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4 Children, Youth and Families Act 2005 (Vic) s 516(1). The County and Supreme Courts are authorised to make any sentencing order under the CYF Act, except for youth justice centre orders and youth residential centre orders, both of which are to be exercised under sections 32–35 of the Sentencing Act 1991 (Vic). In addition, the County and Supreme Courts may sentence a child under section 7(1) of the Sentencing Act 1991 (Vic).
Exclusions

Owing to data and/or resourcing constraints, the report does not include:

• detailed interstate comparisons of young people’s offending rates, sentences received or rates of detention. Interstate comparisons will be limited to data obtained from the Australian Bureau of Statistics (ABS) or the Australian Institute of Health and Welfare (AIHW);
• data on recidivism among young offenders in Victoria;
• analysis of the extent to which young offenders sentenced in the Criminal Division of the Children’s Court are (or have been) involved in child protection cases;
• data specifically relating to the Victorian Children’s Koori Court (Criminal Division) or comparisons between Indigenous and non-Indigenous offenders;
• data analysis of matters processed through the Children and Young Persons Infringement Notice System (CAYPINS). CAYPINS is a method of enforcing infringement notices issued by agencies including Victoria Police and the Department of Infrastructure, when a fine is not paid in the first instance;
• detailed analysis of the effectiveness or otherwise of custodial sanctions for children and young offenders;
• data on remand;
• conviction or non-conviction data (apart from data on fines); or
• data on the influence of pre-sentence programs (such as group conferencing) on the final sentencing outcome.

Terminology

The term ‘young offender’ is used in this report to refer to children and adolescents (10 to 17 years of age inclusive) sentenced in the Criminal Division of the Children’s Court. As the bulk of the report deals with young people who are sentenced by the court, in the majority of instances there is no need to use the qualifier ‘alleged’. In Chapter 4, however, which looks at pre-court diversion, there are references to ‘young alleged offenders’ and ‘young people’ rather than ‘young offenders’. These terms are also used elsewhere in the report as appropriate. The word ‘juvenile’ is only used in references to ‘juvenile justice’ or where it appears in quotations or titles.

The term ‘young adult offender’ is used in Chapter 12 to refer to offenders aged 18 to 20 years who are sentenced under Victoria’s ‘dual track’ system.
The Council’s approach

Statistical analysis

A detailed overview of the data methodology is presented in Appendix 1.

In brief, the data were obtained from the Business Intelligence area of the Courts and Tribunals unit of the Department of Justice, Victoria. The data are derived from records from the Children’s Court Courtlink database. Other data sources, for example, the Australian Bureau of Statistics and the Australian Institute of Health and Welfare, are also used to assist in contextualising the data analysis.

The data set contains cases finalised\(^5\) in the Children’s Court Criminal Division during the period from 2000 to 2009 (calendar years). A total of 84,584 cases (324,325 charges) were heard in the Criminal Division during this period. Each case has a list of charges, with their corresponding sentences. There is also some limited demographic information on defendants, namely age\(^6\) and gender. Other important demographics, such as Indigenous status, culturally and linguistically diverse background, prior convictions and mental health status, are not recorded in the Courtlink database. The data also failed to indicate whether a case was heard in the Koori Division of the Children’s Court.\(^7\)

The ‘principal proven offence’ – the offence in a case that attracts the most serious sentence (within the sentencing hierarchy) at the initial sentencing hearing\(^8\) – has been used as the basis for most data analysis in the report.

Consultation

The Council held individual meetings with a range of organisations and a large roundtable meeting on 24 March 2011. Details of these meetings are contained in Appendix 2.

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\(^5\) Finalised cases can include cases that ended due to a plea or finding of guilt, a diversion through the ‘Ropes’ Program, all charges being struck out or the case being sent for committal to another court.

\(^6\) Due to some errors discovered in the initial age data provided to the Council, separate calculations of age were performed by comparing the defendant’s recorded date of birth with other relevant dates for that case. Through this method, it has been possible to calculate the defendant’s age at committing the offence, age at the issue date of the case, age at first hearing and age at case finalisation.

\(^7\) There are several other limitations to the data, and certain data have been excluded – for example, dismissed/discharged matters – due to lack of reliability: see ‘Data methodology’ in Appendix 1.

\(^8\) Other factors are used to determine the principal proven offence if two or more offences in the same case receive equally severe sentence types. For a detailed explanation of the data methodology, refer to Appendix 1.
Structure of the report

Chapter 2 includes a discussion of offending by young people generally – how it differs from adult offending, the risk factors, an overview of the data on offending by young people in Victoria and a brief interstate comparison.

Chapter 3 provides a historical context to the report with a brief examination of the theoretical models and principles underpinning the Victorian approach to juvenile justice, and a summary of legislative developments preceding the current Children, Youth and Families Act 2005 (Vic).

Chapter 4 covers pre-court diversionary practices, including police cautioning, the ‘Ropes’ Program and various other diversionary programs available to young people in Victoria.

Chapter 5 details the approach of the Criminal Division of the Children’s Court of Victoria, including jurisdiction, definitions, the Koori Division and court operation and services.

Chapter 6 contains a discussion of the principles relating to sentencing in the Children’s Court.

Chapter 7 describes the sentencing options available in the Children’s Court.

Chapters 8 and 9 contain the bulk of the data analysis on offence and sentence distribution in the Children’s Court over the ten-year data period.

Chapter 10 provides a more detailed examination of youth detention, including data analysis.

Chapter 11 examines the sentencing of children in the higher courts over the ten-year period, including a discussion of procedure and an analysis of the data.

Finally, Chapter 12 describes the ‘dual track’ system, which is unique to Victoria.
Chapter 2
An overview of young people’s offending in Australia

Based on police crime statistics – commonly cited to indicate levels of offending – young people are over-represented in detected crime compared with adults. In 2009–10, police nationwide dealt with or ‘processed’ 67,692 young alleged offenders and 306,568 adult alleged offenders.9 Expressed as rates, however, young people were processed by police at a rate of 3,046 per 100,000 and adults at a rate of 1,790 per 100,000.10

Detected crime is a blunt measure of actual offending rates. Only a small proportion of crime is reported to police and results in charges being laid.11 Reporting rates also vary according to the type of offence, and police detection rates may differ according to the type of offence and offender. Cunneen and White suggest that young offenders are more likely to be apprehended by police than their adult counterparts.12 They suggest the following reasons for this: young people are less experienced than ‘accomplished’ offenders, they often

9 Sentencing Advisory Council’s analysis of ‘All states’ datacube: Excel spreadsheet, Australian Bureau of Statistics, Recorded Crime – Offenders, 2009–10, cat. no. 4519.0 (2011), Tables 5 and 7 <http://www.abs.gov.au/ausstats/subscriber.nsf/0/534833A17C86081CA257840000F3DFA/$File/45190do002_200910.xls> at 27 April 2011. These data are based on the count of distinct alleged offenders, where each offender is counted only once regardless of the number of offences or the number of times an offender has been proceeded against by police in the relevant year: see explanatory notes of ‘offender counts’, ibid 51. See also the ‘explanatory notes’ section for a discussion of the methodology used by the Australian Bureau of Statistics and limitations regarding these statistics: ibid 50–58. See ‘Population rates’ in Appendix 1 of this report for details of the age groups used by the Council to differentiate between young alleged offenders and adult alleged offenders.

10 Sentencing Advisory Council’s analysis of ‘All states’ datacube: Excel spreadsheet, Australian Bureau of Statistics (2011), above n 9, and Australian Bureau of Statistics population statistics (see ‘Population rates’ in Appendix 1 of this report for details of the Australian Bureau of Statistics sources used to calculate population). Population rates are based on estimated resident population (ERP) during December 2009 as calculated by the Sentencing Advisory Council. Population figures for December were chosen for use by the Council to be in line with population rates used in Australian Bureau of Statistics (2011), above n 9, and its various datacubes. See explanatory notes of ‘offender rates’ in ibid 52–53.


offend in groups\textsuperscript{13} (leading to higher visibility\textsuperscript{14} and several people being charged over the one incident), the offences are mostly opportunistic and unplanned and occurs in public spaces (again due to higher visibility) and they usually offend close to home. The fact that they often offend in groups means that multiple young people may be arrested for one incident, which can distort the statistical relationship between offences and offenders. Further, some offences in which young people have traditionally been over-represented – such as burglary and theft – have high reporting rates due to insurance requirements.\textsuperscript{15}

Although overall young people have a higher rate of (detected) alleged offending than adults, this is not true for all offence types. Figure 1 displays the rate of alleged offending for young and adult offenders dealt with by police in 2009–10, according to the principal offence.\textsuperscript{16} The rate of alleged offences by young people was higher than that for adults for acts intended to cause injury, public order, theft, property damage and unlawful entry offences (for the latter three, young people had much higher rates than adults). Adult alleged offenders had higher rates of illicit drug offences and offences against justice. For other types of alleged offences, the rates were relatively similar.

Over-representation of young people in police processing figures is frequently reported by the media in a sensationalist manner; creating the impression that there is a wave of crime by young people. Despite the tendency for the media to highlight the threat posed by young people's offending in Australia, young offenders are only infrequently processed for very violent offences, with the majority across Australia charged with minor property, traffic and transit-related offences.\textsuperscript{17}

Compared with adults, a large number of young people processed by police are not later proceeded against in court, but are diverted from the criminal justice system via cautions or other diversionary measures.\textsuperscript{18} As a result, young people are under-represented at the court adjudication stage.

\textsuperscript{13}Jean-Marie McGloin and Alex R. Piquero, “‘I Wasn’t Alone’: Collective Behaviour and Violent Delinquency” (2009) 42(3) Australian and New Zealand Journal of Criminology 336. Criminological research has found that juvenile offending is frequently group-based: ‘A routine finding in research on criminal careers concerns the group nature of juvenile delinquency. In fact, this finding is so consistent that virtually every serious criminological theory must confront (if not include) its observation’. This finding is not confined to the Australian context, but one that emerges from ‘most data sources, time periods, cultures and demographics’: ibid 336 (citations omitted).

\textsuperscript{14}See also Richards (2011), above n 11.

\textsuperscript{15}Cunneen and White (2007), above n 12.

\textsuperscript{16}The principal offence is the most serious offence that police proceeded against for each alleged offender (see glossary definition of principal offence in Australian Bureau of Statistics (2011), above n 9, 66). ‘Principal offence’ should not be confused with ‘principal proven offence’, which describes the offence that attracted the most severe sentencing disposition within the courts (see ‘Counting unit’ in Appendix 1 for details of how the Sentencing Advisory Council calculates the ‘principal proven offence’).

\textsuperscript{17}Kelly Richards, juveniles’ Contact with the Criminal Justice System in Australia, AIC Monitoring Report no. 7 (2009) 68, 70. Although the Australian Bureau of Statistics numbers in Figure 1 suggest that young people outnumber adults in police processing figures for ‘acts intended to cause injury’, this is an extremely broad category. Young people are mostly dealt with in the courts for less serious offences against the person, such as causing injury and common assault.

\textsuperscript{18}Chapter 4 discusses pre-court diversionary measures in Victoria.
An overview of young people’s offending

Figure 1: Rate of alleged offending – adults and young people, by principal alleged offence processed by police, 2009–10

<table>
<thead>
<tr>
<th>Type of principal offence</th>
<th>Rate (per 100,000 of relevant population)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acts intended to cause injury</td>
<td>352.1</td>
</tr>
<tr>
<td>Public order offences</td>
<td>440.8</td>
</tr>
<tr>
<td>Theft and related offences</td>
<td>238.7</td>
</tr>
<tr>
<td>Illicit drug offences</td>
<td>187.6</td>
</tr>
<tr>
<td>Offences against justice</td>
<td>124.9</td>
</tr>
<tr>
<td>Property damage and environmental pollution</td>
<td>78.7</td>
</tr>
<tr>
<td>Miscellaneous offences</td>
<td>85.1</td>
</tr>
<tr>
<td>Unlawful entry with intent</td>
<td>307.3</td>
</tr>
<tr>
<td>Fraud, deception and related offences</td>
<td>49.9</td>
</tr>
<tr>
<td>Prohibited/regulated weapons and explosives offences</td>
<td>40.5</td>
</tr>
<tr>
<td>Sexual assault and related offences</td>
<td>49.2</td>
</tr>
<tr>
<td>Robbery, extortion and related offences</td>
<td>66.5</td>
</tr>
<tr>
<td>Abduction/harassment/other offences against the person</td>
<td>30.1</td>
</tr>
<tr>
<td>Dangerous or negligent acts endangering persons</td>
<td>17.0</td>
</tr>
<tr>
<td>Homicide and related offences</td>
<td>4.9</td>
</tr>
</tbody>
</table>


Young people are between 10 and 17 years of age, while adults are at the age of 18 years and over at the time of police proceeding against them. It was not possible to isolate those between 10 and 16 years of age in Queensland for the purposes of this graph.
The Australian Bureau of Statistics estimated that in 2009–10, there were 661,713 defendants with finalised cases in all criminal courts across Australia. Of these cases, the vast majority occurred within the Magistrates’ Court jurisdiction (603,604 finalised cases, or 91% of all cases). Only 6% occurred within Children’s Courts (41,275 cases) and 3% in the higher courts (16,834 cases). An analysis of the rates per 100,000 of the relevant populations for defendants in the Magistrates’ and Children’s Courts shows that defendants in the Magistrates’ Court (assumed for these purposes to all be adults) had a higher rate of court adjudication for their alleged offending than young people appearing in the Children’s Court (Figure 2). For example, in 2009–10, 1,505 per 100,000 young people were adjudicated in the Children’s Court compared with 3,156 per 100,000 adults adjudicated in the Magistrates’ Court. These rates have remained relatively steady over the last few years.

When restricting the analysis to only proven cases (that is, where the defendant was found or pleaded guilty), the rates appear almost identical to those in Figure 2.

Figure 2: Rate of adjudication in Australia, by type of court and year of adjudication

Source: Sentencing Advisory Council’s analysis of Australian Bureau of Statistics, Criminal Courts, Australia 2009–10, 64 and 102, and population statistics. Note that Children’s Court data at a national level were not available prior to 2006–07.

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21 Adjudicated cases means cases where the defendant was either found or pleaded guilty, or acquitted of all charges (see glossary definition of ‘adjudicated outcomes’ in Australian Bureau of Statistics (2011), above n 20, 147).
Risk factors for offending by young people

In the last decade or so, a body of research has emerged that suggests that adolescent brains are not fully mature until well into the early twenties. Such neurological immaturity (combined with various aspects of psychosocial immaturity), may undermine adolescents' ability to refrain from criminal behaviour. The frontal lobe, which governs reasoning, planning and organisation, is the last part of the brain to develop. This is likely to contribute to adolescents' lack of impulse control, although their attraction to risk and the high value they place on the immediate rewards flowing from risky behaviour, as well as their heavy 'discounting' of the future costs of this behaviour, also contribute. Adolescents are very vulnerable to peer pressure (which in turn can strongly affect their risk-taking behaviour), in part due to the importance they place on peers and in part due to neurological and hormonal changes. Scott and Steinberg conclude that although adolescents have roughly the same ability as adults to employ logical reasoning in making decisions by early to mid adolescence, adolescents have far less experience using these skills. The authors state that:

Youthful criminal choices may share much in common with those of adults whose decision-making capacities are impaired by emotional disturbance, mental illness or retardation, vulnerability to influence or domination by others, or failure to understand fully the consequences of their acts.

The American Bar Association agrees, arguing that the research on adolescent brain development, although not serving to excuse adolescents from violent crime, ‘clearly lessens their culpability’, as adolescents are ‘less than adult’.

New South Wales Magistrate Paul Mulroney has acknowledged the neuroscience research and commented on the potential effects of adolescents’ different functioning:

It is typical of the offences committed by young offenders that they are opportunistic, there is little if any forethought of consequences and there is peer pressure or groupthink i.e. everyone thinks that it was someone else’s idea and ‘goes with the flow’.

In addition to incomplete brain development, which is likely to be an important factor in at least some, if not most, offending behaviour by young people, particular social characteristics are prevalent among young offenders. Commonly recognised social ‘risk factors’ include Indigenous status, ethnicity, low socioeconomic

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23 Elizabeth Scott and Laurence Steinberg, Rethinking Juvenile Justice (2008).

24 Sowell et al. (2001), above n 22, 8828.

25 Scott and Steinberg (2008), above n 23, 44.

26 Ibid 37–43, 47.

27 Ibid 38, 48.

28 Ibid 36, 131.


status, minimal educational attainment or lack of engagement with other learning opportunities, homelessness or inadequate housing, alcohol and/or drug misuse, mental illness, intellectual disability, family instability and/or a history of involvement in the child protection system.\textsuperscript{32}

These risk factors – an examination of which is beyond the scope of this report – reflect some of the broader causes of offending by young people. They also highlight the complexity of the issues faced by service and criminal justice agencies, including the Children’s Court.

A statistical snapshot of young people’s contact with the criminal justice system in Victoria

As much adolescent offending is minor in nature and many adolescents are likely to “grow out” of offending,\textsuperscript{33} less intensive sanctions are more appropriate for the majority of young offenders. As Curran and Stary comment:

\begin{quote}
 to be too punitive [at an age when juveniles are ‘testing the boundaries and still learning about law abiding behaviours’] … may be counterproductive as it might harden a young person where there is hope for redemption.\textsuperscript{34}
\end{quote}

Since the enactment of the \textit{Children and Young Persons Act 1989} (Vic), which formally recognised that young people have different (developmental) needs to adults, the approach in Victoria has been to maximise diversion of young people coming into contact with the criminal justice system. As the Department of Human Services has commented:

\begin{quote}
The funnelling effect of diversion results in only the most troublesome and troubled – those with multiple risk factors for reoffending – as juvenile justice clients.\textsuperscript{35}
\end{quote}

According to the Australian Bureau of Statistics, in 2009–10 there were 548,340\textsuperscript{36} young people aged between 10 and 17 years in Victoria. Of these, 14,556 young people (distinct persons)\textsuperscript{37} were processed by police.\textsuperscript{38} This was 2.7% of the 10 to 17 year old population for that year. Furthermore, 5,957 young people (or 40.9% of all those processed) were not proceeded against in court during 2009–10, for example, through lack of evidence or through diversion from court by way of a caution (formal or informal) or other type of

\begin{thebibliography}{99}
\bibitem{34} Liz Curran and Rob Stary, ‘On the Right Track’ (2003) 77(8) \textit{Law Institute Journal} 42, 45.
\bibitem{36} Sentencing Advisory Council’s analysis of Australian Bureau of Statistics population statistics (see ‘Population rates’ in Appendix 1 of this report for details of the Australian Bureau of Statistics sources used to calculate population). Population rates are based on estimated resident population (ERP) during December 2009 as calculated by the Sentencing Advisory Council. Population figures for December were chosen for use by the Council to be in line with population rates used in Australian Bureau of Statistics (2011), above n 9, and its various datacubes. See explanatory notes of ‘offender rates’: ibid 52–53).
\bibitem{37} Sentencing Advisory Council’s analysis of ‘All states’ datacube: Excel spreadsheet, Australian Bureau of Statistics (2011), above n 9, Table 7. The distinct offender count only includes an offender once during the reference period regardless of the number of alleged offences or the number of times that police processed that individual (see explanatory notes of ‘offender counts’ in Australian Bureau of Statistics (2011), above n 9, 51).
\bibitem{38} Ibid. For the definition of ‘police proceedings’, see the glossary definition in Australian Bureau of Statistics (2011), above n 9, 66.
\end{thebibliography}
An overview of young people’s offending diversion, or the issuing of penalty or infringement notices. In that same year, the Victorian Children’s Court dealt with 8,599 cases, of which 7,064 (82.1%) were proven. Of the proven cases, 1,556 (22.0%) were given some form of supervisory order, while 172 (2.4% of proven cases) were sentenced to youth detention.

In later chapters, there is an examination of offence and sentence distributions over the 10 years from 2000 to 2009. The overwhelming majority of children came before the Children’s Court for minor property or public transport-related offences (for example, theft and riding on public transport without a valid ticket).

Figure 3: Snapshot of young people’s involvement in the Victorian criminal justice system, 2009–10

548,340 young people aged 10 to 17 in Victoria

14,556 young people processed by police (2.7% of population aged 10 to 17)

5,957 young people diverted or not proceeded against (40.9% of young people processed)

8,599 cases dealt with in Children’s Court

7,064 (82.1%) cases proved

1,556 (22.0%) given supervisory orders

172 (2.4%) given youth detention

The figure of 5,957 is an estimate based on the difference between number of distinct offenders processed (from Australian Bureau of Statistics (2011), above n 9, Table 7) and the number of Children’s Court cases finalised (as obtained from Australian Bureau of Statistics (2011), above n 20, 101). Caution should be used when attempting to compare statistics from these two data sources. Lag in time between police and courts’ handling of the matter or police later withdrawing the court action could alter the figures. The number of court cases finalised may also include cases prosecuted by authorities other than police. See explanatory notes ‘comparisons to other ABS data’ in Australian Bureau of Statistics (2011), above n 20, 131.


Sentencing Advisory Council’s analysis of ‘Children’s Courts supplementary datacubes 1 to 6’, datacube: Excel spreadsheet, Australian Bureau of Statistics (2011), above n 20, 6 <http://www.abs.gov.au/Ausstats/subscriber.nsf/0/S5446AF745C98613CA257B230014C318/$File/4S130d008_200910.xls> at 27 April 2011. The number and percentage of people given a ‘supervisory order in the community’ include the Australian Bureau of Statistics categories of cases sentenced to ‘custody in the community’ and ‘community supervision or work orders’ (see glossary definitions in Australian Bureau of Statistics (2011), above n 20, 149). These two categories include sentencing dispositions such as intensive correction orders, community service orders, probation and treatment orders. They would be roughly equivalent to the category of ‘supervisory orders’, which will be used later in this report to discuss sentencing dispositions.
Interstate comparisons

Figure 4 indicates the rate of young alleged offenders processed by police during the years 2008–09 and 2009–10 for each Australian state and territory. Victoria, New South Wales, the Australian Capital Territory and Queensland had the lowest rates of processing. New South Wales had the lowest rate during 2008–09 (2,529 per 100,000 young people) while the Australian Capital Territory had the lowest rate during 2009–10 (2,208 per 100,000 young people). Victoria’s rate of distinct young alleged offenders processed by police was the second lowest in both years (2,665 per 100,000 in 2008–09 and 2,655 per 100,000 in 2009–10). The Northern Territory had the highest rates of distinct young alleged offenders processed for both years.

Figure 4: Distinct young alleged offenders (per 100,000 people of relevant age group) processed by police, 2008–09 and 2009–10 by state and territory, and year


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42 Figure 4 is based on statistics from the Australian Bureau of Statistics and refers to ‘distinct’ alleged offenders. The distinct offender count only includes an offender once during the reference period regardless of the number of alleged offences or the number of times that police processed that individual (see explanatory notes of ‘offender counts’ in Australian Bureau of Statistics (2011), above n 9, 51).

43 The Australian Bureau of Statistics states, however, that due to data problems, the number of distinct offenders for South Australia may be overstated (see explanatory notes 46–48 in Australian Bureau of Statistics (2011), above n 9, 55–56). Given this, it is likely that the rate of distinct alleged offenders processed by the police would be more in line with the rates of New South Wales, Victoria and Queensland.

44 The Australian Bureau of Statistics states that the number of distinct offenders for the Australian Capital Territory is likely to be an underestimation, due to the introduction of a new infringement system during December 2009, which had yet to integrate its offence records with the main police database. See explanatory note 53 in Australian Bureau of Statistics (2011), above n 9, 56.

45 See ‘Population rates’ in Appendix 1 of this report for details of the age groups used to calculate the rate of young alleged offenders.
Figure 5 shows the percentage distribution of young alleged offenders in each state and territory, according to the number of times they were processed by police during the 2009–10 financial year. Throughout all states and territories, the majority of young alleged offenders were only processed once. Victoria and the Australian Capital Territory had a particularly high percentage of distinct offenders having only one police proceeding against them (above 75% each) during 2009–10. Conversely, Tasmania had the lowest percentage of distinct offenders who were only processed once (67.8%) and the highest percentage of distinct offenders who were processed five or more times (10.1%). According to some research studies, those with more than one reported contact with the criminal justice system account for a ‘disproportionately large amount of offending’.

Figure 5: Percentage of distinct young alleged offenders by number of times processed by police, 2009–10, by state and territory


46 The reference here is to ‘distinct’ alleged offenders as previously defined: see above n 42.
47 For a description of possible problems with Australian Capital Territory data, see above n 44.
48 A possible reason for these high numbers in Tasmania is the expansion of regulated public spaces during 2009–10. See explanatory note 49 in Australian Bureau of Statistics (2011), above n 9, 56.
49 See, for example, Michael Livingston et al., ‘Understanding Juvenile Offending Trajectories’ (2008) 41(3) Australian and New Zealand Journal of Criminology 345, 349.
50 For every state and territory, apart from Queensland, the number of distinct alleged offenders aged between 10 and 17 years was used. For Queensland, the number of distinct alleged offenders aged between 10 and 16 years was used. Data for Western Australia were not available.
Figure 6 examines whether there are any state or territory differences in the rate of proven cases in Children’s Court jurisdictions from 2006–07 to 2009–10. It was found that New South Wales and the Australian Capital Territory had the lowest rates of proven Children’s Court cases per 100,000 of their relevant population for all four years, followed by Victoria. Apart from a high rate of proven cases in 2006–07, Victoria’s rates were relatively steady over time. Tasmania and the Northern Territory were the two Children’s Court jurisdictions to experience an increase in the rate of proven cases, while Western Australia had the highest rate of proven cases across the whole period.

Figure 6: Rate of proven cases (per 100,000 young people) in the Children’s Court jurisdiction, 2006–07 to 2009–10, by state and territory


Proven cases include cases resulting in a finding of guilty, either through a plea of guilty or through a guilty verdict. See glossary definition of ‘proven guilty’ in Australian Bureau of Statistics (2011), above n 20, 155.

The high rate of proven cases in 2006–07 reflects the delay in the rollout of the Children and Young Persons Infringement Notice System (CAYPINS), which has led to the Victorian Children’s Court dealing with large numbers of fare evasion and transit ticketing offences that year. See also explanatory note 72 in Australian Bureau of Statistics (2011), above n 20, 133.

See ‘Population rates’ in Appendix I for details of the age groups used to calculate the rate of young alleged offenders.
Figure 7 displays the distribution of principal offences\textsuperscript{54} in proven cases within the various state and territory Children’s Court jurisdictions in 2009–10.\textsuperscript{55} The Children’s Court of Victoria dealt with a large percentage of cases involving theft and related offences (27.5%) or acts intended to cause injury (20.3%) as principal offences. States and territories that dealt with a significant percentage of acts intended to cause injury were New South Wales (29.4%), Tasmania (24.3%) and the Australian Capital Territory (24.0%). Traffic and vehicle regulatory offences were another major group of offences heard in the Children’s Court, particularly in South Australia (19.7%), Western Australia (23.0%), the Northern Territory (30.0%) and the Australian Capital Territory (16.2%). Offences involving unlawful entry made up a significant percentage of the offences heard within Queensland (16.3%), the Northern Territory (19.9%) and the Australian Capital Territory (19.5%).

Figure 7: Distribution of principal proven offences in various Children’s Courts, 2009–10, by state and territory

![Figure 7: Distribution of principal proven offences in various Children’s Courts, 2009–10, by state and territory](image)


\textsuperscript{54} The principal offence is a similar concept to the ‘principal proven offence’; however, the latter describes the offence that attracted the most severe sentencing disposition within the courts. Refer to explanatory notes 40–44 for details of how the Australian Bureau of Statistics calculates ‘principal offence’: Australian Bureau of Statistics (2011), above n 20, 129–30. Refer to ‘Counting unit’ in Appendix I of this report for details of how the Sentencing Advisory Council calculates the ‘principal proven offence’.

\textsuperscript{55} See above n 51 for details of what constitutes a ‘proven case’.
Reoffending

There has been little research in Australia on the issue of young people who reoffend in adulthood. This is due to inadequate data collection in most jurisdictions, which makes it very difficult or impossible to track these offenders’ later appearances in the adult courts.56

Some Australian researchers have suggested that only a small group of more persistent adolescent offenders goes on to offend past early adulthood. These offenders, however, account for a disproportionate amount of offending. The others, who do not go on to offend in adulthood, have been described as ‘adolescent-limited offenders’.57 These offenders show “temporary offending patterns believed to be caused by proximal factors beginning at puberty and ending in young adulthood”.58

A Queensland study identified ‘chronic offenders’ (those who begin offending at an early age and go on to offend in adulthood) as making up only 11% of the study cohort but responsible for 33% of all offending in the cohort.59 A Victorian study by the Department of Human Services (DHS) found that an earlier age of onset of offending was associated with a higher risk of recidivism, with those aged 11 to 13 years at the age of first detected offending showing the highest recidivism rates among age groups.60 The Department of Human Services study found that the recidivism rate for first-time offenders sentenced to probation or more severe sanctions was 41.4%, compared with 60.7% for those with prior convictions.61 Recidivism rates were also higher for Indigenous young offenders and those who had previously received custodial orders.62

A South Australian study reported similar findings.63 This study looked at the number of police apprehensions per young person (aged 10 to 17 years inclusive) in 2000 and found that, on average, each young person was apprehended 1.7 times within the twelve months.64 The majority of the 5,352 young offenders apprehended in 200065 were apprehended only once (69.7%) and had only one or two charges filed against them, with those apprehended more than once accounting for a disproportionate number of all offences. Those with six or more apprehensions (11% of individuals) accounted for almost 40% of all offences.66

A study published by the NSW Bureau of Crime Statistics and Research (BOCSAR) in 1994 reported that 69.7% of young offenders (described as ‘juveniles’ in the paper) had only one appearance in the Children’s Court during the study period.67 Almost half of the appearances were accounted for by the 15.4% of young offenders who each had two or more appearances.68 The author commented that “[c]ontrary to popular opinion, juvenile involvement in crime appears to be extremely transitory”.69 However, this study did not

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58 Livingston et al. (2008), above n 49, 348. The authors are discussing the work of T. E. Moffitt from 1993 and 1997.
59 Livingston et al. (2008), above n 49, 355.
60 Department of Human Services (2001), above n 35, 41. The Department of Human Services has not published more recent statistics on recidivism among Victorian young offenders.
61 Ibid.
62 Ibid 42.
64 Ibid 3.
65 Ibid. These were distinct individuals.
67 Christine Coumarelos, Juvenile Offending: Predicting Persistence and Determining the Cost-Effectiveness of Interventions, Report no. 33 (1994). All data are based on final criminal appearances in the Children’s Court from the start of 1982 to the end of June 1992. To be included, young offenders had to be first convicted in the court between the start of 1982 and the end of 1986 and reach 18 years of age by the end of the study period. Note that the methodology used in this study was later criticised in another BOCSAR report: see Chen et al. (2005), above n 56, 10.
68 Coumarelos (1994), above n 67, 7.
69 Ibid 8.
track the young offenders into the adult system. As more than 50% of young offenders had their first appearance in the Children’s Court at the age of 16 or 17 years (and therefore did not have much time to reoffend in this jurisdiction) it is possible that they went on to reoffend as young adults.

Two later BOCSAR studies on reoffending appear to contradict the earlier findings that only a minority of young offenders reoffend. These studies had longer tracking periods than the earlier ones and both tracked young offenders into the adult court system. A 2005 study examined the transition from under age to adult offending by tracking for eight years a cohort of 5,476 young offenders aged 10 to 18 years appearing for the first time in the New South Wales Children’s Court in 1995. The BOCSAR reported:

The most surprising finding to come out of the present research is the discovery that most juveniles appearing in court reoffend. Nearly 70 per cent of the 5,476 juveniles examined in the present study reappeared in court within eight years. These results are fairly consistent with the international literature on juvenile reoffending (Blumstein, Cohen, Roth and Visher 1986), however they seem to conflict with Coumarelos’s [1994] finding that only about 30 per cent of juveniles appearing in the NSW Children’s Court between 1982 and 1986 had more than one juvenile appearance.

The study found significantly higher average rates of reappearance in court among Indigenous and male offenders, as well as those who were relatively young (10 to 14 years) at the time of their first court appearance.

A later BOCSAR report found similar results. BOCSAR looked at a cohort of 81,500 people, all those convicted of at least one offence in a New South Wales court in 1994. The study used the NSW Reoffending Database to determine the proportion of offenders convicted of a further offence since 1994, over a fifteen-year period. It reported high reconviction rates for adults (57%) but even higher rates for young offenders (79%). Most of these (62%) reoffended within three years: 40% of young offenders were reconvicted within one year, another 15% within two years and a further 7% within three years. The study does not report on the proportion of young offenders who went on to reoffend in adulthood. Most of those young offenders who reoffended more than three years after their 1994 conviction (38%) would have been adults at the time of reoffending.

In this regard, the Australian Institute of Criminology has commented that offending tends to peak ‘in late adolescence, when young people are aged 18 to 19 years and are no longer legally defined as juveniles’. Data from the Australian Bureau of Statistics reveal that the largest group of alleged offenders processed by the police nationwide in 2009–10 were those aged 15 to 19 years (23.4% of all alleged offenders processed). Of the 15 to 19 year age group, the greatest component consisted of people aged 18 (22.0%) at the time of police processing, followed by 17 year olds (21.6%) and 19 year olds (21.3%).

There is good research evidence to indicate that young offenders aged 18–20 years are not fully developed from a neurological viewpoint. It is possible that many 18 and 19 year old offenders cease their offending behaviour only once they reach neurological and social maturity, and it is only the ‘persistent’ offenders who continue offending beyond this point.

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70 Chen et al. (2005), above n 56.
71 Ibid 10.
72 Ibid 2.
74 Ibid 4.
75 Ibid 2.
76 More than half of the young offenders who reoffended within 15 years were reconvicted of the same offence for theft and related offences (55% reconvicted), assault (54% reconvicted) and traffic and vehicle regulatory offences (52% reconvicted): see Holmes (2011), above n 73, 5.
77 Richards (2011), above n 33, 2.
79 Unfortunately the Australian Bureau of Statistics does not provide data on individual ages for alleged offenders over the age of 19 within the Recorded Crime – Offenders 2009–10 report or its associated data: see Australian Bureau of Statistics (2011), above n 9.
Chapter 3
Theoretical framework and legislative development

Historically, children were considered ‘mini adults’ and could be convicted and sanctioned as adults. The modern western concept of children and adolescents as innocent, immature and needing of protection developed slowly, with the modern legal concept of ‘childhood’ taking root in the eighteenth and nineteenth centuries during the ‘child saving movement’. It has been argued that the idea of ‘adolescence’ as a special stage of life separate from adulthood only came about in the early twentieth century.80

At law today, children’s incapacities are based on chronological age.81 Eade argues that research to date ‘tends to suggest quite strongly that biological age is not an accurate determinant of a child’s actual, as opposed to presumed, “moral” capacity’.82 Under the Children, Youth and Families Act 2005 (Vic) (‘CYF Act’), children under the age of 10 years cannot be held criminally responsible for their actions.83

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80 Monahan and Young (2008), above n 32.
81 There is long-standing debate about the appropriate age of criminal responsibility, which varies throughout the common law world. See, for example, Lauren Eade, ‘Legal Incapacity, Autonomy and Children’s Rights’ (2003) 5(2) Newcastle Law Review 157. Interestingly, the UK Sentencing Guidelines Council breaks down the age of the offender into both chronological and emotional age and deems this the first key element in determining a sentence for a child or young person: see Sentencing Guidelines Council (UK), Overarching Principles – Sentencing Youths: Definitive Guideline (2009).
82 Eade (2003), above n 81, 159.
83 Children, Youth and Families Act 2005 (Vic) s 3(1) (definition of ‘child’).
Victoria: Underlying juvenile justice models and principles

Juvenile justice systems have traditionally been divided into two basic paradigms – the ‘welfare model’ and the justice model. The welfare model originated in the United States at the beginning of the twentieth century and dominated juvenile justice systems until the middle of the century, when the justice model emerged to compete with it.

The welfare model is ‘needs’ based, offering treatment and rehabilitation rather than punishment. It is based on the premise that offending is the product of influences external to the individual offender rather than free moral choice. Under the welfare model, young offenders are to be dealt with in an informal manner, away from the public eye and separate from adult offenders.

Under the justice model, young offenders are considered rational, responsible and accountable. As offending is the result of free choice and therefore personal responsibility, the correct legal response is the imposition of a sanction appropriate to the seriousness of the crime. This model is based on responding to past deeds, contrasted with the welfare model, which is future-oriented.

At the time of the emergence of the justice model, a philosophical debate began about which model – or combination of the two – forms the most sound basis for sentencing children. Freiberg has argued that this ‘needs vs deeds’ debate has become ‘increasingly sterile’ as courts face the enormous challenges presented by drug and alcohol use, poverty, mental illness and unemployment, requiring courts to not simply … adjudicate a dispute between the parties but to attempt to address the underlying problems. Travers, on the other hand, is of the opinion that the debate ‘remains central to policy debates on juvenile justice’. However, he asserts that ‘[d]ebates about welfare and punishment should only be relevant to young people who repeatedly commit serious offences’, the implication being that they are irrelevant to the large number of young offenders who are sentenced for minor or ‘trivial’ offences and dealt with via lower-level sanctions.

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85 Ibid [164].
86 Ibid [163].
87 Ibid [165].
90 Ibid 111.
The Australian Law Reform Commission has suggested that a third model – based on restorative justice principles – is emerging in the area of juvenile justice. This model is a ‘contextual model that acknowledges the desirability of balancing young offenders’ rights against their responsibilities to the community’. The aim of this model is for the offender to take individual responsibility for harm done (similar in this respect to the justice model), but rather than focusing largely on punishment, the goals are more in the direction of reparation for harm done. In recent years, all Australian jurisdictions have introduced programs for young offenders based on restorative justice principles, for example, group conferencing, Youth Justice Conferencing or juvenile justice teams, with most accepting referrals from both police and courts. Restorative justice approaches, although sometimes described as incompatible with the traditional adversarial criminal justice system, can complement and support the traditional system.

The current Victorian approach to dealing with young offenders in Victoria includes elements of all three theoretical models. In keeping with the spirit of the CYF Act and with the Victorian juvenile justice policy context generally, there is a strong emphasis in Victoria on diversion – and more recently on restorative justice – for young people who come into contact with the criminal justice system. In Victoria, police cautioning, the ‘Ropes’ Program and, to a lesser extent, the Youth Justice Group Conferencing Program are the primary means by which young people’s involvement with the criminal justice system is minimised at various stages in the process. The latter is a restorative justice process, in that it aims to divert the young offender from more intensive supervisory outcomes, encourage the offender to take responsibility for the harm done to the victim and encourage reparation to the victim and the community.

There are strong elements of the welfare model apparent in the sentencing principles set out in the CYF Act. However, there is also evidence of the justice model. Fox and Freiberg describe the legislation as ‘a compromise between these two models’ (welfare and justice). The authors point out that the two models do not reside at ‘opposite ends of a continuum’ and each contains elements both inconsistent with and complementary to those of the alternative model. The CYF Act sentencing principles are discussed in detail in Chapter 6.

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91 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission (1997), above n 32, [18.34].
92 Ibid.
93 Richards (2009), above n 17, 71.
95 For a detailed discussion of these options, see Chapters 4 and 5.
97 Ibid 829.
Legislative development

Historically, youthfulness did not entitle a person to separate treatment. Child offenders were subject to the same procedures and sanctions as adults. Young children were even imprisoned in adult jails. The first evidence in the legal arena of youthfulness being recognised as a mitigatory factor was executive clemency after conviction. Later, in the mid nineteenth century, judges developed a new non-custodial sentencing option of probation in order to avoid having to imprison young offenders.

Increasing recognition of the need for specialised responses for dealing with children led to the development of a court exclusive to children and a separate legislative framework for child crime and protection matters – with these operating side by side with adult courts and adult sentencing legislation.

The first Children's Court was established in Victoria in 1906 with the exclusive jurisdiction to hear summary matters relating to child offenders as well as applications concerning neglected children. To enable children to escape the ‘contamination and stigma’ of adult courts, the legislation establishing the Children’s Court envisaged it as an entity ‘separate’ from the Magistrates’ Court. However, the Children’s Court ‘in reality … remained a division of the Magistrates’ Court’ – control over the administration of the Children's Court was vested in the Chief Magistrate, the bench was selected from among members of the Magistrates' Court and sittings were conducted from locations in which Courts of Petty Sessions operated.

The new court created under the Children’s Court Act 1906 (Vic) did not separate child protection and welfare-related matters from criminal matters. Recognition of the ‘substantive, procedural and dispositional differences’ between these two classes led to recommendations in 1984 by the Child Welfare Practice and Legislation Review, chaired by Dr Terry Carney (‘the Carney Report’) that the Children’s Court be split into two divisions – a Criminal Division and a Family Division. This and other recommendations of the Carney Report were implemented in the Children and Young Persons Act 1989 (Vic).

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98 Freiberg, Fox and Hogan (1988), above n 84, 2. For further detail on the history of juvenile justice and children's courts, see Monahan and Young (2008), above n 32.
100 Richards (2011), above n 33, citing Cunneen and White (2007), above n 12.
101 Freiberg, Fox and Hogan (1988), above n 84.
102 Fox and Freiberg (1999), above n 96, 824.
103 Children’s Court Act 1906 (Vic) s 12. The Children’s Court could also hear ‘charges for felony and misdemeanour’. Under section 2 of the Act, children were defined as persons aged 17 and under. See further Children’s Court of Victoria (2006), above n 99.
104 Cunneen and White (2007), above n 12, 14. See also Freiberg, Fox and Hogan (1988), above n 84, 2.
105 John Francis Fogarty, Protective Services for Children in Victoria: A Report by Justice Fogarty, Judge of the Family Court of Australia (1993), 137.
107 Victoria, Parliamentary Debates, Legislative Assembly, 6 May 1986, 1676 (C. R. T. Matthews, Minister for the Arts).
108 As found in the Carney Report: ‘adjudication in offender matters is based on a philosophy focussing on the individual responsibility of the young offender whereas in protection matters responsibility for the acts or omissions by adults should not be attributed to the child: Terry Carney, Child Welfare Practice and Legislation Review, Report, vol. 2 (1984), 238.
110 The Children's Court was, in fact, first split into two divisions by the Children's Court (Amendment) Act 1986 (Vic). This legislation was ‘consolidated and replaced’ by the Children and Young Persons Act 1989 (Vic). See further Victorian Law Reform Commission (2010), above n 106, 46.
The Children and Young Persons Act 1989 (Vic), which received royal assent in 1989 (and became largely operational in 1991), consolidated various pre-existing legislative instruments relating to child welfare and child offending, while clearly separating the court’s criminal jurisdiction from its ability to hear and determine family matters. As stated in the Second Reading Speech, the purpose of separating the court into a Criminal Division and a Family Division was to ‘reflect the fundamental difference in the nature of child protection and juvenile justice proceedings’ and to ensure ‘that protective issues … do not obscure issues of criminal responsibility’.113

The Children and Young Persons Act 1989 (Vic) established the ‘Children’s Court of Victoria’ as a ‘specialist’ court distinct from adult courts. However, under the Children and Young Persons Act 1989 (Vic) as initially drafted, responsibility for the practice and procedure of the Children’s Court remained vested in a senior magistrate. To enable the court to ‘develop its specialist responsibilities autonomously … as a freestanding, separately recognised court’, later legislative amendments replaced the senior magistrate with a County Court judge, who was to sit as the President of the Children’s Court and with whom the control of the Children’s Court was to be vested.

Other modifications made by the Children and Young Persons Act 1989 (Vic) include the introduction of new natural justice safeguards, the expansion of the range and flexibility of available sentencing dispositions and the elevation of the age of criminal responsibility from eight to 10 years of age.

In 2004, the Children’s Court was expanded to include a third Division – the Koori Court Division. A fourth Division, the Neighbourhood Justice Division, was established in 2007.

The Children’s Court of Victoria continues in operation today under the CYF Act, which received royal assent on 7 December 2005 (and commenced operation in 2007). The CYF Act made very few substantive amendments to the operation of the Criminal Division, other than providing for the use of group conferencing prior to the imposition of sentence and expanding the court’s powers to breach orders and enforce fines imposed by the court against persons who are no longer children. Relevant provisions of the CYF Act are covered more comprehensively in later chapters of this report.

111 Victoria, Parliamentary Debates, Legislative Assembly, 8 December 1988, 1150 (Peter Spyker, Minister for Community Services).
114 Children and Young Persons Act 1989 (Vic) s 1.
115 Children and Young Persons Act 1989 (Vic) s 12. See also Victorian Law Reform Commission (2010), above n 106, 47.
117 Children and Young Persons (Appointment of President) Act 2000 (Vic) s 5 (substituting Children and Young Persons Act 1989 (Vic) s 12).
119 Children and Young Persons Act 1989 (Vic) s 3 (definition of ‘child’).
120 Children, Youth and Families Act 2005 (Vic) s 504(1).
121 The regulations made under the CYF Act are the Children, Youth and Families Regulations 2007 (Vic).
Chapter 4
Pre-court diversionary practices

One of the sentencing principles set out in the *Children, Youth and Families Act 2005* (Vic) (‘CYF Act’) is ‘the need to minimise the stigma to the child resulting from a court determination’. 123 Fox and Freiberg have suggested that:

this statutory direction to minimise stigma indicates that diversion from the criminal justice system and use of non-governmental, non-coercive community-based ways of handling the misconduct are to be preferred to more formal interventions and intrusive court determinations, particularly those resulting in confinement.124

Victoria’s approach to offending by young people has been one of diversion and rehabilitation rather than punitiveness. Judge Paul Grant, President of the Victorian Children’s Court, made the following point on the importance of diverting children from the court system wherever possible:

*It is a well established principle in youth justice systems that, whenever appropriate, young people should be diverted from formal court processes whilst at the same time ensuring human rights and legal safeguards are fully respected.*125

The Victoria Police Child and Youth Strategy 2009–2013 (‘Child and Youth Strategy’), however, reports that Victoria Police has the ‘lowest rate of diversion of all Australian police jurisdictions’ and puts this down to ‘a general lack of knowledge … within the operational environment regarding the long-term benefits of effective diversion processes’.126 It is also possible that Victoria’s diversion statistics are misleading. In other Australian jurisdictions, police generally have the power to divert children to group conferencing programs

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123 *Children, Youth and Families Act 2005* (Vic) s 362(1)(d).
124 Fox and Freiberg (1999), above n 96, 830–831. Fox and Freiberg were commenting on the predecessor to section 362(1)(d), which was section 139(1)(d) of the former *Children and Young Persons Act 1989* (Vic). This provision was not altered with the change of legislation in 2005.
at an earlier stage in proceedings, whereas in Victoria only the Children’s Court can refer children to the Group Conferencing Program, and therefore this does not formally count as diversion.127

Victoria Police has identified ‘increasing effective diversion processes’ as one of five objectives in its Child and Youth Strategy;128 on the basis that:

Young people who are cautioned, rather than charged, are less likely to have further contact with police than those who appear in court for their first offence. Available evidence suggests that the later a young person enters the criminal justice system, the less likely they are to have continued involvement.129

Despite this strong support within the Victorian criminal justice system for diverting young people, diversion for this age group – apart from police cautioning – appears to be somewhat ad hoc. The main program available to young offenders is ‘Ropes’ (discussed below). In addition to ‘Ropes’ there are a number of smaller (often pilot) diversion programs operating throughout the state, as well as several locally established programs. However, these are usually restricted to certain geographic regions, they are only suitable for particular offenders and they have no funding.130 The absence of a comprehensive statewide diversion program for young people can lead to inequitable outcomes and possibly also to net-widening in certain areas. It may also be a missed opportunity in terms of keeping potentially large numbers of low-level young offenders out of the Children’s Court. As one participant in the Council’s stakeholder roundtable meeting commented:

Nearly 50% of people [children] are being dealt with by undertakings or bonds and so, if you had a good statewide diversion program that was available to young people in Ballarat just like it would be in Melbourne, then you would be diverting some of those people away from Court.131

Ironically, given the lesser emphasis placed on diversion for adult offenders, the situation is far better in the adult system, which has the (legislated and well co-ordinated) Criminal Justice Diversion Program available to offenders aged 18 years and above. The Criminal Justice Diversion Program co-ordinator has access to many programs that may be recommended as part of a diversion plan.

There are steps underway in Victoria to provide more early intervention diversion services for young people. In 2010, an interdepartmental steering committee was established to scope a co-ordinated and comprehensive approach to diversion for young people, focusing specifically on the Children’s Court. The Youth Support Service (YSS) is a new service designed to intervene early and divert young people away from the youth justice system by addressing the underlying causes of their offending and risk-taking behaviour. The Youth Support Service is being delivered by 35 youth workers employed by eight community service organisations. It has been operating since May 2011 in metropolitan regions and the regional centres of Ballarat, Bendigo, Geelong, Latrobe Valley, Mildura and Shepparton. Police identify and refer suitable children to the service.

128 Victoria Police (2009), above n 126, 5.
129 Ibid 10.
130 Meeting with Courts and Tribunals unit, Department of Justice (31 March 2011).
131 Stakeholder Roundtable Meeting (24 March 2011). See Appendix 2 for a list of participating organisations.
Police cautioning

Cautioning is one of the main methods police use to divert children and young people from the criminal justice system. Cautioning 'has long been regarded as an important program for diverting young offenders away from court'.  

Police caution a much higher proportion of young people than adults. According to police statistics for 2009–10, police processed 35,865 young alleged offenders, 9,029 (or about 25%) of whom received formal cautions. In the same year, police processed 133,714 adult alleged offenders, of whom only 3,629 (or 2.7%) received formal cautions. In addition to young people being formally cautioned are those receiving informal cautions and those diverted via various other programs such as ‘Ropes’ (see below). Informal cautions are not reflected in the cautioning statistics. This high level of diversion for young people is consistent with the accepted approach in Victoria of diverting as many young people as possible before they become involved in formal court processes.

There are a number of eligibility criteria for police to consider when deciding whether a caution is appropriate. Cautions may be issued to most offenders; however, those who have committed very serious offences are excluded. Police will only consider a caution for sexual or related offences in exceptional circumstances and will obtain advice as to suitability from the Manager of the Sexual Crimes Squad. Generally police will not caution offenders in situations where the offence involves more than five victims, or five separate incidents against the one victim. Cautions are most often issued to first-time offenders; however, it is open to police to issue more than one caution to an individual. Cautions in Victoria are unconditional; that is, police cannot attach any conditions such as program attendance to the caution. The young person in question must admit guilt and there must be sufficient evidence to prove guilt before police may issue a caution. Police cannot allege cautions in court.

The Victoria Police Youth Strategy reports that within one year of being cautioned, 80% of ‘young people’ had not reoffended and 65% had not reoffended after three years. ‘Young people’ are defined in the strategy as those up to the age of 24 years.

132 Grant (2008), above n 125, 1.
134 Victoria Police, Crime Statistics 2009/10 (2010), 14. Police statistics class anyone under 18 years of age as a ‘juvenile’, including children who are under 10 years of age (see definition of ‘juveniles’: ibid 7). However, given the very small number of alleged offenders younger than 10 years of age, only the Victorian juvenile population between 10 and 17 years of age will be used as a comparison.
135 Ibid 38. Police can also issue ‘informal cautions’. It is important to note that the phrase ‘alleged offenders’ is defined as ‘persons who have allegedly committed a criminal offence and have been processed for that offence by either arrest, summons, caution, penalty notice, official warning or warrant of apprehension between 1 July 2009 and 30 June 2010 regardless of when the offence occurred ... Persons are counted on each occasion they are processed and for each offence counted in recorded offences (e.g. a person processed on three occasions will be counted three times)’: ibid 6.
136 Meeting with Victoria Police (16 February 2011).
137 Meeting with Victoria Police (16 February 2011).
138 In some other states, police may seek undertakings from the juvenile following the formal caution. See Bargen (1996), above n 127.
139 Victoria Police (2009), above n 126, 10.
A more detailed picture of reoffending by young people following cautioning is provided in a recent report published by the NSW Bureau of Crime Statistics and Research (BOCSAR), which has access to a much broader range of data than are currently available in Victoria. Lind examined data for all young people (10 to 17 years of age) cautioned by police or the courts in New South Wales in 2006 (n = 8,537) in order ‘to assess whether it is possible to reliably identify juvenile recidivists from information readily available at the time of cautioning a young offender’.

Lind found that the majority of those cautioned in 2006 had either no prior contact with the criminal justice system (70%) or only one or two contacts (23%), with less than 10% having had contact for a previous violent offence. However, 52% were recorded as having at least one more contact with the criminal justice system over the following three years. The most common subsequent offending was violence-related (most often assaults); however, theft and driving offences were also common. The study concluded that the risk of reoffending could be predicted by gender, Indigenous status, the number of previous contacts with the criminal justice system and whether the caution was issued by the court or by police.

The BOCSAR study reports a much higher reoffending rate following cautioning than the Victoria Police Youth Strategy (48% compared with 35%), although since the BOCSAR is limited to young people aged 10 to 17 years, it is more likely to reflect an accurate picture. Offending rates for young people in Victoria and New South Wales are similar; however, given the differences in approach to juvenile justice in the two states (and likely differences in police cautioning policies and practices), it would be unwise to apply the New South Wales figures directly to Victoria.

140 Bronwyn Lind, ‘Screening Cautioned Young People for Further Assessment and Intervention’, Crime and Justice Bulletin: Contemporary Issues in Crime and Justice 149 (2011) 2. When a young person had been cautioned more than once during 2006, one of the cautions was selected at random. This is referred to as the ‘index caution’. Victoria does not have a BOCSAR equivalent.
141 Ibid 4. Twenty-one percent had at least three more contacts with the criminal justice system over the three years following the index caution: ibid 10. Proven court appearances made up 71% of all subsequent criminal justice contacts: ibid 5.
142 Ibid 10. Based on BOCSAR’s seriousness scale, more than a third of subsequent offences ranked in the top 50 offences on the scale: ibid 6–7.
143 Ibid 10.
**Victorian cautioning data**

Figure 8 shows the percentage of Victorian young offenders processed by police through the use of cautions, according to the type of alleged offence and the year of processing. Trends in cautioning young people for each type of offence remained relatively stable between 2000–01 and 2009–10. Young people were most likely to receive a caution for alleged drug offences (43.5% of all young people processed for drug offences in 2000–01, and 48.2% in 2009–10) and least likely to receive cautions for alleged offences against the person (16% of all young people processed for offences against the person in 2000–01, and 10.7% in 2009–10). The lower percentage of cautions for young people alleged to have committed offences against the person is likely to reflect the more serious nature of the offending behaviour.

Figure 8: Percentage of young alleged offenders given police cautions, by year of processing by police

Source: Sentencing Advisory Council’s analysis of Victoria Police data.

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144 The type of alleged offence recorded in Victoria Police’s Law Enforcement Assistance Program (LEAP) system is restricted to ‘[o]nly the most serious offence which best describes a distinct course of criminal conduct … (e.g. an offender carrying a firearm commits an armed robbery – only the offence of armed robbery is recorded although the offender would be charged with armed robbery and possession of a firearm)’: Victoria Police (2010), above n 134, 5, 9.

145 The definition of juvenile alleged offenders changed within the police statistics to reflect the inclusion in the Children’s Court jurisdiction of individuals 17 years of age from 1 July 2005. Prior to the 2005–06 financial year, a juvenile alleged offender was someone under 17 years of age at the time of being processed by police, whereas since 2005–06, a juvenile alleged offender is someone under 18 years of age at the time of being processed by police (see definition of ‘juveniles’ in the various Victoria Police Crime Statistics publications). Traffic offences and offences dealt with by penalty notices are not recorded on the police LEAP system and do not appear in Figure 8 (see the definition of ‘offence categories’ in Victoria Police (2010), above n 134, 6).
Figure 9 examines in more detail the specific types of alleged offences that were most likely to receive a police caution, for offences processed by police in 2009–10. The percentages reflect the proportion of young people who received a caution for a particular alleged offence, in comparison with young people processed in other ways for that same offence. For example, 25% of young people processed by police for the alleged offence of burglary (other) were dealt with through a caution. Just over half of young people processed for the alleged offence of theft (shopsteal) or drug possession were given a caution (57.7% and 51.3% respectively). Other offences with a significant percentage of alleged offenders receiving a caution were mostly of a non-violent nature, such as public order or property offences. Very few offences involving violence were dealt with by a caution.

Figure 9: Percentage of young alleged offenders receiving police cautions, by type of alleged offence, 2009–10


146 The commentary in above n 145 also applies to Figure 9.
Drug diversion caution

This caution is for child (or adult) offenders detected for the use or possession of a small quantity of an illicit drug other than cannabis.147 Offenders who have been convicted of prior offences are not precluded from receiving a drug diversion caution. Following the issuing of the caution, the offender is referred to early assessment and treatment managed by the Department of Human Services.148 Other Australian jurisdictions have similar cautioning measures. The New South Wales Audit Office reported recently that only 3% of young people who received cautions for minor cannabis offences appeared in court within two years for similar offences, compared with 13% of those who were charged.149

Koori youth diversion pilot

This program aims to ensure that young Koori people have access to relevant resources after receiving a caution. If the young Koori person admits the offence and there is sufficient evidence to establish the offence, and the person consents to the caution along with a parent or guardian, a program will be tailored based on consultation with the person, family and others who may be involved. A prior criminal history does not exclude someone from the program; however, generally the incident should not be more than the offender’s third offence.150

‘Ropes’ Program

‘Ropes’ courses were originally designed for use in training the French military but have since been widely used for educational and developmental purposes.151 The Victorian course runs for one day and involves the young person being paired with an adult (usually their police informant or other available police person) to complete some low ropes and high ropes challenges, instructed and supervised by a trained outdoor expert. ‘Low’ challenges might include communication activities, trust exercises or problem solving with the aim of encouraging the development of team work. ‘High’ challenges involve tasks literally above ground – for example, rock-climbing or climbing on ropes well above the ground – that are challenging or may feel risky and that are aimed at helping individuals develop confidence and test their limits.152 After completion of these challenges there is a discussion session.

The ‘Ropes’ Program was developed by the Children’s Court and Victoria Police in 2002 to provide a diversion option for young people appearing in the Children’s Court for the first time. Prior to that there was no diversion program for children for the stage between police charging and the formal court hearing. ‘Ropes’ initially operated only out of the Ringwood Children’s Court but was expanded during 2005 to Melbourne metropolitan courts and some country regions.153

147 People detected for cannabis offences are included in the main cautioning program.
150 Department of Justice (2010), above n 148.
152 Ibid 11.
153 Grant (2008), above n 125, 1. The court locations that offer ‘Ropes’ courses are Melbourne, Collingwood Justice Centre, Moorabbin, Sunshine, Geelong, Colac, Broadmeadows, Bendigo, Ringwood, Heidelberg, Wonthaggi, Frankston, Dandenong, Sale and Bairnsdale: Department of Justice (2010), above n 148.
The main aim of the ‘Ropes’ Program is to:

- demonstrate to young people that although they have offended and been apprehended by police, it does not have to end in a path of continual anti social behaviour or criminal activity. It is also envisaged and planned with the concept that it will give young persons a better understanding of police responsibilities.\(^{154}\)

Its objectives are to give young people an understanding of their own ability to achieve what they thought was not possible, to create the capacity for positive behaviour change, to engender an understanding in young people that police can support them with issues that underlie their offending behaviour and to deter them from further criminal behaviour.\(^{155}\)

Participation in the ‘Ropes’ Program is described as ‘an alternate pathway to processing for a criminal offence’.\(^{156}\) In order to be eligible to be considered for ‘Ropes’:

- the young person must have been under the age of 18 when the offence was committed;
- the offence must be triable summarily;
- the young person must admit the offence and have only received cautions in the past (no more than two) or be appearing in the Children’s Court for the first time;
- the young person must not previously participated in a ‘Ropes’ course;
- the young person must agree to participate and parents or guardians must also agree; and
- the young person must be considered ‘suitable’.\(^{157}\)

Following summons, the child attends court and if police have assessed the child as suitable for the ‘Ropes’ Program and the other criteria are satisfied, police recommend to the court that it refer the child to ‘Ropes’ and adjourn the matter. After successful completion of the program, police recommend to the court that the charge is struck out, which means there is no finding of guilt and no sentencing order against the child.

In 2009–10, 662 children completed ‘Ropes’ courses.\(^{158}\) However, this is likely to be an underestimation, as not all magistrates record this information correctly.\(^{159}\)

The evaluation of ‘Ropes’ identified some weaknesses. One of the main criteria for referral to the ‘Ropes’ Program is an ‘assessment of suitability by the police informant’. The evaluation points out that ‘there are few guidelines to define ‘suitability’, [and therefore] referral tends to be discretionary’\(^{160}\). The evaluation also comments that ‘while the program is certainly of value to young people in terms of offering a second chance, for those young people most likely to reoffend (an estimated 25 per cent of participants) the program is less likely to be contributing to sustained change’.\(^{161}\) Another major limitation is that the program is only suitable for physically capable young people.

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154 KPMG for Victoria Police (2010), above n 151, 23.
155 Ibid 23–24.
156 Ibid 23.
157 Department of Justice (2010), above n 148.
159 Meeting with Children’s Court of Victoria (23 February 2011).
160 KPMG for Victoria Police (2010), above n 151, 2. Police can refer to the ‘Ropes’ Program young offenders who have previously received a caution.
161 Ibid 53.
Other diversionary programs

There are several unfunded, locally established programs for young offenders across the state. However, at present there is no co-ordinated statewide diversion response. The following are examples of the type of programs currently operating in specific geographic areas.

‘Right Step’ is a three-year pilot program developed by Victoria Police and Youth Connect, aimed at diverting 10 to 18 year olds from the court system and identifying and addressing issues that put these young people at risk of reoffending. Currently, only young people who reside in the Kingston, Bayside or Glen Eira municipalities are eligible to participate in Right Step. At the time of charging, if the police officer considers a young person suitable for the program, and the young person consents to participate, he or she will be referred to the Right Step case manager and the magistrate will adjourn the matter for eight weeks. The program is intensive and aims at empowering young people, using techniques such as counselling, guidance, coaching and pathway planning, as well as referrals to relevant agencies. The young person has at least one session each week with the case manager for eight weeks. Following completion of the program, the case manager will provide a report to the magistrate, who, if of the opinion that the young person has successfully completed the program, will dismiss the charges.

The ‘GRIPP’ Program is another geographically contained program, this time directed at young males aged between 13 and 17 years who live in the local areas of Dandenong, Casey, Cardinia and Monash and who have committed violent offences. They must have received a police caution for an assault-type offence, been sentenced by the Children’s Court to a good behaviour bond, a deferral of sentence or an accountable undertaking for an assault or an assault-like offence or had an intervention order made against them. Children in the program (along with their families or support people) work closely with GRIPP workers to develop a plan to achieve positive life change. Older males (15 to 17 years) are expected to participate in a ten-week group training program, which includes both life skills and self-control training.

Unfortunately, there do not appear to be any programs similar to GRIPP that are available to female violent offenders.

162 Youth Connect, Right Step, Information Sheet (n.d.).
163 See Department of Justice, Get a GRIPP: Gain Respect, Increase Personal Power, Brochure (2007).
Chapter 5
The Children’s Court of Victoria

The Children’s Court of Victoria operates as a ‘specialist court’ under the Children, Youth and Families Act 2005 (Vic) (‘CYF Act’) to hear and determine matters relating to young people. The CYF Act sets out the jurisdiction, powers and procedure of the Children’s Court in respect of its Criminal, Family, Koori and Neighbourhood Justice Divisions.

The sentencing of young offenders largely occurs in the Criminal Division of the Children’s Court; however, the Koori Division and the Neighbourhood Justice Division also have jurisdiction to hear criminal matters.

The Koori Division of the Children’s Court (‘Children’s Koori Court’), although listed as a separate Division of the court, functions in effect as a subset of the Criminal Division. The Children’s Koori Court hears matters within the jurisdiction of the Criminal Division, other than sexual offences, to which Indigenous children plead guilty, intend to plead guilty or are found guilty. While the sentencing process in the Koori Court differs from the Criminal Division, the sentences that can be imposed and the principles of sentencing are the same as those available in the Criminal Division. Information about the Koori Division is provided in greater detail below.

The Neighbourhood Justice Centre (NJC) Division, which sits in Collingwood, hears criminal matters relating to children who reside in the City of Yarra, other than sexual offences, providing that the child consents

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164 Children, Youth and Families Act 2005 (Vic) s 1(d).
165 The divisions of the Children’s Court are set out in Children, Youth and Families Act 2005 (Vic) s 504(3).
166 Children, Youth and Families Act 2005 (Vic) s 504(3)(e).
167 Children, Youth and Families Act 2005 (Vic) s 519.
168 The Neighbourhood Justice Centre (NJC) may also hear offences committed by homeless children living in crisis or transitional accommodation in the City of Yarra (Children, Youth and Families Act 2005 (Vic) ss 3(1), 520C(3)(a) (iii)). The NJC may also hear offences committed in the City of Yarra, where the child is an Aboriginal person with a ‘close connection’ to the land or is a homeless person: Children, Youth and Families Act 2005 (Vic) ss 520C(1), (3) (a). Jurisdictional requirements relating to family violence and stalking matters are set out in Children, Youth and Families Act 2005 (Vic) s 520C.
169 Children, Youth and Families Act 2005 (Vic) s 520C(5). The Children’s Court may also deal with breaches of sentencing orders it has made and applications to vary orders it has made, but it cannot undertake committal proceedings into indictable offences: Children, Youth and Families Act 2005 (Vic) ss 520C(4)(c), 520C(5)(a).
to the jurisdiction of the NJC. Established in 2007, the NJC aims to provide a "one-stop" integrated service response to court users by connecting offenders to a wide range of agencies and support services and by assisting them to address factors underlying their offending behaviour. The NJC also aims to create a more responsive and accessible justice system through engagement with the local community, by constructing a court environment that is more welcoming and comfortable than mainstream courts and by employing only one magistrate to facilitate a more collaborative, familiar and stable court environment.

The NJC has the same sentencing powers available as the Criminal Division, but, like the Koori Court Division, is set up to exercise its jurisdiction with minimal formality and technicality. The legislation also empowers the magistrate to be informed by submissions of a wide variety of people, including a Neighbourhood Justice officer, relatives of the child and health and community service providers. The NJC, which also has jurisdiction to deal with adults and minor civil matters, lists children’s criminal court matters once a month. As relatively few matters are heard in the Neighbourhood Justice Centre Division of the Children’s Court (for example, in 2008–09, 54 matters were heard, with 23 finalisations), this paper combines NJC data with mainstream Children’s Court data.

The Family Division of the Children’s Court deals with a range of applications, including applications relating to the care and protection of young people at risk and applications for intervention orders. While there are many overlaps between the Family Division and the Criminal Division, the work of the Family Division is outside the scope of this paper.

The Criminal Division of the court operates in a number of suburban and country locations. The headquarters court in Melbourne is the only Children’s Court to sit daily in both the Criminal and the Family Divisions. Other Children’s Courts sit at gazetted times in Magistrates’ Courts across the state.

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170 Children, Youth and Families Act 2005 (Vic) s 520C(2).
172 Ibid.
173 The court is, for example, ‘marked by its space, light and openness’: ibid 16–17.
174 Ibid 25.
175 Children, Youth and Families Act 2005 (Vic) s 520A(4).
176 Children, Youth and Families Act 2005 (Vic) s 520E(2).
177 In addition to a Magistrates’ Court, the NJC provides a Victorian Civil and Administrative Tribunal and a Victims of Crime Assistance Tribunal: Department of Justice (2010), above n 171, 1.
178 Ibid 19.
179 The jurisdiction of the Family Division is set out in Children, Youth and Families Act 2005 (Vic) s 515.
Criminal Division of the Children’s Court

Jurisdiction of the Criminal Division

The jurisdiction of the Criminal Division of the Children’s Court is set out in section 516 of the CYF Act. Subject to some exceptions (see ‘Exclusions from jurisdiction’ below), the Children’s Court may hear and determine summarily all charges against children,\(^{182}\) including those for indictable offences.\(^{183}\)

Provided that the accused is a ‘child’ within the meaning of the CYF Act (the definition of ‘child’ and issues concerning age-related thresholds are set out below), the Children’s Court may also conduct committal proceedings into all charges for indictable offences, deal with bail applications and deal with breaches of sentence or sentence variations (subject to Chapter 5 of the CYF Act).\(^{184}\)

Offences against laws of the Commonwealth (such as social security fraud and offences against Commonwealth property) may also be ‘tried, punished or otherwise dealt with’ by the Children’s Court, as if they were offences against Victorian law.\(^{185}\)

In relation to the matters over which it has jurisdiction (and unless the contrary is expressed in legislation), the Children’s Court is vested with all of the powers and authority of the Magistrates’ Court.\(^{186}\)

Definition of ‘child’

For the Criminal Division of the Children’s Court to hear a matter, the accused:

• must, at the time the offence was allegedly committed, have been aged 10 years or above (‘threshold age of criminal responsibility’), but under 18 years of age (‘age of majority’); and

• must not, at the time of commencement of proceedings in the court, be the age of 19 years or above.\(^{187}\)

In the absence of positive evidence as to age, the court is required to consider ‘apparent age’.\(^{188}\)

Threshold age of criminal responsibility

Pursuant to section 3(1) of the CYF Act, it is ‘conclusively presumed’ that children under the statutory threshold of 10 years of age are unable to commit a criminal law offence.\(^{189}\) Having a minimum age of criminal responsibility is based on the premise that young children are incapable of forming the criminal intent required to be found guilty of a criminal offence.

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\(^{182}\) Children, Youth and Families Act 2005 (Vic) s 3 (definition of ‘child’).
\(^{183}\) Children, Youth and Families Act 2005 (Vic) s 516(1)(b).
\(^{184}\) Children, Youth and Families Act 2005 (Vic) s 516(1)(c)–(e).
\(^{185}\) Crimes Act 1914 (Cth) s 20C.
\(^{186}\) Children, Youth and Families Act 2005 (Vic) s 528(1).
\(^{187}\) Children, Youth and Families Act 2005 (Vic) s 3.
\(^{188}\) Children, Youth and Families Act 2005 (Vic) s 3.
There is an ‘element of arbitrariness’ in prescribing a biological age as the threshold for criminal responsibility given the significant differences in capacity among children.190 The appropriate statutory minimum is also likely to differ widely between jurisdictions ‘owing to [differences in] history and culture’.191 The United Nations Committee of the Rights of the Child suggests 12 years as the appropriate statutory minimum.192

Until recently, Australian jurisdictions had diverged as to the appropriate minimum age to bear criminal responsibility. The age of 10 is now uniformly prescribed as the minimum age by the Commonwealth and all states and territories.193

In addition to the statutory minimum age of responsibility, there is a presumption at common law in Victoria that a child aged under 14 is ‘incapable of crime’ (doli incapax).194 In order to commence a criminal action against a child aged between 10 and 14, the prosecution must rebut the presumption by proving beyond reasonable doubt that the child understood his or her act or omission as being ‘seriously wrong’.195

The designation of an ‘intermediate zone’ (between 10 and 14 years),196 during which children are presumed incapable of criminal behaviour until evidence is adduced otherwise, acknowledges that children undergo ‘significant psychological, moral and personal development’197 during the early adolescent years. Children do not automatically develop an understanding of the wrongfulness of their criminal behaviour upon reaching a particular age, but rather mature at ‘different and inconsistent rates’;198 the ‘closer the child is to 14, and the more obviously wrong the act’, the easier the presumption is to rebut.199 Evidence used to rebut 190

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R v ALH (2003) 6 VR 276, 295, 298 (Cummins AJA, with whom Callaway JA and Batt JA agreed in separate reasons); ibid 280–281. His Honour restated the principle as part of the mental element of the offence, which is not the traditional interpretation. See Crofts (2008), above n 189, 171–172; Power (2011), above n 3, [10.4] (‘Criminal Division Procedure’).

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Crofts (2008), above n 189, 172 (citations omitted).
the presumption includes, but is not limited to, statements made by the child to police, expert evidence, inferences drawn from circumstances surrounding the act, the child’s background and the child’s past criminal behaviour.\textsuperscript{200}

Children aged 14 and over can be held fully responsible for their criminal acts, much as adults can, although the range of sanctions such children are subject to in the Children’s Court is somewhat different from that in the adult jurisdictions.\textsuperscript{201}

**Age of majority**

The jurisdiction of the Criminal Division of the Children’s Court extends to persons who, at the time the offence was committed, were under 18 years of age.\textsuperscript{202}

Prior to 1 July 2005, the age of majority under Victorian legislation was 17 years of age. Pursuant to recommendations of the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission\textsuperscript{203} the Children and Young Persons (Age Jurisdiction) Act 2004 (Vic) extended this to 18 years of age.\textsuperscript{204} The age of 18 is consistent with the *Convention on the Rights of the Child*, which identifies the age of majority as 18 (unless a state identifies it to be an earlier age).\textsuperscript{205}

**Maximum age at commencement of proceedings**

The definition of ‘child’ excludes persons ‘of or above the age of 19 years when a proceeding for the offence is commenced in the court’.\textsuperscript{206} The time at which proceedings are commenced are set out by the *Criminal Procedure Act 2009* (Vic).\textsuperscript{207}

Prior to 1 July 2005, persons of or above the age of 18 years at the time of being ‘brought before the court’ were excluded from the definition of ‘child’ in the Children and Young Persons Act 1989 (Vic).\textsuperscript{208} The ambiguity of this provision was one of the reasons that led to the change in terminology.\textsuperscript{209}

\begin{itemize}
\item \textsuperscript{200} Ibid 172–178. The use of past criminal records and previous dealings with police is, however, controversial: ibid 166–167.
\item \textsuperscript{201} The exception is that children charged with certain very serious offences must be dealt with in the higher courts, where the full range of sentencing options is available. Other children may also be subject to a wider range of sanctions in higher courts, where, for example, the court considers itself unsuitable to determine the case summarily. See Chapter 11 for further details.
\item \textsuperscript{202} *Children, Youth and Families Act 2005* (Vic) s 3 (definition of ‘child’).
\item \textsuperscript{204} *Children and Young Persons (Age Jurisdiction Act)* 2004 (Vic) ss 3, 23. See further Power (2011), above n 3, [7.2.1] (‘Criminal – General’).
\item \textsuperscript{206} *Children, Youth and Families Act 2005* (Vic) s 3 (definition of ‘child’).
\item \textsuperscript{207} The *Criminal Procedure Act 2009* (Vic) ss 5–6 sets out the way in which criminal proceedings are currently commenced in the Children’s Court (and Magistrates’ Court). See also *Children, Youth and Families Act 2005* (Vic) s 528. Prior to the *Criminal Procedure Act 2009* (Vic), which commenced on 1 January 2010, the Magistrates’ Court Act 1989 (Vic) s 26(1) dealt with the commencement of proceedings.
\item \textsuperscript{208} *Children and Young Persons Act 1989* (Vic) s 3 (definition of ‘child’). This was amended by the *Children and Young Persons (Miscellaneous Amendments) Act 2005* (Vic) s 4. See also *Children and Young Persons (Age Jurisdiction Act)* 2004 (Vic) ss 3, 23.
Maximum age for breach proceedings

With minor exceptions, the Children’s Court must hear proceedings for a breach of a CYF Act sentence commenced against a person who is under the age of 19 (at the date breach proceedings commenced). If, at the time breach proceedings are commenced, the person is aged 19 or above, the court must transfer the proceeding to the Magistrates’ Court or to the court that made the sentencing order; unless the breach is of an accountable undertaking or – taking into account matters including the age of the person, the stage of proceedings and the nature and circumstances of breach – the court considers it appropriate to hear and determine the proceedings.

Transfers

If the alleged offender is above the age of 19 before or during the hearing, the person must be transferred from the Children’s Court to the Magistrates’ Court. If the person was of the correct age at commencement of proceedings but at the date of appearance is aged 19 or above, the Children’s Court must hear and determine the charge, unless exceptional circumstances exist. In determining the existence of exceptional circumstances, the Children’s Court takes into account factors including age, the nature and circumstances of the alleged offence and the existence or reasoning for any delay.

Exclusions from jurisdiction

Seven death-related indictable offences (murder, attempted murder, manslaughter, child homicide, defensive homicide, arson causing death and culpable driving causing death) are specifically excluded from the jurisdiction of the Children’s Court. These serious offences must be heard and determined in the County Court or the Supreme Court.

Also excluded from this jurisdiction are indictable offences to which the child (or, in certain circumstances, the parent) objects to being heard summarily and those that the court considers unsuitable to be determined summarily given the existence of ‘exceptional circumstances’.

Objections by children to the exercise of summary jurisdiction by the Children’s Court are foreseeable where the child hopes to obtain acquittal by jury; however, according to Magistrate Peter Power, such objections are virtually unknown.
It is also ‘rare’ for the Children’s Court to find that there exists circumstances of such an exceptional nature that the court is required to withdraw from hearing the matter summarily.221 As stated by Vincent J:

for very good reasons, our society has adopted a very different approach to both the ascertainment of and response to criminality on the part of young persons to that which is regarded as appropriate where adults are involved. It is only where very special, unusual, or exceptional, circumstances exist of a kind which render unsuitable the determination of a case in the jurisdiction specifically established with this difference in mind, that the matter should be removed from that jurisdiction to the adult courts.222

In determining whether exceptional circumstances exist, ‘[c]onsiderations to do with the nature, significance and gravity of the alleged offence(s) will be critical … but not necessarily conclusive … [c]ircumstances personal to the offender must also be considered’.223 Also influential are matters concerning the administration of justice.224 However, the fact that the accused person’s matter would otherwise be heard jointly with adult co-offenders in an adult court does not ordinarily justify the withdrawal of the court’s jurisdiction.225 Ultimately, the authorities require that the Children’s Court only relinquish its ‘embracive jurisdiction’ sparingly and with great reluctance.226 It cannot be a matter of mere convenience.227

An example of where the court was prepared to find that it did not have the appropriate sentencing powers to hear a matter summarily was the case of Victoria Police v CB.228 The accused, who was above the age of 17 at the time of offending, had a significant prior history of appearances in the Children’s Court (including for violent offences), was serving two concurrent youth supervision orders at the time of offending and was charged with particularly ‘grave’ instances of intentionally causing serious injury and aggravated burglary.229

The court held that:

The circumstances, severity and viciousness of the knife attack, the significant injuries suffered by the victim, the age of the accused at the time and his prior criminal history, all combine to establish exceptional circumstances … The sentencing court needs to be able to consider the fullest possible range of sentencing options, [and] not be limited to a maximum period of three years detention in a youth justice centre.230

221 Ibid.
222 DL (A Minor by His Litigation Guardian) v Magistrate of the Children’s Court, Duncan Reynolds and Ors (Unreported, Supreme Court of Victoria Practice Court, Vincent J, 9 August 1994) 4 (Vincent J). This proposition was cited with approval in Office of Public Prosecutions v BW [2010] VChC 2 (13 May 2010) [10]–[12] (Judge Grant); Victoria Police v CB [2010] VChC 3 (24 June 2010) [7], [10], [11].
229 The offences left one victim with extensive injuries as a result of 13 stab wounds.
Koori Court Division of the Children’s Court

Establishment of the Koori Division

Following the development of the Koori Court Division of the Magistrates’ Court (which was first piloted in 2002), legislation establishing a pilot Children’s Koori Court received royal assent in 2004. Children’s Koori Courts now operate in Melbourne and Mildura, with sittings conducted fortnightly in each location.

The Children’s Koori Court was established to provide a more inclusive and culturally relevant sentencing process for young Indigenous people charged with offences, by involving Aboriginal Elders and other members of the Indigenous community in the court hearing (among other measures). The objectives of the Children’s Koori Court, like the Koori Court Divisions of the Magistrates’ and County Courts, originated in the recommendations of the Royal Commission into Aboriginal Deaths in Custody and the agreements developed to implement those recommendations (in particular the Victorian Aboriginal Justice Agreement).

The Royal Commission found that Indigenous people, particularly Indigenous youth, were significantly over-represented at all stages of the criminal justice process, largely because of the social, economic and cultural disadvantages faced by Indigenous people in Australian society. Criminal justice processes, including court, sentencing and policing procedures, were also found to influence, or potentially influence, Indigenous over-representation.

Reducing the Indigenous over-representation recognised by the Royal Commission was among the criminal justice objectives underlying the construction of the Children’s Koori Court and its sentencing processes.
Jurisdiction of the Koori Court Division

For the Children’s Koori Court to hear a matter:

- the child must be ‘Aboriginal’;\(^{241}\)
- the offence must be within the jurisdiction of the Criminal Division of the Children’s Court, but must not be a ‘sexual offence’;\(^{242}\)
- the child must plead guilty, intend to plead guilty or be found guilty of the offence;\(^{243}\) and
- the child must consent to the matter being heard by the Children’s Koori Court.\(^{244}\)

The Koori Court also has jurisdiction to deal with breaches of sentencing orders it has made and applications to vary orders it has made.\(^{245}\)

Koori Division practice, procedure and sentencing

To provide a more culturally relevant, comprehensible and inclusive court process for young Indigenous people, the Children’s Koori Court is designed to operate with minimum technicality and formality, taking the time necessary to determine the matter in a manner that is comprehensible to the accused, the family of the accused and Indigenous persons present at the hearing.\(^{246}\)

Koori courtrooms are furnished in a culturally respectful manner; with three flags (Indigenous, Torres Strait Islander and Australian) and Indigenous artworks prominently displayed. Proceedings commence with the magistrate paying respects to the traditional owners and acknowledging the smoking ceremony that was conducted prior to the operation of the court.\(^{247}\) To assist participants to engage in a ‘sentencing conversation’\(^{248}\) rather than an adversarial contest, the hearing is conducted around an oval table, with the magistrate sitting at the same level as other participants. All participants (including Elders and Respected People, the accused, family members of the accused, the Koori support worker, the prosecutor and the defence lawyer) are given the opportunity to contribute to proceedings.

The Children’s Koori Court reserves a particularly significant role for Indigenous Elders and Respected People in the ‘sentencing conversation’. Seated side by side with the magistrate at the oval table, Elders and Respected People talk directly to the accused, offering advice and encouragement and asking questions. Unlike in mainstream proceedings, child defendants also play an active role, answering questions and giving their account of past events. The child’s family is also actively included in the proceedings.\(^{249}\)

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\(^{241}\) Children, Youth and Families Act 2005 (Vic) s 519(1)(a). See also Children, Youth and Families Act 2005 (Vic) s 3 (definition of ‘Aboriginal person’).

\(^{242}\) Children, Youth and Families Act 2005 (Vic) s 519(1)(b); Sentencing Act 1991 (Vic) s 6B(1) (definition of ‘sexual offence’).

\(^{243}\) Children, Youth and Families Act 2005 (Vic) s 519(1)(c).

\(^{244}\) Children, Youth and Families Act 2005 (Vic) s 519(1)(d).

\(^{245}\) Children, Youth and Families Act 2005 (Vic) s 518.

\(^{246}\) Children, Youth and Families Act 2005 (Vic) ss 517(3)–(4).

\(^{247}\) Visit to Children’s Koori Court, Melbourne (16 December 2010).

\(^{248}\) The term ‘sentencing conversation’ was used by Dr Mark Harris in his evaluation of the Koori Court Division of the Magistrates’ Court: Mark Harris, ‘A Sentencing Conversation: Evaluation of the Koori Courts Pilot Program, October 2002–October 2004, Report (2006). The term, which was originally drawn from a comment made by Dr Kate Auty, the inaugural Magistrate of the Shepparton Koori Court Division of the Magistrates’ Court, has subsequently been used to refer to the method of communication in Koori Court proceedings. See further Sentencing Advisory Council (2010), above n 231, 16.

\(^{249}\) Visit to Children’s Koori Court, Melbourne (16 December 2010). The sentencing processes of the Koori Court Division of the Magistrates’ Court are analysed in detail in Sentencing Advisory Council (2010), above n 231.
While the sentencing process in the Children’s Koori Court differs substantially from mainstream proceedings, the orders that can be imposed on an accused person appearing before the court, the principles of sentencing and the matters that may be taken into account by magistrates in determining sentence are the same as those available in the mainstream Children’s Court. As in the mainstream court, the magistrate retains responsibility for sentencing. However, in determining the appropriate sentence, the magistrate may take into account the submissions of Elders, Respected People, family members of the accused and other listed persons.

The data received from the Children’s Court do not distinguish between Koori Division and mainstream matters. It follows that despite differences in sentencing procedure, the Council’s analysis of sentencing outcomes in Chapter 9 includes data from both divisions. As the data do not identify whether offenders are Indigenous or non-Indigenous, it was impossible to determine whether there were any differences in sentencing outcomes.

CAYPINS

The Children and Young Persons Infringement Notice System (CAYPINS) deals with young people who fail to pay infringement notices issued by authorities such as Victoria Police and the Department of Transport. CAYPINS ‘provides for an administrative and quasi-judicial decision-making role to be performed by Children’s Court registrars throughout the state’. Prior to the introduction of CAYPINS, the Children’s Court dealt with these matters via the traditional open court summons. Transit offences in particular made up a large proportion of offences dealt with by the Children’s Court.

The Children’s Court annual report for 2009–10 reports that the CAYPINS ‘process has substantially reduced the occasions on which young people are summoned to appear before a magistrate in open court for these types of infringements’.

CAYPINS came into effect on 1 July 2005. However, there was a delay in implementation, which led to a large spike in transit offences coming before the court in 2006–07. The spike occurred because enforcement authorities held back issuing proceedings in the normal manner in the expectation that CAYPINS would be operational soon after July 2005. When the delay continued, however, enforcement authorities issued these proceedings, leading to the large influx of transit matters into the Children’s Court in 2007. Another factor in the spike was the inclusion of individuals aged 17 years who, prior to the age increase in the Children’s Court jurisdiction, were processed in the adult Penalty Enforcement by Registration of Infringement Notice System (PERIN). Prosecuting authorities began lodging CAYPINS matters in November 2007, with the first registrar’s hearings held in December 2007. In 2009–10, 1,645 CAYPINS matters were finalised in the Melbourne region. The finalised CAYPINS matters statewide for that year numbered 9,879.

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251 Children, Youth and Families Act 2005 (Vic) ss 520(2)–(3).
253 Children’s Court of Victoria (2010), above n 252, 10.
254 Children, Youth and Families Act 2005 (Vic) sch 3 s 581.
255 Meeting with Children’s Court of Victoria (23 February 2011); Stakeholder Roundtable Meeting (24 March 2011).
256 Children’s Court of Victoria (2010), above n 252, 15.
The CAYPINS procedure is set out in Schedule 3 of the CYF Act. If a child fails to pay a fine specified on an infringement notice (for example, for travelling without a valid ticket on public transport, failing to wear a bicycle helmet or unlicenced driving) after receiving a reminder notice, the enforcement authority (usually Victoria Police or the Department of Infrastructure) can register the infringement notice with the Children’s Court. The court then sends the child a ‘notice of court case’ (CAYPINS) that sets out the date and time of a registrar’s hearing. The child is given a number of options, including paying the fine (in which case the matter is closed), applying for further time in which to pay or for the amount to be reduced or applying for the matter to be heard by a magistrate.

If a child fails to pay within one month an amount ordered to be paid or any instalment due under an instalment order, the Children’s Court may serve the child with a notice to attend an enforcement hearing. At this hearing, the court may make any of the orders set out under section 378 of the CYF Act, which includes adjourning the matter for up to six months on any terms the court thinks fit, ordering a variation to the amount payable, ordering that the amount be levied by a warrant to seize property or releasing the person on probation or a youth supervision order for a period of up to three months.

If an enforcement order is made in a CAYPINS matter, the child is not to be taken to have been convicted of the offence and is not liable to any further proceedings for the alleged offence. Further, payment in accordance with the order is not an admission of liability for the purpose of any civil claim or proceeding arising out of the same occurrence.

The new Transport (Infringement) Regulations 2010, which came into effect on 1 February 2010, may have the effect of lessening the number of prosecutions against young people for unpaid infringements. Under the Regulations, for the first time children are liable to a lesser maximum fine than adults for public transport infringements. The maximum penalty is 0.5 of a penalty unit (approximately $61), which may be a more achievable amount for children to pay than the adult fine.

The Children’s Court database does not include CAYPINS matters, as the orders made through the Schedule 3 process are not considered ‘sentencing orders’. Thus it was not possible to perform a separate analysis of cases that were dealt with under CAYPINS.

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257 *Children, Youth and Families Act 2005 (Vic)* s 581 refers to Schedule 3.
258 Pursuant to *Children, Youth and Families Act 2005 (Vic)* sch 3 cls 7, 8(3)(c)–(d), 10(5).
259 *Children, Youth and Families Act 2005 (Vic)* s 378(1).
260 *Children, Youth and Families Act 2005 (Vic)* sch 3 cls 12(1)(a)–(b).
261 *Children, Youth and Families Act 2005 (Vic)* sch 3 cl 12(1)(d).
262 Children’s Court of Victoria (2010), above n 252, 10.
Court programs and services

Youth Justice services at the Children’s Court

Children’s Court Clinic
The Children’s Court Clinic provides psychological and psychiatric assessments of children and families for both the Criminal Division and the Family Division of the Children’s Court, on request of the judge or magistrate. The clinic can suggest treatment options, for example, where drug abuse is an issue.

Youth Justice Court Advice workers
At least one Youth Justice Court Advice worker is located at each Children’s Court around the state. These workers do not provide case management for children appearing before the court, although they may make recommendations about appropriate referral options. They may support and advise magistrates on referral options or sentencing issues, and assist Youth Justice workers appearing in the court.

Children’s Court Liaison Office
The Children’s Court Liaison Office has the function of providing information and advice about the court to children, families and the community, co-ordinating the provision of reports required by the court, collecting and keeping statistics and general information about the court and providing general assistance.

Youth Justice Intensive Bail Supervision Program
Due to concern about a persistent increase in the number of young people on remand in youth justice centres, the Intensive Bail Supervision Program (IBSP) commenced as a pilot in June 2010, with four years’ funding secured in the 2011–12 state budget. The IBSP, funded in the North and West Metropolitan Region and the Southern Metropolitan Region, is available to young people aged 10 to 18 years appearing at the Children’s Court who are at risk of remand or re-remand. Youth Justice units across the state are offering bail supervision to young people at risk of remand, with the service negotiated on a case by case basis.

In the North and West Metropolitan Region, the Department of Human Services is collaborating with the community service organisation Concern Australia, which undertakes outreach work with young people on bail in conjunction with the IBSP case manager.

Other services
There are many programs and services for young people involved with the criminal justice system. The following is a selection.

Duty lawyers
Duty lawyers (from Victoria Legal Aid) are always present in Children’s Courts in metropolitan areas, and on mention days in other areas. Most children can obtain Victoria Legal Aid assistance free of charge.

Youth Justice Court Advice Service
The Youth Justice Court Advice Service provides information to the Children’s Court and adult courts on a range of community-based options including diversion, bail and community support services. The service undertakes suitability assessments for the IBSP, Youth Justice Group Conferencing and youth justice centre orders.

In the adult courts, Youth Justice provides case management of young adults aged 18–20 on supervised bail orders or deferral of sentence where diversion from a more intensive adult justice outcome or imprisonment is possible.

263 The Children’s Court Liaison Office is established by the Children, Youth and Families Act 2005 (Vic) s 545.
Youth Justice Community Support Service

The Youth Justice Community Support Service (YJCSS) is an integrated individualised response providing transition support to Youth Justice clients following a period in custody or a community court order. YJCSS is delivered in partnership with a consortium of community service organisations, with intensive case management supporting a young person’s social connectedness, economic participation and reintegration in the community. YJCSS can endure beyond statutory supervision, which is limited to the length of the court order.

The YJCSS commenced in metropolitan regions in October 2008 and rural regions from February 2009, to complement the statutory case management undertaken by Youth Justice units. YJCSS aims to reduce the rate and severity of reoffending by young offenders, minimise their progression into the criminal justice system, help connect them to family and community and assist them in improving their capacity to participate in education and employment.

Referrals to the YJCSS are initiated by regional Youth Justice workers as part of the case planning process. The target groups are those requiring intensive support services and/or those requiring transitional housing and support.

The YJCSS is designed to ensure that service access and service delivery for Youth Justice clients are provided in an integrated and co-ordinated manner at a regional level, with a high level of collaboration between Youth Justice and community service organisations.

Central After Hours Assessment and Bail Placement Service (CAHABPS)

The Central After Hours Assessment and Bail Placement Service (CAHABPS) is a statewide after hours service available to young people aged 10 to 17 years inclusive, who are being considered by police for remand or who require bail accommodation.

CAHABPS is delivered by the Department of Human Services and provides a single point of contact for police in matters where police and/or a bail justice are considering remand of a young person outside business hours. During business hours, police contact the regional Youth Justice unit.

The service aims to reduce inappropriate remands in custody, enhance informed decision-making and ensure that young people are dealt with in a manner consistent with the key principles of diversion and minimum intervention that underpin the Children, Youth and Families Act 2005 (Vic).

Community organisations

There are a number of community-based organisations providing services to young offenders and those at risk of becoming involved with the criminal justice system. These include Brosnan Youth Services (Jesuit Social Services), the Youth Support and Advocacy Service (YSAS), the Centre for Multicultural Youth, Salvation Army, Uniting Care, Whitelion, Concern Australia, the Youth Referral and Independent Person Program (YRIPP) and community legal centres (in particular Victoria Legal Aid and Youthlaw).

264 Department of Human Services, Youth Justice Fact Sheet – Youth Justice Community Support Service (YJCSS), Brochure (2011).
265 Ibid.
266 Ibid.
Chapter 6
Sentencing in the Children’s Court

Determination of sentence

Sentencing children under the *Children, Youth and Families Act 2005* (Vic) (‘CYF Act’) is a very different process to the sentencing of adults (or children) under the *Sentencing Act 1991* (Vic).267 The sentencing frameworks contained in the *Sentencing Act 1991* (Vic) and the CYF Act are ‘strikingly different’,268 with the principles set out in section 362 of the CYF Act differing ‘in kind and emphasis’269 from those set out in section 5 of the *Sentencing Act 1991* (Vic).

Section 5 instructs courts of adult jurisdiction270 that the purposes for which a sentence may be imposed are punishment, deterrence, rehabilitation, denunciation and protection of the community.271 The section 362 principles, on the other hand, ‘are all directed at an assessment of the particular offending, and of the particular offender’.272

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267 Children whose cases are heard in the higher courts may also be sentenced under the *Sentencing Act 1991* (Vic). See Chapter 11.


270 While termed ‘courts of adult jurisdiction’, courts such as the County and Supreme Courts also have jurisdiction over children where offences allegedly committed by children are excluded from summary jurisdiction or a Children’s Court matter is appealed. See Chapter 11.

271 This is discussed further in Chapter 11.

272 *CNK v The Queen* [2011] VSCA 228 (10 August 2011) [39].
Sentencing principles in the CYF Act

The principles to which the Children’s Court must have regard in imposing a sentence on a child are set out in section 362 of the CYF Act. The section reads:

(1) In determining which sentence to impose on a child, the court must, as far as practicable, have regard to –

(a) the need to strengthen and preserve the relationship between the child and the child’s family; and

(b) the desirability of allowing the child to live at home; and

(c) the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance; and

(d) the need to minimise stigma to the child resulting from a court determination; and

(e) the suitability of the sentence to the child; and

(f) if appropriate, the need to ensure that the child is aware that he or she must bear a responsibility for any action by him or her against the law; and

(g) if appropriate, the need to protect the community or any person from the violent or other wrongful acts of the child.

There are few published sentencing remarks of the Children’s Court and relatively few superior court decisions specifically dealing with the application of section 362 of the CYF Act. Despite the minimal written material, it is very clear that rehabilitation operates as a core sentencing principle in the court. As stated by the President of the Children’s Court, Judge Grant:

It has been said often enough that one of the great aims of the criminal law is the rehabilitation of the young offender. That is generally the focus of orders in the Children’s Court.

While the word ‘rehabilitation’ is not used in section 362, rehabilitation nevertheless underpins the first four of the principles set out in section 362(1) – the preservation of family and home, the continuation of education and employment and the minimisation of stigma. Reflecting a welfare model of sentencing,

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273 These principles are discussed in the context of the sentencing models underlying juvenile justice systems (the welfare model and the justice model) in Chapter 3.

274 CNK v The Queen [2011] VSCA 228 (10 August 2011) [8]. The Court of Appeal held that the words ‘must … as far as practicable’ require the court to have regard to each of the specified matters ‘to the maximum extent possible’. The words ‘have regard to’ requires the court to ‘give the matter weight “as a fundamental element in the decision-making process”’.


276 One of the few cases specifically dealing with the application of section 362 is a recent Court of Appeal case, CNK v The Queen [2011] VSCA 228 (10 August 2011). There is, however, much jurisprudence on the sentencing of child offenders under the Sentencing Act 1991 (Vic).


279 H v Rowe and Ors [2008] VSC 369 (19 September 2008) [12] (Forrest J). The importance of rehabilitation may also be evidenced by the fact that sections 362(a)–(d) of the Children, Youth and Families Act 2005 (Vic) are given primacy of place in the section: Fox and Freiberg (1999), above n 96, 830.
the first four principles of section 362(1) prioritise reform of the ‘still malleable’ child offender over the punishment of the child pursuant to the gravity of the criminal behaviour. As stated by Vincent JA:

Underlying this system is the attribution of considerable significance to the generally accepted immaturity of the young people who appear before the Children’s Court and the need, in the interests of the community and the young persons concerned, to endeavour to divert them from engagement in anti-social conduct at that early stage of their lives.

The principle of rehabilitation generally prevails over other factors in the Children’s Court; however, in individual cases where it is considered ‘appropriate’, the emphasis on rehabilitating the offender will be qualified by the need to protect the community, specifically deter offenders and ensure offenders are held accountable for their actions.

Where a child is found to have ‘good prospects of rehabilitation’, the court may be particularly conscious of the need to select a sentencing option least likely to undermine that rehabilitative potential, that is, a non-custodial option that allows for the continuation of productive activity and the retention of relationships. Factors referred to in published Children’s Court sentencing remarks as demonstrating strong rehabilitative prospects include lack of prior convictions, pleading guilty (and other expressions of remorse and accountability for behaviour), cooperation with authorities and willingness to engage in treatment programs (where relevant). Positive protective factors are also highly relevant to determining a child’s rehabilitative potential – such as strong family support (including appropriate family responses to the behaviour), support from school staff, academic achievement and positive engagement in employment, sport and other community activities.

While non-custodial sanctions may be justified by reference to any of the first five principles set out under section 362, it does not follow that all non-custodial sanctions are rehabilitative in effect. For example, fines were imposed on a large proportion of young offenders over the ten-year period analysed by the Council (2000–09). For children who are unable to pay fines (and who do not have families to pay on their behalf), debt default may, in fact, escalate the child’s criminal behaviour, rather than assist their rehabilitation. Higher-level sanctions, such as supervisory orders with treatment components, are more likely to be rehabilitative than fines.

Non-custodial options – ‘by far the preferred course’ – are also, depending on the circumstances, not necessarily the only method of achieving the objective of rehabilitation. In some cases, the objective may be achieved by a sentence of youth detention (as opposed to adult imprisonment, particularly given the schooling and programs available in youth detention), and by a shorter period of detention than might otherwise be the case. Rehabilitative programs undertaken prior to sentencing during deferral may also assist young offenders to address underlying causes of offending.

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280 Fox and Freiberg (1999), above n 96, 829. For a discussion of the welfare model, see Chapter 3.
281 Principles (e) and (f) also have a welfare element, although they may also be characterised in accordance with the justice model: Children, Youth and Families Act 2005 (Vic) ss 362(e)-(f).
284 R v P and ors [2007] VChC 3 (5 November 2007) [22]–[23] (Judge Grant); R v M and others [2008] VChC 4 (12 February 2008) [18], [20], [22]–[23] (Judge Grant). Many of these factors are considered in detail below.
285 R v P and ors [2007] VChC 3 (5 November 2007) [34] (Judge Grant); R v M and others [2008] VChC 4 (12 February 2008) [34]–[35], [39], [40], [42] (Judge Grant).
286 Meeting with Youth Affairs Council of Victoria and Youth Referral Independent Persons Program (7 April 2011).
287 Director of Public Prosecutions v TY (No 3) (2007) 18 VR 241, 242 (Bell J).
288 Ibid. Administratively, parole may also assist rehabilitation.
Preserving family, home and education and minimising stigma

The emphasis placed on the needs of the child in retaining connections with home, family, education and employment suggests that preference in sentencing should be given to non-custodial sanctions that allow the child to develop socially, educationally and productively and may, therefore, contribute to the child’s ‘realisation of his or her law-abiding potential’.289

The reference to the minimisation of stigma, both as a sentencing principle and as a procedural guideline to be followed by the court,290 also indicates a preference for diverting children, where possible, from custody and other punitive sanctions. There may be significant legal and social stigma attached to Children’s Court determinations. Conviction, for example, may result in significant ‘social censure’ as well as an automatic ‘diminution of the offender’s legal rights and capacities’.291

The need to minimise stigma is supported by the criminological theory that the labelling of an offender as a ‘criminal’ through formal conviction or through association with criminal justice processes may “amplify” an offender’s deviance and expose the child to ‘a greater chance of further formal and informal sanctions that serve to stereotype the person as delinquent’.292 A child identified as a ‘criminal’ may lose access to future opportunities (such as employment opportunities) and may experience an erosion of social ‘ties to family and to the conventional [social] order’,293 enforcing prolonged association with offenders and reducing the incentive for law-abiding behaviour.294

Suitability of sentence

Like the first four principles, the fifth, which instructs the court to have regard to the suitability of the sanction to the child, also requires the court to consider the child’s interests and developmental needs. This principle has a welfare element; however, it may also be characterised in accordance with the justice model.295

The fashioning of a sentence to reflect the particular needs of each child may lead to ‘dispositions which would be regarded as entirely inappropriate in the case of older and presumably more mature individuals’.296 Given the emphasis on rehabilitation in the Children’s Court and the recognition that children are ‘less responsible and therefore less blameworthy than adults’,297 the principle of proportionality (that is, that the sentence be commensurate with the seriousness of the crime) generally plays a less significant role in the Children’s Court than it does in other courts.298 In courts of adult jurisdiction, the proportionality principle requires a court to match sanctions to the objective seriousness of a crime.299 Sentence outcomes

289 Fox and Freiberg (1999), above n 96, 830. The importance of providing a child with instruction, guidance and assistance in order for the child to develop an ‘ability to abide by the law’ is also contemplated in the objects for imposing a youth attendance order under Children, Youth and Families Act 2005 (Vic) s 405(d).

290 Children, Youth and Families Act 2005 (Vic) ss 362(1)(d), 522(1)(f).


294 See further Sentencing Advisory Council (2011), above n 293, 21.

295 See Chapter 3 for a discussion of the welfare and justice models.


298 Fox and Freiberg (1999), above n 96, 831–832.

that are too lenient are constrained, as are sanctions that are too excessive. In the Children’s Court, the emphasis is less on matching the sanction to the crime and more on selecting a sentence that is suitable for rehabilitating the child and avoiding sentences that may detract from this purpose.

Perceived disparities in sentencing – parity is the concept that like cases be treated alike and that materially different cases not be dealt with identically – may also be justified by the prioritisation of rehabilitation in the Children’s Court and the recognition that, given the differences in the developmental needs and rehabilitative potential of offenders, different sanctions may be suitable.

**Bearing responsibility for criminal behaviour**

The reference in section 362(1)(f) to ensuring the child is aware of a personal responsibility for any actions taken against the law is based more on the justice model rather than the welfare model. While a welfare-based approach is generally prioritised in the Children’s Court given the young age of offenders sentenced in the court, section 362(1)(f) recognises that in some instances children should be treated more like adults in sentencing and be required to take more responsibility for their actions.

In doing so, this provision places a ‘brake’ on the mitigation of sentence ‘because of reliance on ... youthfulness as an indicator of reduced personal culpability’. The ‘brake’ is, however, not always operative. Sentencing will only reflect the need for children to take greater accountability for their behaviour where it is deemed ‘appropriate’.

An early guilty plea (depending on the nature of the crime and the circumstances of the offender) may assist a magistrate in being satisfied that the offender understands the importance of accepting responsibility for criminal actions. However, offenders who plead guilty may still be required to account for their actions. Whether further steps are deemed ‘appropriate’ may depend on factors such as the seriousness of the offending behaviour, the role and age of the offender and whether or not the offender has relevant prior offences.

One possible way of achieving greater accountability is through the imposition of a more severe sanction. It follows that while there is no ‘explicit mention’ of punishment in section 362 (punishment is legislatively recognised as a purpose of sentencing under the Sentencing Act 1991 (Vic), but not explicitly referred to as a matter to be taken into account under the CYF Act), the punishment of the offender may, in suitable cases, ‘be justified by the “accountability” principle’.

Punishment of the offender is also contemplated by section 405 of the CYF Act, which sets out the objectives of a youth attendance order to include activities and requirements ‘which penalise the person by imposing restrictions on his or her liberty’ (emphasis added).

While a relatively severe sanction may, at times, be justified under section 362(1)(f), this provision does not compel the imposition of a more severe sentence or require the child to be detained. Supervisory orders incorporating treatment components may be sufficient to satisfy this purpose. For example, in *R v P and ors*
(‘R v P’), eight co-offenders, who were each charged with assault, child pornography and procuring by intimidation a person to participate in acts of sexual penetration, were ordered to participate in the Male Adolescent Program for Positive Sexuality (MAPPS) as a special condition of youth supervision or probation orders.310 MAPPS, as stated by Judge Grant in R v P, ‘“places emphasis on the young person accepting responsibility for his offending behaviour and for making the necessary changes so that [the offender] can lead a life that doesn’t include offending”’.311 Most of the offenders also had convictions recorded against them, given the seriousness of the offending, the role and characteristics of those convicted and ‘the need for … [the offenders] to understand … [their] responsibility for what occurred’.312

The performance of community service may also be a means of requiring a child offender to account for, and even ‘make amends’ for, criminal behaviour.313

Protection of the community

Section 362(1)(g) of the CYF Act lists as a sentencing principle the need to protect the community or any person from the violent or other wrongful behaviour of the child. This principle is ‘utilitarian’ rather than justice-oriented; however, it clearly does not fit within the welfare model.314 As with subsection (f), the principle is qualified by the phrase ‘if appropriate’. Where it is considered ‘appropriate’, for example, where the offending behaviour is particularly violent or persistent,315 detaining a child – therefore limiting the child’s capacity to endanger the community for the duration of the sentence – may be justified by section 362(1)(g).

Like subsection (f), subsection (g) creates a tension with the generally prioritised purpose of rehabilitation. While non-custodial orders may be justified by the rehabilitative emphasis of sections 362(1)(a)–(f) of the CYF Act, more severe sanctions, such as youth detention, may be justified through the principles of community protection and offender accountability. However, whether detention achieves the aim of protecting the community on a longer-term basis is questionable. The courts have acknowledged that rehabilitative sanctions may serve this function equally well.316 For example, the Western Australian Court of Criminal Appeal held:

It is fallacious to regard the rehabilitation of an individual offender as a consideration separate and apart from, and somehow inimical to, the protection of the public. The two things are intrinsically connected. The criminal justice system aims to rehabilitate offenders (particularly young offenders) because rehabilitation removes the danger to the public from one of its (previously) errant members.317

Programs addressing underlying behaviour may in some cases be a more powerful means of community protection. For example, in the Victorian Children’s Court case of R v P, Judge Grant commented that the offenders’ participation in MAPPS – as a special condition attached to their probation or youth supervision orders – may contribute to the long-term protection of the community.318

311 Ibid [24] (Judge Grant) (emphasis added).
312 Ibid [39]–[51] (emphasis added).
313 The imposition of requirements that compel the offender to make amends is listed as one of the objects of a youth attendance order: Children, Youth and Families Act 2005 (Vic) s 405(c).
314 ‘Utilitarianism’ is a philosophy holding that the best course of action is the one that maximises benefits for the greatest number of people, that is, ‘for the greater good’. See Chapter 3 for a brief discussion of the welfare and justice models.
315 See, for example, the relevance of persistency of offending in H v Rowe and Ors [2008] VSC 369 (19 September 2008) [81], [84] (Forrest J). Forrest J upheld the twenty-seven month sentence imposed on the offender.
316 Fox and Freiberg (1999), above n 96, 833–835.
317 B (A Child) v The Queen (1995) 82 A Crim R 234, 244.
318 R v P and ors [2007] VChC 3 (5 November 2007) [23] (Judge Grant).
Specific deterrence

According to Forrest J in *H v Rowe and Ors*, section 362(1)(g) also incorporates specific – but not general – deterrence. It aims to dissuade the child from reoffending through the child’s experience of a criminal sanction. Other commentators regard specific deterrence (together with the principle of punishment) to instead be encapsulated in sections 362(1)(f) or (e) where appropriate.

As with community protection and accountability principles, the principle of specific deterrence may be used, in appropriate cases, to justify a more severe sanction, such as detention. However, it does not follow that offenders are specifically deterred by custodial sentences. A recent review of the evidence on deterrence conducted by the Council has found that detention ‘has, at best, no effect on the rate of reoffending and often results in a greater rate of recidivism’ by those detained, compared with those receiving a different sentencing outcome. Reasons for these findings include:

- prison is a learning environment for crime, prison reinforces criminal identity and may diminish or sever social ties that encourage lawful behaviour and imprisonment is not an appropriate response to the needs of many offenders who require treatment for the underlying causes of their criminality (such as drug, alcohol and mental health issues).

The Australian Institute of Criminology has also recently examined the question of whether those who receive custodial penalties are less likely to reoffend than those who are given non-custodial sanctions – with specific focus on young offenders. Controlling for various factors likely to influence recidivism, including socioeconomic status, prior criminal record, substance abuse, school attendance and race, the authors found that, ‘other things being equal, young offenders given custodial orders are no less likely to reoffend than young offenders given non-custodial orders’. Given the ‘absence of strong evidence that custodial penalties act as a specific deterrent for juvenile offending’ and given the additional adverse effects of detention over the short and long term, and in particular the ‘adverse effects of imprisonment on employment outcomes’, the authors concluded that ‘custodial penalties ought to be used very sparingly with juvenile offenders’.

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319 General deterrence as a sentencing factor is explored below.
320 *H v Rowe and Ors* [2008] VSC 369 (19 September 2008) [12] (Forrest J). The applicability of specific deterrence (but not general deterrence) in *Children, Youth and Families Act 2005* (Vic) s 362(1)(g) has been recently confirmed by the Court of Appeal in *CNK v The Queen* [2011] VSCA 228 (10 August 2011) [10], [12].
321 See further Sentencing Advisory Council (2011), above n 293; Fox and Freiberg (1999), above n 96, 207–208.
323 Sentencing Advisory Council (2011), above n 293, 2. This summary of findings relates to offenders of all ages. The Council also considered the deterrent effect as it related specifically to children: Sentencing Advisory Council (2011), above n 293, 22–23. The Council also found that, as with adults, ‘young offenders do not appear to be deterred by imprisonment’, where ‘some studies show a criminogenic effect’. Where imprisonment did generate a specific deterrent effect for young offenders, it was a result of ‘bullying and victimisation, dislocation from important others and fearful perceptions of adult corrections’: Peter J. Ashkar and Dianna T. Kenny, ‘Views from the Inside: Young Offenders’ Subjective Experiences of Incarceration’ (2008) 52(5) *International Journal of Offender Therapy and Comparative Criminology* 584, 594.
324 Sentencing Advisory Council (2011), above n 293. These findings were made in relation to offenders of all ages. The Council also comments specifically about young offenders.
325 Don Weatherburn, Sumitra Vignaendra and Andrew McGrath, *The Specific Deterrent Effect of Custodial Penalties on Juvenile Reoffending*, Technical and Background Paper no. 33 (2009). The Australian Institute of Criminology cites international research that came to the same conclusion.
326 Ibid 5.
327 Ibid 10.
328 Ibid.
Prior to this 2009 study, only two Australian studies had looked at the specific deterrent effect of youth detention on reoffending by young people. These studies (published in 1974 and 1996) found that young offenders sentenced to youth detention were more likely to reoffend than those who were given non-custodial penalties.\(^{329}\)

In a recent Court of Appeal judgment, Maxwell P, Harper JA and Lasry AJA commented that:

> The risk that a period of detention will be counterproductive for an offender – and hence for the community – is never higher than in relation to a young offender who has not previously been in custody. Research to which the Chief Scientist of New Zealand has recently drawn attention has highlighted the potential for the immature brain to respond to punitive punishments in such a way as to make recidivism more rather than less likely.\(^{330}\)

### Other principles

#### General deterrence

The principle of general deterrence is aimed at reducing crime by discouraging potential offenders through the ‘fear of punishment’.\(^{331}\) While general deterrence is explicitly recognised as a purpose for which sentences may be imposed on offenders under section 5 of the Sentencing Act 1991 (Vic), it is not listed as a matter to be taken into account in sentencing under section 362 of the CYF Act. Courts sentencing children under the CYF Act have therefore not ordinarily applied the principle of general deterrence.\(^{332}\)

Justice Kaye in the recent Supreme Court decision of *Director of Public Prosecutions v Hills [No 1]*\(^{333}\) held that the factors set out in section 362 are not exclusive and that general deterrence and denunciation are relevant

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\(^{329}\) These previous studies are discussed in Weatherburn, Vignaendra and McGrath (2009), above n 325, 10. The Australian Institute of Criminology commented that the difference in findings is ‘probably due to the fact that the present study more effectively controlled for prior criminal record’. Young people’s reoffending is discussed in Chapter 2 of this report.


\(^{331}\) Andrew von Hirsch et al., *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999), 5. See further Sentencing Advisory Council (2011), above n 293.

\(^{332}\) Prior to *Director of Public Prosecutions v Hills [2011] VSC 87* (18 March 2011), some Victorian courts found guidance in the interpretation by South Australian courts of the former Children’s Protection and Young Offenders Act 1979 (SA) s 7 – a ‘similar’ provision upon which the former section 139 of the Children and Young Persons Act 1989 (Vic) (which is the same as the current section 362) was modelled: *R v Angelopolous* [2005] VSCA 258 (10 November 2005) [53] (Eames JA). For example, in the case of *In the Appeal of JD* Judge Strong of the County Court sought guidance from the South Australian cases *R v S (A Child)* (1982) 31 SASR 263 and *R v Wilson* (1984) 35 SASR 200, finding that, pursuant to those cases and ‘in the absence of specific guidance to the contrary’ from Victorian superior court authority, ‘[t]here is nothing in s.362 which appears to sanction general deterrence as a sentencing consideration’. See *In the Appeal of JD* (Unreported, County Court of Victoria, Judge Strong, 22 February 2008) [12]; cited in *Power* (2011), above n 3, [11.1.4] (‘Sentencing’).

\(^{333}\) *Director of Public Prosecutions v Hills* (No 11) [2011] VSC 88 (18 March 2011). In that case, two children aged 15 at the time of offending were found guilty of offences including aggravated burglary and kidnapping. One of the accused, NC, was also found guilty of recklessly causing serious injury, while another accused, RC, was also found guilty of reckless conduct endangering the person. The children were sentenced to three years in a youth justice centre: ibid [92], [98].
sentencing principles to be taken into account under the CYF Act.334 According to Justice Kaye, appellate authority in Victoria did not preclude this approach,335 the principle of general deterrence was relevant to the sentencing of children in several superior court cases336 and the applicability of general deterrence was the preferable textual reading of section 362.337 Further, according to Justice Kaye, if section 362 exhaustively prescribed the sentencing principles to be taken into account, other factors that are ‘implicit in, or assumed by, other provisions of the Act, [but] which do not necessarily fall within any of the categories described in s 362(1)338 may be excluded – such as the offender’s character and whether or not the offender has pleaded guilty.

This approach has recently been rejected on appeal by the Court of Appeal in CNK v The Queen.339 In CNK v The Queen, the Court of Appeal unanimously held that ‘the language of s 362(1), and the nature of matters to which regard must be had, are such to preclude any consideration of general deterrence’.340 The Court of Appeal arrived at the same conclusion as the Full Court of the Supreme Court of South Australia in construing what was described as ‘almost identical legislation’.341

According to the Court of Appeal, the ‘language of the statute conveys a clear legislative intention to exclude general deterrence’.342 As stated by the court, section 362(1)(g) is concerned only with community protection through specific deterrence:

> The deliberate use of language in para (g) which deals only with specific deterrence, and which says nothing about the need to deter others from committing ‘violent or other wrongful acts’, is a clear indication of legislative intention.343

The introduction of the principle of general deterrence would be, according to the court, inconsistent with the CYF Act.344 Unlike the principles set out in section 362(1) of the CYF Act, which are ‘all directed at an assessment of the particular offending, and of the particular offender’,345 general deterrence is ‘unconnected with the particular offender’.346 Instead, the principle of general deterrence aims to deter others by making an ‘example’ of the child; it ‘treats the offender as a means to an end, as an instrument for effecting a broader community interest’.347

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335 Ibid [3], [5]. According to Kaye J, the statement made by Forrest J in H v Rowe and Ors [2008] VSC 369 (19 September 2008) [12], that ‘general deterrence is not a relevant sentencing principle’ was merely obiter, and the case of R v Angelopolous raised the issue without deciding. See: R v Angelopolous [2005] VSCA 258 (10 November 2005) [2] (Callaway JA); [56] (Eames JA).


338 Ibid [15] (Kaye J); see also ibid [14].


340 Ibid [7].

341 Ibid [10].

342 Ibid [15].

343 Ibid [10].

344 The principle was also stated as being ‘entirely foreign’ to the CYF Act legislative scheme: ibid [12].

345 Ibid [39].

346 Ibid [12].

According to the court, the application of general deterrence would also be in direct conflict with several subsections of section 362, including the court’s obligation to “minimise the stigma to the child” and the ‘unambiguous command of s 362(1) ... that no greater sentence should be imposed on the child than the nature and circumstances of the child’s offending require’.

The Court of Appeal rejected Justice Kaye’s reliance on various superior court authorities. The children in these cases – although children within the meaning of the CYF Act or its predecessor, the Children and Young Persons Act 1989 (Vic) – could not be sentenced by the Children’s Court under the CYF Act given the nature of the crimes allegedly committed (namely, the excluded offences of murder and manslaughter). Further, the sentence under consideration in each of these cases was imprisonment, a sentence that can only be imposed under the Sentencing Act 1991 (Vic). Under the Sentencing Act 1991 (Vic), principles that ‘differ in kind and emphasis’ from those enunciated in the CYF Act apply. General deterrence is one such principle; however, even so, ‘general deterrence ordinarily has a lesser role to play in the sentencing of children and immature young people than in the case of mature adults’. As the sentencing in these superior court cases was not governed by the Children’s Court legislation, the question of the relevance of general deterrence to the CYF Act was not considered. The Court of Appeal therefore held that it was unconstrained ‘so far as Victorian appellate authority is concerned’.

The Court of Appeal further held that its analysis did not depend on section 362(1) being an exhaustive statement of the matters to be taken into account in sentencing. The Court of Appeal agreed that a number of the factors referred to by Justice Kaye, such as the gravity of the offence, whether or not the offender pleaded guilty, the offender’s remorse, character and antecedents and the impact of the offence on the victim, are clearly relevant to the determination of sentence.

The findings of the Court of Appeal suggest that a child sentenced under the CYF Act is not an appropriate vehicle for general deterrence. As stated by Fox and Freiberg:

Deterrence would seem to depend on the ability of the potential offender to weigh up, in a rational manner, the advantages and disadvantages of a course of conduct and to base his or her actions upon the results of this reasoning.

Ultimately, the assumption that child offenders make a rational choice to engage in a particular course of conduct does not sit well with the philosophy underlying the operation of the Children’s Court. Nor does it sit well with the research on adolescent brain development discussed in Chapter 2. The establishment of a different sentencing regime for children is based on the premise that children may not yet have the capacity for rational decision-making. Children are assumed to ‘lack the degree of insight, judgement and
self-control that is possessed358 by adult (rational) persons and may often act impulsively ‘on the “spur of the moment”’359 without weighing up the consequences of their actions.360 The imposition of general deterrence as a sentencing principle is even more problematic when one considers the large number of child offenders who suffer from mental illness, cognitive impairment or substance abuse issues.361

Even in relation to adult offenders, it is questionable whether the threat of even very serious sanctions, such as imprisonment, is effective as a general deterrent. The Council examined the strength of imprisonment as a general deterrent in its paper Does Imprisonment Deter? A Review of the Evidence362 and found that imprisonment has a generally insignificant effect on crime rates, representing at best a small deterrent effect. This link is perhaps even more tenuous in relation to children.

**Human rights principles**

**International conventions**

Australia has ratified a number of multilateral treaties that deal with the rights of children.363 Children’s rights are most specifically and comprehensively dealt with by the Convention on the Rights of the Child (CROC),364 which Australia ratified in 1991 with one reservation.365 Drawing from the principles that had been enunciated in the Beijing Rules,366 the Convention on the Rights of the Child sets out a number of civil, cultural, economic, political and social rights pertaining to persons under 18 years of age367 and the manner in which those rights are to be protected. Principles particularly relevant to child sentencing include368 that the best interests of the child be a primary consideration in decision-making;369 that, where appropriate, children be diverted from judicial proceedings;370 that sentencing be proportionate, with rehabilitation a principle of

358 Director of Public Prosecutions v TY (No 3) (2007) 18 VR 241, 242 (Bell J).
359 Ibid. This was in reference to comments made by Phillips CJ, Chernov and Vincent JJA in Director of Public Prosecutions v SJ; Director of Public Prosecutions v GAS [2002] VSCA 131 (26 August 2002) [62].
360 That children may not possess the ‘foresight and prudence’ of adults or the ‘understanding of causes and effects, balance of judgment [or] thoughtfulness’ is also well recognised in other areas of law, such as the law of negligence: McHale v Watson (1966) 115 CLR 199 [213]; Director of Public Prosecutions v TY (No 3) (2007) 18 VR 241, 242 (Bell J).
361 The Victorian Supreme Court of Appeal held that where an offender suffers from impaired mental functioning, it may be appropriate to moderate the need for general and/or specific deterrence: R v Verdins; R v Buckley; R v Vo (2007) 16 VR 269.
362 Sentencing Advisory Council (2011), above n 293.
363 Among the conventions dealing with the rights of children are the International Covenant on Civil and Political Rights (ICCPR), opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976). Although there are some provisions in these treaties that refer explicitly to the rights of children (such as Article 24 ICCPR; Article 10 ICESCR) most provisions apply to children as they do to adults. See further Human Rights Law Centre, Human Rights Law Centre Manual (Human Rights Law Centre, 2011) <http://www.hrlc.org.au/resources/manual/> at 22 August 2011, ch 2, 18.
367 Children are defined in Article 1 of the Convention on the Rights of the Child as those under 18 years of age, unless under relevant law age of majority is attained earlier.
369 Convention on the Rights of the Child, art 3.1. See also the Beijing Rules, r 17.1(d).
370 Convention on the Rights of the Child, art 40.3(b).
particular emphasis;372 and that detention be used as a sanction of last resort and for minimal time.373 Under the Convention on the Rights of the Child, children accused of offending behaviour are also entitled to various guarantees,374 including the opportunity to be heard and involved in proceedings.375

By ratifying the Convention on the Rights of the Child and other international treaties, Australia is obliged to act in ‘good faith’ to ensure the rights contained within those instruments are performed in Australia.376 However, ratification by the executive does not mean that these rights are automatically enforceable in Australia. Treaty obligations must be incorporated by parliament into legislation to operate as a direct source of domestic rights and obligations.377

No federal legislative instrument directly incorporates the Convention on the Rights of the Child into Australian law,378 although some of the rights enunciated in the CYF Act are clearly ‘consistent with human rights covenants’.379 While complaints alleging breaches of the Convention on the Rights of the Child may be made to the Human Rights and Equal Opportunity Commission (HREOC), the fact that the Convention on the Rights of the Child is scheduled to the Human Rights and Equal Opportunity Act 1986 (Cth)380 ‘does not amount to incorporation’, and the HREOC has no power to impose penalties for lack of compliance.381

373 Convention on the Rights of the Child, art 37(b).
375 Convention on the Rights of the Child, art 12. See also the Beijing Rules, art 14.2 (proceedings to be conducted in an atmosphere conducive to participation).
376 Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 26: ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith’. See also Convention on the Rights of the Child, art 4: ‘States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention’.
378 Note, however, in the Second Reading Speech of the Children, Youth and Families Bill, the then Minister for Community Services stated: ‘The rights of children and young people who come before the court are clearly established in the proposed legislation’ (in the provision made for proceedings to be comprehensible to the accused and their families and the need to minimise stigma and the need to respect cultural identity): Victoria, Parliamentary Debates, Legislative Assembly, 8 December 1988, 1151 (Peter Spyker, Minister for Community Services).
Even though treaties and other sources of international law do not have direct application, they may have ancillary relevance. For example, Australian treaty obligations may assist in statutory interpretation where legislation is ambiguous and may give rise to a legitimate expectation that administrative discretionary powers will be exercised in conformity with those obligations. In a number of cases Australian courts have also taken into account international human rights conventions, and specifically the Convention on the Rights of the Child, in exercising sentencing discretions.

Director of Public Prosecutions v TY (No 3) was such a case. DPP v TY involved the sentencing of a child (who was 14 at the time of the offence) for the murder of an 18 year old, whom he had twice struck to the head with an umbrella. In sentencing the offender, Bell J proposed that principles enunciated in the Convention on the Rights of the Child could be taken into account if the subject matter was within scope and was not inconsistent with legislation or common law. After concluding that the matter was clearly within scope and was ‘in keeping’ with the CYF Act, the Sentencing Act 1991 (Vic) and the common law (which remained applicable), Bell J held that it was ‘open’ to consider the Convention on the Rights of the Child, the ‘main significance’ of which was to ‘supply a further basis for, and to reinforce the existing principle of, giving primary emphasis to youth and rehabilitation as a mitigating factor when sentencing children’. Bell J was, however, careful to point out that:

[taking the Convention into account does not lead to the result that children can escape criminal responsibility and just punishment; where the crime is very serious, considerations other than youth and rehabilitation can become more pressing.]

Bell J also noted that consideration given to the Convention on the Rights of the Child can also ‘cut both ways’ where the victim is a child (the Convention on the Rights of the Child, for example, refers to a child’s entitlement to survival and development).

The Court of Appeal has subsequently referred to the sentencing remarks of Bell J in DPP v TY as ‘exemplary’.

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382 The sources of international law are set out in Statute of the International Court of Justice art 38.1 (ICJ Statute). The ICJ Statute is annexed to the Charter of the United Nations.

383 See generally Human Rights Law Centre (2011), above n 363.

384 Minister of State for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273, 287 (Mason CJ and Deane J); Acts Interpretation Act 1901 (Cth) s 15AB.

385 Minister of State for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273, 287 (Mason CJ and Deane J). Note, however, the ‘Teoh’ legitimate expectation doctrine has been met with disapproval by McHugh and Gummow JJ (in obiter) in Re Minister for Immigration and Multicultural and Indigenous Affairs: Ex parte Lam (2003) 214 CLR 1. The federal government has also attempted to negate the doctrine through legislation and other measures. See further Human Rights Law Centre (2011), above n 363, ch 4, 18–21.

386 Maxwell P lists a number of these cases in Royal Women’s Hospital v Medical Practitioners Board (2006) 15 VR 22, 38. See also Director of Public Prosecutions v TY (No 3) (2007) 18 VR 241 [244] (Bell J); Tomasevic v Travaglini and Another (2007) 17 VR 100, 114–115 (Bell J).


389 The child was convicted of murder at the initial trial and again on retrial.

390 Director of Public Prosecutions v TY (No 3) (2007) 18 VR 241, 244–245 (Bell J).

391 Ibid 51 (Bell J).

392 Ibid 48 (Bell J).


Victorian Charter of Human Rights and Responsibilities

In Victoria, formal recognition of a range of civil and political rights is contained in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ("the Charter"). The Charter imposes duties on each of the three arms of government to have regard to and, where possible, act consistently with the rights set out in the Charter. The parliament and executive are required to consider human rights implications prior to introducing new legislation; public authorities must have regard to and, where possible, act in accordance with human rights, and a duty is imposed on courts to interpret laws consistently with human rights. While the Charter imposes limits on the three branches, it is not, however, a source of individual rights.

The rights set out in Part 2 of the Charter (which are largely derived from the rights guaranteed under the *International Covenant on Civil and Political Rights*) apply to children in the same way as adults (except the right to vote). The rights are not absolute, but are subject to 'reasonable limits', and other qualifications, such as a provision enabling parliament to override the operation of rights in the Charter. Among rights relevant to the Children's Court context is the right to be tried without unreasonable delay and the right to a procedure that takes into account the age of a child and the desirability of promoting the child's rehabilitation.

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399 The right to vote is restricted to ‘eligible person[s] … which in effect is likely to mean, for the most part, “every citizen” of capacity and age’: Human Rights Law Centre (2011), above n 363, ch 5, 38.


401 Parliament can override the operation of rights in the Charter by express declaration that an Act or provision has effect despite being incompatible with the Charter: *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 31.

402 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 25(2)(c), (3).
Other matters influencing sentencing

Guilty plea

The CYF Act does not contain a provision analogous to section 5(2)(e) of the Sentencing Act 1991 (Vic), which requires a court in determining sentence to generally have regard to an offender's plea of guilty and the timing of that plea.403 However, sections 367(1)(c) and 362A of the CYF Act at least ‘implicitly, refer to the mitigating weight of a plea of guilty by a child’.404 Under section 362A, when the court imposes a less severe sentence for an offence by virtue of a guilty plea and the child is subsequently sentenced to a youth attendance order; youth residential centre order or youth justice centre order; the court is required to quantify and record the amount by which the sentence has been reduced for each offence.405 For other sanction types, the court has discretion to state the sentence that would have been ordered ‘but for’ the guilty plea.406 Under section 367(1)(c), the court is also expressly instructed to take into account a guilty plea in determining whether an adjournment for a good behaviour bond is warranted (a good behaviour bond is among the less severe sentencing options available in the court).407

Even without a general provision such as section 5(2)(e) of the Sentencing Act 1991 (Vic), a plea of guilty, particularly an early plea, is likely to result in a reduction of sentence as it does in adult courts.408 Significant reasons of public policy underlie the reduction of sentence for a guilty plea. A plea may evidence genuine remorse and indicate that the offender understands the importance of accepting responsibility for criminal actions – both of which may contribute to the rehabilitation process and may save the victim the burden of being required to testify in court.409 As stated by Judge Grant in R v P in relation to the pleas of guilty submitted by the offenders in that case:

I give great credit to your pleas of guilty. They are so significant because they relieve the victim of the burden of giving evidence. She is not compelled to re-live these terrible events. Importantly, your pleas of guilty also indicate your remorse.410

In that case, the victim submitted a Victim Impact Statement in which she acknowledged that things have ‘been easier on my family and me’ since the offenders pleaded guilty.411 The victim’s father also submitted a Victim Impact Statement, recognising that ‘things have lifted for me since the boys pleaded guilty and freed my daughter from having to give evidence’.412

405 Children, Youth and Families Act 2005 (Vic) s 362A(1)(b). Note, however, that failure to comply with this section does not invalidate an order.
406 Children, Youth and Families Act 2005 (Vic) s 362A(2).
407 See Chapter 7 for a discussion of the various sentencing options for children.
408 Power (2011), above n 3, [11.2.8] (‘Sentencing’). Magistrate Power therefore suggests that the cases applicable to adult courts in relation to pleas of guilty are relevant to the sentencing of young offenders ‘at least so far as any non-rehabilitative component of the sentence is concerned’: ibid [11.2.8].
409 R v P and ors [2007] VChC 3 (5 November 2007) [22]–[23] (Judge Grant).
410 Ibid. The offenders pleaded guilty to charges including common law assault, the making of pornography and the procurement by intimidation of the victim to participate in acts of sexual penetration.
411 Ibid [14].
412 Ibid [16].
Pleas entered at an early stage in proceedings may be particularly indicative of remorse. Nonetheless, actual remorse, a plea may also be in the public interest, simply in that it saves the state the time and expense of conducting a contested trial.

Stakeholders have suggested that most children plead guilty in the Children’s Court. The rehabilitative philosophy underlying the court (which may encourage children to admit criminal behaviour) and the fact that young people may simply want to get the criminal process ‘out of the way’ are also likely contributors to the high number of guilty pleas.

The high number of guilty pleas has raised concerns about implications for procedural justice:

with the plea of guilty, the child abandons many of the standard rights and protections implicit in due process … [the child] fails to take advantage of the presumption of innocence and the right to have the prosecution prove its case beyond reasonable doubt.

Pre-sentence reports

Pre-sentence reports are also relevant to the determination of sentence. After a guilty finding, the court may defer sentencing and order that a pre-sentence report be prepared by the Youth Justice division of the Department of Human Services or the Children’s Court Clinic. However, the court must order the production of a pre-sentence report under the CYF Act if it is considering detaining the child in a youth residential centre or youth justice centre or if it appears that the child suffers from an intellectual disability.

Pre-sentence reports are admissible at the adjourned hearing date and must be taken into account by the court in the determination of sentence.

Pre-sentence reports provide courts with background information on the child to assist the court in determining the rehabilitative prospects of the child, individual treatment needs (if any) and the appropriate sanction to be imposed. Matters that may be included in pre-sentence reports include the child’s family and medical history, the child’s education and employment status, whether the child has previously been...

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413 See, for example, R v P and ors [2007] VChC 3 (5 November 2007) [23] (Judge Grant); R v OJS [2009] VSC 265 (30 June 2009) [25] (Kaye J). Pleas entered in circumstances to the credit of the offender may also carry more weight, for example, where there may have otherwise been strong prospects of a successful contest: R v OJS [2009] VSC 265 (30 June 2009) [25] (Kaye J), which involved a child being sentenced for manslaughter under the Sentencing Act 1991 (Vic).
414 Ciantar v The Queen; Rose v The Queen [2010] VSCA 313 (29 November 2010) [30]–[32].
415 Meeting with Children’s Court of Victoria (23 February 2011). See also Cunneen and White (2007), above n 12, 250–251.
416 Meeting with Children’s Court of Victoria (23 February 2011). There are also a high number of guilty pleas in the Magistrates’ Court. Australian Bureau of Statistics data suggest that 68.6% of defendants finalised between 1 July 2009 and 30 June 2010 in the Magistrates’ Court of Victoria pleaded guilty (a further 2.1% were found guilty and 9.1% were dealt with ex parte); Australian Bureau of Statistics (2011), above n 20, 63. During that same time period, of the 68.7% of finalised defendants who pleaded guilty in the Children’s Court, 0% were ‘found guilty’ and 12% were dealt with ex parte; Australian Bureau of Statistics (2011), above n 20, 101.
418 Children, Youth and Families Act 2005 (Vic) ss 571(1), 572. See also section 414(2)(b), which provides for a ‘further pre-sentence report’ to be prepared. A request for a Children’s Court Clinic report is made where a psychological, psychiatric or neuropsychological assessment of the child is required. See Jennifer Bowles, ‘Sentencing in the Children’s Court and the Sentencing of Young Offenders’ (Paper presented at the Judicial College of Victoria Sentencing Workshop, Melbourne, 26–27 May 2011) 11–12.
419 Children, Youth and Families Act 2005 (Vic) s 571(2). See also sections 410(1)(e), 412(1)(e).
420 Children, Youth and Families Act 2005 (Vic) s 571(3). See further section 571(4) for contents of the pre-sentence report.
421 Children, Youth and Families Act 2005 (Vic) s 358(a).
422 Children, Youth and Families Act 2005 (Vic) s 416(3)(b).
subject to other sentences and the circumstances of the offence for which the child has been found guilty.\textsuperscript{424} The report may also make recommendations as to an appropriate sentence to be imposed.\textsuperscript{425} Although the issue of non-judicial personnel making recommendations to the court as to sentencing was somewhat controversial in the past,\textsuperscript{426} nowadays it appears to be widely accepted.\textsuperscript{427}

Where a pre-sentence report is prepared, the child and the child’s legal representative must receive a copy,\textsuperscript{428} unless the report’s author considers that the report may be prejudicial to the child’s physical or mental health.\textsuperscript{429}

**Group conferencing**

Involvement in group conferencing is another matter to be taken into account by the court in the determination of sentence.

The Youth Justice Group Conferencing (YJGC) Program is a pre-sentence restorative justice option operating in the Criminal Division of the Children’s Court. The program began as a small pilot in 1995 and was expanded in 2002–03 to cover all metropolitan Children’s Courts and two rural courts. Following enactment of the CYF Act, which gave the program a legislative basis, the program was expanded statewide.\textsuperscript{430} Unlike in other Australian states and territories, which each have legislated restorative justice programs for young offenders,\textsuperscript{431} in Victoria, the Youth Justice Group Conferencing Program only takes referrals from the Children’s Court of Victoria. Community organisations are funded by the Department of Human Services to facilitate the conferences.\textsuperscript{432}

Under the Youth Justice Group Conferencing Program, if the Children’s Court is considering imposing a probation order or youth supervision order on a child,\textsuperscript{433} whereby the court considers the child suitable to participate in the program and the child consents to participating in the program, the court may defer sentencing the child for up to four months to enable a group conference to occur.\textsuperscript{434}

A group conference is a facilitated meeting attended by the offender, the offender’s family or support people and legal representative, police informant, victim(s) and their family or support people, or, if the victim does not wish to attend, a victim representative.\textsuperscript{435} The process aims to examine issues that may have contributed to the young person’s offending behaviour, to arrive at an outcome that is satisfactory to all participants (including the victim) and to divert the offender from the intensive supervisory sanctions that the court may otherwise impose.\textsuperscript{436}

\textsuperscript{424} *Children, Youth and Families Act 2005* (Vic) s 573. See also section 571(4) in relation to reports prepared for children who appear to be intellectually disabled.

\textsuperscript{425} *Children, Youth and Families Act 2005* (Vic) ss 573(3)–(4).


\textsuperscript{427} Fox and Freiberg (1999), above n 96, 159–160.

\textsuperscript{428} *Children, Youth and Families Act 2005* (Vic) s 575(1).

\textsuperscript{429} *Children, Youth and Families Act 2005* (Vic) s 575(2)(a). Furthermore, the child can object to the report being forwarded: *Children, Youth and Families Act 2005* (Vic) s 575(2)(b).

\textsuperscript{430} This occurred from October 2006. The 2011–12 state budget allocated $5.15 million over four years to increase the number of conferences from 170 to 370 annually.

\textsuperscript{431} Richards (2009), above n 17, 71.

\textsuperscript{432} The Australian Institute of Criminology has noted that this ‘may inflate the number of juveniles appearing before the court in Victoria in comparison with other jurisdictions’: ibid 71.

\textsuperscript{433} *Children, Youth and Families Act 2005* (Vic) s 415(1).

\textsuperscript{434} *Children, Youth and Families Act 2005* (Vic) s 414(1).

\textsuperscript{435} *Children, Youth and Families Act 2005* (Vic) s 415. Certain people must, pursuant to section 415(6), attend the conference: the child (offender), offender’s legal representative, police informant and convenor. The offender’s family or support people, the victim and the victim’s support people may attend: *Children, Youth and Families Act 2005* (Vic) s 415(7). However, in practice approximately 90% of group conferences include some kind of victim participation, and family members attended more than half of the conferences: KPMG for Department of Human Services, *Review of the Youth Justice Group Conferencing Program, Final Report* (2010) 33–35.

\textsuperscript{436} KPMG for Department of Human Services (2010), above n 435.
The objectives of the conference, as set out in the CYF Act, are:

(a) to increase the child’s understanding of the effect of his or her offending on the victim and the community;

(b) to reduce the likelihood of the child reoffending; and

(c) to negotiate an outcome plan that is agreed to by the child.

An outcome plan is ‘a plan designed to assist the child to take responsibility and make reparation for his or her actions and to reduce the likelihood of the child re-offending’. The court must order the production of a group conference report if it makes a deferral for the purposes of a group conference. The report, and any evidence provided by the author of the report are admissible at the adjourned hearing date.

In determining the appropriate sentence for a child, the court must have regard to the fact of the child’s participation in a group conference, the child’s behaviour during the period of deferral and the contents of the group conference report.

Successful completion of Youth Justice Group Conferencing entitles a child to a reduction in sentence. Where a child participates in a group conference and agrees to the outcome plan developed through the process, the court must impose a less severe sentence than it would otherwise have imposed (although the discount need not be recorded). The court must not, however, impose a more severe sentence than it would have otherwise if the child fails to participate in the group conference.

No data were available to the Council that would indicate whether offenders have participated in group conferencing. It is therefore not possible to analyse sentencing outcomes for those participating in the program. However, it has been suggested that group conferencing may have contributed to the relatively high numbers of good behaviour bonds and probation orders imposed after 2006 for (sometimes) serious offences.

Some indication of sentencing outcomes can be obtained from reviews conducted of the program. In 2006, the Department of Human Services commissioned a review of the pilot program, which reported that 86% of participants received a good behaviour bond following successful completion of the conference process.

A 2010 evaluation of the Youth Justice Group Conferencing Program by KPMG for the Department of Human Services (considering the period from September 2009 to September 2010) reported that 75.5% of participants received a non-supervisory order at sentencing.

The most common offences that led to group conferencing were burglary (28%), recklessly causing serious injury (8.6%), unlawful assault (8.1%), criminal damage (6.5%), intentionally causing injury (5.9%), armed robbery (5.4%) and theft of a motor vehicle (5.4%).

The 2010 evaluation found that recidivism rates for young offenders who had participated in Youth Justice Group Conferencing were much lower within two years after a conference than the rates for offenders who

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437 Children, Youth and Families Act 2005 (Vic) s 415(4).
438 Children, Youth and Families Act 2005 (Vic) s 415(5).
439 Children, Youth and Families Act 2005 (Vic) s 414(2)(c).
440 Children, Youth and Families Act 2005 (Vic) s 416(3)(d).
441 Children, Youth and Families Act 2005 (Vic) ss 416(3)(a), (c), (d).
442 Children, Youth and Families Act 2005 (Vic) s 362(3).
443 Children, Youth and Families Act 2005 (Vic) s 362(4).
444 Meeting with Children’s Court of Victoria (23 February 2011). See Chapter 9 for sentence distributions.
446 Ibid 37.
447 Ibid 40.
had been given probation or youth supervision orders. Within two years of completing a group conference, only 19.2% of participants had reoffended, compared with 42.9% of offenders who had received a probation or youth supervision order.448

The 2010 evaluation reported a very high degree of satisfaction among participants with their involvement in the group conferencing process.449

**Assisting authorities**

Section 362(5) of the CYF Act anticipates that the court may impose a less severe sanction than it would otherwise where a child undertakes to assist law enforcement agencies after sentencing. The court is not required to specify the amount of reduction – only to announce whether such a reduction has been made.450

Significant reasons of public policy underlie the reduction in sentence for cooperation with authorities. As stated by O’Bryan AJA:

> Leniency is extended to an informer; firstly because it is in the interests of the community to encourage informer[s], secondly because the informer is exposed to a risk in prison and within the community when the informer’s conduct becomes known.451

**Other mitigating and aggravating factors**

*Factors relating to the child*

Under section 358(d) of the CYF Act, where a child is found guilty of an offence, prior convictions and findings of guilt may be taken into account as admissible evidence in the determination of sentence. Specific reference is also made to the ‘character and antecedents of the child’ in determining whether a good behaviour bond should be imposed under section 367(1)(b).

Characteristics of the offender, such as age and evidence of prior criminality, are also ordinarily relevant to a determination of the child’s rehabilitative potential (as well as to the assessment of other sentencing principles in section 362). As stated by the President of the Children’s Court, Judge Grant, in *R v P*:

> As a general principle the law has always recognised the importance of rehabilitation as a sentencing principle for the young offender – particularly the young first offender.452

The age of the child may bear on the assessment of the child’s culpability and rehabilitative prospects.453 These are still dependent on other characteristics of the offender and the offence, but the younger the child is, the less responsibility that is likely to be attributed to the child for his or her actions, and the greater

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448 Ibid 39. The report noted that, due to the small sample size, the review could not determine the impact of personal characteristics, such as age, gender or Aboriginal status, on recidivism: ibid 40. A recent UK Ministry of Justice Green Paper reported an ‘unacceptably high level of re-offending’ (68% within a year) for young people on community sentences (and an even higher rate for those released from detention). One of the commitments to action aimed at preventing young people from offending is to ‘increase the use of restorative justice’, which is reported as being ‘already a key part of youth justice’. Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing for Offenders*, Cmd 7972 (2010) 67, 69. The NSW Bureau of Crime Statistics and Research recently found a higher than expected rate of recorveron among juveniles dealt with through a Youth Justice Conference and recommended a ‘thorough evaluation’ to determine whether these conferences are becoming less effective over time in reducing juvenile recidivism: Nadine Smith, ‘Why Is the NSW Juvenile Reconviction Rate Higher than Expected?’ *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* 146 (2010) 11.

449 One hundred percent of surveyed victims and family members and 91% of surveyed young offenders strongly agreed or agreed with the statement: “[o]verall, I was satisfied with my involvement with the whole Group Conferencing Process”: KPMG for Department of Human Services (2010), above n 435, 57.

450 *Children, Youth and Families Act 2005* (Vic) s 362(6).


452 *R v P and ors* [2007] VChC 3 (5 November 2007) [18] (Judge Grant) (emphasis added).

453 *CNK v The Queen* [2011] VSCA 228 (10 August 2011) [63], [71], [75] (Maxwell P, Harper JA and Lasry AJA).
the emphasis that is likely to be placed on the need for rehabilitative, non-custodial options.\footnote{Age of itself is, however; 'not conclusive proof of immaturity': Fox and Freiberg (1999), above n 96, 274.} Children of younger ages are also more likely to be first-time offenders.\footnote{Ibid 273.}

Prior convictions and findings of guilt – but not prior police cautions\footnote{\textit{Y v F} (2002) 130 A Crim R 11, 22 (McDonald J). In that case, the taking into account of a formal caution by the Children’s Court magistrate was held to be an error of law. See further Power (2011), above n 3, [11.4.3] (‘Sentencing’).} – are also particularly influential in the determination of sentence in the Children’s Court. Although no Victorian data are available relating to prior offences for children sentenced in the Children’s Court, discussions with the Children’s Court suggest that detention and more severe supervisory penalties are reserved for persistent offenders or young offenders who have committed a particularly serious offence (again, generally as a repeat offender).\footnote{Meeting with Children’s Court of Victoria (23 February 2011).} The relevance of prior offending to the imposition of custodial sentences is implicitly referred to in section 397, which provides for the option of imposing a youth attendance order where the ‘child would otherwise be sentenced to detention in a youth justice centre as a result of the gravity or habitual nature of the child’s unlawful behaviour’.\footnote{\textit{Children, Youth and Families Act 2005} (Vic) s 397(1)(a) (emphasis added).} Those without prior convictions may be regarded as having better prospects for rehabilitation and, therefore, depending on the nature of the offence, may be more likely to be granted the opportunity to remain in the community (whether on a supervisory order or otherwise).\footnote{R v Fuller-Cust (2002) 6 VR 496, 520 (Eames JA).}

Other personal characteristics relevant to the determination of rehabilitative potential and to an assessment of the suitability of sentence (among other sentencing principles in section 362) include cognitive impairment, mental illness, social and economic considerations, substance abuse issues and willingness to participate in treatment programs.\footnote{\textit{R v P and ors} [2007] VChC 3 (5 November 2007) [22], [27]–[28]; \textit{R v M and others} [2008] VChC 4 (12 February 2008) [22], [27]–[28].\textit{ Neal v The Queen} (1982) 149 CLR 305, 326 (Brennan J); Director of Public Prosecutions v Terrick; Director of Public Prosecutions v Marks; Director of Public Prosecutions v Stewart (2009) 24 VR 457, 468–469. See further Judicial College of Victoria, Victorian Sentencing Manual (Judicial College of Victoria, 2011) <www.justice.vic.gov.au/emanuals/VSM/default.htm> at 27 September 2010, [10.5.3].} Protective factors personal to the offender may also be relevant. Some personal characteristics may be both mitigating and aggravating in effect. For example, the culpability of an offender and the need for offenders to be aware of their responsibility for actions taken under section 362(1)(f) may be reduced by the existence of mental illness (where the illness does not amount to insanity). However, depending on the nature of the offence and other characteristics specific to the offender, significant weight may also be placed on the need to protect the community (pursuant to section 362(1)(g)) in formulating an appropriate response to the offending behaviour.

Indigenous or ethnic identity is not itself a personal characteristic to be taken into account in determining sentence.\footnote{\textit{Director of Public Prosecutions v Terrick}; Director of Public Prosecutions v Marks; Director of Public Prosecutions v Stewart (2009) 24 VR 457, 469.} However, the factors associated with Indigenous or ethnic identification may be taken into account where relevant.\footnote{R v Fuller-Cust (2002) 6 VR 496, 520 (Eames JA).} In particular, ‘the social and economic disadvantages often faced in Indigenous communities are powerful considerations’.\footnote{\textit{Director of Public Prosecutions v Terrick}; Director of Public Prosecutions v Marks; Director of Public Prosecutions v Stewart (2009) 24 VR 457, 469.}

The fact that a child is the subject, or has been the subject, of a Family Division order, cannot be taken into account as a factor increasing sentence severity.464

Factors relating to the offence

While the seriousness of offending behaviour is not expressly referred to in the section 362 sentencing principles, the relevance of offence gravity to sentence determination is clearly implied in several sections of the CYF Act.465 To impose a youth residential centre order, the court must be 'satisfied that the circumstances and the nature of the offence are sufficiently serious.'466 The 'gravity' of offending behaviour is also relevant, at least by implication, to the imposition of a youth justice centre order,467 and to the requirements of and activities to be undertaken under a youth attendance order.468 At what may be the other end of the seriousness spectrum, the court is required to consider the nature of the offence in determining whether to impose a good behaviour bond.469

The nature of offending also clearly informs the application of sentencing principles in section 362. An example is the community protection principle, which requires the court to consider, in appropriate cases, the need to protect the community or any person from the violent or other wrongful acts of the child. In doing so, the court would need to consider the nature of the offence for which it is sentencing the child and, in particular, the level of any violence inflicted by the child as part of the offence. The suitability of sentence and the accountability principle may also require consideration of the nature of the offence in appropriate cases.

In very exceptional cases, the particularly serious nature of offending, combined with other factors, may require the court to exclude its own jurisdiction to hear the matter.470

Other

Other matters that may be taken into account in sentencing include Victim Impact Statements and the submissions of the offender and the police prosecutor or informant.471 Victim Impact Statements may assist the court in determining the impact of a crime on those directly impacted by offending behaviour.472 Statements may include evidence of the impact of the offence on the victim and evidence of any injury, loss (such as economic loss) or other damage suffered by the victim as a direct consequence of the offence.473 The statement, or part of the statement, may be read aloud in court.474

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464 Children, Youth and Families Act 2005 (Vic) s 584.
466 Children, Youth and Families Act 2005 (Vic) s 410(1)(c).
467 A youth attendance order may only be imposed where a child would otherwise be sentenced to a youth justice centre order given the ‘gravity or habitual nature’ of offending: Children, Youth and Families Act 2005 (Vic) s 397(1)(a) (emphasis added).
468 Children, Youth and Families Act 2005 (Vic) s 405(a). See also section 397(1)(a).
469 Children, Youth and Families Act 2005 (Vic) s 367(1)(a). Note also that the circumstances of the offence may be included in pre-sentencing reports, which, when prepared, must be taken into account in the determination of sentence: Children, Youth and Families Act 2005 (Vic) ss 416(3), 573(1)(b).
470 See, for example, Victoria Police v CB [2010] VChC 3 (24 June 2010).
471 Children, Youth and Families Act 2005 (Vic) ss 358(c), (e), (f).
473 Children, Youth and Families Act 2005 (Vic) s 359(4).
474 Children, Youth and Families Act 2005 (Vic) ss 359(12)–(12B).
Sentencing procedures

As with most Magistrates' Court matters, proceedings in the Criminal Division of the Children’s Court are generally open to the public.\(^{475}\)

In recognition of the particular vulnerability of children charged with criminal offences, the CYF Act sets out a number of procedural guidelines designed to protect an accused child and to enhance the child’s ability to understand and properly participate in proceedings.\(^{476}\)

The child may also be assisted in addressing the underlying causes of offending behaviour through procedural mechanisms, such as the court’s power to defer sentencing.

Comprehension of and participation in proceedings

Section 522 requires the court to take steps to ensure that the proceedings are comprehensible to the child, the child’s parents and others with a direct interest in the proceedings. The court must satisfy itself that the child understands the nature and implications of the proceedings. Any orders made by the court must be explained in a plain and simple (rather than legalistic) manner that the child and other relevant parties are likely to understand.\(^{477}\) If the child (or another relevant party) has difficulty in communicating in English, the court is required to conduct its processes and explain any orders through an interpreter.\(^{478}\)

In addition to language, the court must respect the cultural identity of the child and the child’s family.\(^{479}\) Respect for cultural identity is most clearly manifested in the operation of the Children’s Koori Court Division, which aims to foster a culturally relevant, comprehensible and inclusive court process for young Koori offenders.

Children must not only understand proceedings, but they must also be able to ‘participate fully’ in proceedings and decisions that affect them,\(^{480}\) with any wishes expressed by the child required to be taken into account by the Children’s Court.\(^{481}\)

The Australian Law Reform Commission (ALRC) in its report *Seen and Heard: Priority for Children in the Legal Process* describes the physical environment of the court as influential to a child’s comprehension of and participation in proceedings, ‘particularly if the child feels intimidated into silence’.\(^{482}\) With the intention of creating a less intimidating court environment for child offenders, courtrooms in the Melbourne Children’s Court display large windows to allow for a greater amount of natural light and are furnished with light colours.\(^{483}\) As in the Magistrates’ Court, wigs and gowns are not worn.

A child’s comprehension of and participation in proceedings is largely facilitated by legal representation. Under the CYF Act, a child must be legally represented if alleged to have committed an offence that, if

\(^{475}\) *Children, Youth and Families Act 2005* (Vic) s 523. See further Power (2011), above n 3, [2.7] (‘Court Overview’).

\(^{476}\) Fox and Freiberg (1999), above n 96, 838. These procedural guidelines are set out in the Second Reading Speech to the Children and Young Persons Bill: Victoria, *Parliamentary Debates*, Legislative Assembly, 8 December 1988, 1151–1152 (Peter Spyker, Minister for Community Services); *Herald and Weekly Times Pty Ltd v AB* [2008] VChC 3 (20 May 2008) [19] (Judge Grant).

\(^{477}\) *Children, Youth and Families Act 2005* (Vic) ss 522(1)(b), 527(1).

\(^{478}\) *Children, Youth and Families Act 2005* (Vic) ss 526, 527(2).

\(^{479}\) *Children, Youth and Families Act 2005* (Vic) s 522(1)(e).


\(^{481}\) *Children, Youth and Families Act 2005* (Vic) s 522(1)(d).


\(^{483}\) Visit to Children’s Court of Victoria, Melbourne (18 November 2010).
committed by an adult, would be punishable by imprisonment. Legal representation is also required where bail is being contested and in relation to breach proceedings for accountable undertakings, bond, probation and youth supervision and youth attendance orders imposed by the court that relate to offences punishable by imprisonment (in the case of an adult).484 If in any such proceedings a child does not have separate legal representation, the court must adjourn the proceedings to enable the child to obtain representation.485

Most children receive legal representation through Victoria Legal Aid. Other children are represented in court through private lawyers and specialist services such as the Aboriginal Legal Service.

Protecting the child

A number of procedural guidelines in the CYF Act are directed at protecting children charged with criminal offences from the stigma associated with criminal justice proceedings and from potential abuses of various kinds.

Procedural steps to minimise stigma

The court must take steps to minimise the stigma associated with the child’s participation in criminal proceedings.486 (see, for example, the emphasis on avoiding convictions where possible).487

There is also a general restriction on the publication of details that may identify a child involved in the proceedings.488 A person who, without permission, publishes material likely to identify the child (such as the child’s name, address or physical description) may be subject to a fine of 100 penalty units or a term of imprisonment. This restriction, which places the interests of the child ‘ahead of the community’s right to know who that person is’,489 as stated by Judge Grant in Herald and Weekly Times Pty Ltd v AB,490 is ‘soundly based in legal principle and is consistent with the human rights covenants’.491 It is ‘well established’ both in Australia and ‘throughout the common law world’.492 The aim of the non-identification principle is ‘to protect a young person appearing in the Criminal Division from the indignity of being labelled a criminal and the stigma that attaches to that description’,493 and therefore to prevent any detrimental impact on the child’s

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484 Children, Youth and Families Act 2005 (Vic) s 525(2). Legal representation is also required where proceedings involve the review of fines imposed for offences punishable, in the case of an adult, by imprisonment: Children, Youth and Families Act 2005 (Vic) s 525(2)(d).

485 Children, Youth and Families Act 2005 (Vic) s 524(2). The court cannot resume the hearing unless the child is legally represented, or if the court is satisfied that the child had reasonable opportunity to obtain legal representation and has failed to do so: Children, Youth and Families Act 2005 (Vic) ss 524(2)–(3).

486 Children, Youth and Families Act 2005 (Vic) ss 522(1)(e)–(f).


488 Children, Youth and Families Act 2005 (Vic) s 534. See also definition of ‘publish’: Children, Youth and Families Act 2005 (Vic) s 3. Higher courts have taken care to ‘anonymise references’ made to child offenders and surviving victims and their families in sentencing remarks: R v BC [2011] (Unreported, County Court of Victoria, Judge Thornton, 18 May 2011) [1] (Thornton J). Care has also been taken to de-identify sentencing remarks in the few cases that have been published on the Children’s Court website.

489 R v SJK and GAS [2006] VSC 335 (27 September 2006) [38] (Gillard J) citing Transcript of Proceedings (Supreme Court of Victoria, Bongiorno J, 11 October 2001) 54. Bongiorno J had imposed a suppression order that the Herald and Weekly Times sought to vacate in R v SJK and GAS.

490 Herald and Weekly Times Pty Ltd v AB [2008] VChC 3 (20 May 2008). That case involved a request for permission under Children, Youth and Families Act 2005 (Vic) s 534(1) for the publication of details identifying a child who had joined a popular national television show.

491 Herald and Weekly Times Pty Ltd v AB [2008] VChC 3 (20 May 2008) [20]. See further [15]–[16], which makes reference to the Beijing Rules and the official commentary to the Beijing Rules: the Beijing Rules, rr 8.1, 8.2.


493 Herald and Weekly Times Pty Ltd v AB [2008] VChC 3 (20 May 2008) [19]. According to criminological research into the labelling of offenders, identifying children as criminal or deviant may result in secondary, ‘amplified’ deviance.
rehabilitation that may be caused by publication. In emphasising the connection between publication and rehabilitation in *Herald and Weekly Times Pty Ltd v AB*, Judge Grant notes as ‘pertinent’ the observations of US Supreme Court Chief Justice William Rehnquist:

Publication of the names of juvenile offenders may seriously impair the rehabilitative goals of the juvenile justice system and handicap the youths’ prospects for adjustment in society and acceptance by the public.

The President of the Children’s Court, and in some cases the Secretary may give permission for identifying material to be published. However, this has rarely been done. Instances where permission has been granted include an attempt to locate a missing child who escaped from a detention facility where the child was serving time for a serious indictable offence, and a television show that published the story of a child’s successful rehabilitation (with the consent of the child and the child’s family).

**Other protections**

Other protections set out in the CYF Act include the requirement that, unless exceptional circumstances exist, children be proceeded against by summons rather than by arrest. There are also restrictions on remand and bail. A child cannot have bail refused only on the basis that the child has inadequate or no accommodation, and children must not be held on remand for more than 21 days.

Some legislated protections are, however, at times undercut by practical difficulties. The lack of accommodation and treatment facilities for the mentally ill may, for example, contribute to the high remand rate of those with mental health problems – despite the protection in section 346(9). As observed by Jesuit Social Services in their recent report *Young People on Remand in Victoria: Balancing Individual and Community Interests*, ‘[p]eople with mental health problems are remanded into custody at [a] much higher rate than other prisoners and the general population’. A legal aid worker is quoted in the report as saying:

One of the major issues we’ve come across recently is that the remand system seems to have become the dumping ground for people with mental health problems and with intellectual disabilities … There has been a massive increase of people with mental health issues who are in the remand system and who’ve got nowhere to go.

**Notes**

494 The importance of restricting identification of children in criminal proceedings was also referred to in *R v SJK and GAS* [2006] VSC 335 (27 September 2006) [38]–[43] (Gillard J).


497 *Children, Youth and Families Act 2005* (Vic) ss 534(1)–(3).

498 Permission was granted under the former *Children and Young Persons Act 1989* (Vic), by the former President of the Children’s Court of Victoria, Judge Coate: see *Herald and Weekly Times Pty Ltd v AB* [2008] VChC 3 (20 May 2008) [11], [21] (Judge Grant).

499 *Children, Youth and Families Act 2005* (Vic) s 345(1).

500 *Children, Youth and Families Act 2005* (Vic) s 346(9).

501 *Children, Youth and Families Act 2005* (Vic) s 346(3)(b). Children on remand are to be placed in a remand centre: *Children, Youth and Families Act 2005* (Vic) s 347(1). A child may, however, be remanded in a police jail or another facility where this is provided for in regulations (in relation to prescribed regions). Where remanded in a police jail, the child has the right to be separated from adults and from those of the opposite sex: *Children, Youth and Families Act 2005* (Vic) s 347(2). See further Power (2011), above n 3, [9.1.2] (‘Custody and Bail’).

502 See page 174, ‘Remand and bail’.


504 Ibid (citations omitted).
Deferral of sentence

The CYF Act enables the court to defer sentencing for up to four months if it thinks it is ‘in the interests of the child’ and the child agrees to the deferral. Deferral may be ordered to enable, for example, a pre-sentence report or a further pre-sentence report to be prepared or so that a group conference can take place (provided that the criteria for group conferencing are met). As stated by Magistrate Bowles, “it is rare for the court not to request a pre-sentence report or deferral report to be provided by Youth Justice when a matter is deferred.” During deferral, the child is released either unconditionally or on bail.

The deferral process may assist magistrates to determine the most appropriate sentencing outcome to address the particular needs of the accused. For example, where the court defers sentencing to enable a pre-sentence report, the report may indicate matters relevant to individual treatment needs of the child and may advise the magistrate on an appropriate sentencing outcome given the matters identified. Deferral may also enable magistrates to manage offenders for a period of time prior to sentencing and to encourage compliance with programs (such as treatment programs) undertaken during deferral. As stated by Magistrate Fleming of the Dandenong Children’s Court, children may be more likely to follow Youth Justice programs if a magistrate warns them that they will be locked up otherwise.

The deferral process may also provide an incentive for accused persons to address underlying causes of offending and to alter their behaviour. On return to the court after the deferral period, the court must, in sentencing the child, take into account the child’s behaviour during deferral. The court must also take into account the contents of any group conference or pre-sentence reports and any other relevant matter, with successful completion of group conferencing compelling a reduction in sentence.

According to some attendees at the Council’s roundtable meeting, there may be a difference in the use made of deferral between rural and city courts. As stated by these participants, deferral may be used less frequently in rural areas for reasons including the disinclination of Circuit Court magistrates to hold on to matters if they are uncertain when they may next be listed in that area, the possibility that rural magistrates may not work in the Children’s Court as frequently as in the Magistrates’ Court (and therefore may not use deferral as often), and the likelihood that Melbourne magistrates, when sent to rural areas to relieve rural magistrates (for example, when on leave), may not want to retain part-heard cases.

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505 Children, Youth and Families Act 2005 (Vic) ss 360(2), 414(1).
506 Children, Youth and Families Act 2005 (Vic) s 414.
507 Bowles (2011), above n 418, 11.
508 Children, Youth and Families Act 2005 (Vic) s 414(2)(a).
509 Meeting with Children’s Court of Victoria (15 April 2011).
510 Victoria, Parliamentary Debates, Legislative Council, 5 May 1999, 425 (Louise Asher; Minister for Small Business). Minister Asher commented on the value of deferred sentencing in the Children’s Court and more generally in the context of a proposal to extend the availability of deferred sentencing to offenders under the age of 25: ibid 426.
511 Children, Youth and Families Act 2005 (Vic) s 416(3)(a).
512 Children, Youth and Families Act 2005 (Vic) ss 416(3)(c)–(e). See also section 358(b).
513 Children, Youth and Families Act 2005 (Vic) s 362(3): where a child participates in a group conference and agrees to the outcome plan developed through the process, the court must impose a less severe sentence than it would have otherwise.
514 Stakeholder Roundtable Meeting (24 March 2011). See Appendix 2 for a list of participating organisations.
515 While the Magistrates’ Court does have the power to defer sentencing, this power is currently limited to individuals aged 18 to under 25 years: Sentencing Act 1991 (Vic) ss 7(2), 83A. The Council has previously recommended that the age restriction applying to the power to defer be removed: Sentencing Advisory Council, Suspended Sentences and Intermediate Sentencing Orders, Suspended Sentences Final Report Part 2 (2008) 275 (Recommendation 13–1). This has been incorporated into the Sentencing Amendment Act 2010 (Vic) s 21(1)(b), which became operative on 1 January 2012.
Chapter 7
Sentencing options in the Children’s Court

The orders the court may make if a child is found guilty of either an indictable or a summary offence form a ‘sentencing hierarchy’. Sanctions are listed in section 360 of the Children, Youth and Families Act 2005 (Vic) (‘CYF Act’) in order of increasing severity. The principle of parsimony precludes a magistrate from imposing a more severe sentence if a lower sentencing order is appropriate. This principle positions detention as a sanction of last resort. The principle of parsimony is also applicable to the sentencing of adults under the Sentencing Act 1991 (Vic). However, the emphasis placed on non-custodial responses to offending behaviour is greater in the Children’s Court, due to the principles the Children’s Court must take into account in determining sentence under section 362(1).

Offenders sentenced under the CYF Act are subject to a different set of sanctions from those applicable under the Sentencing Act 1991 (Vic). Sanctions differ in type (the CYF Act sanctions are set out below) and in the purposes for which they are imposed. Sanctions also differ in scale, with those under the CYF Act less punitive than those under the Sentencing Act 1991 (Vic).

The most severe sanction that may be imposed under the CYF Act is a detention order in a youth justice centre (if the child is aged 15 years or above) or in a youth residential centre (if the child is under 15 years of age). Custodial orders under the CYF Act may not exceed the maximum term applicable for an adult committing that offence, with the maximum aggregate term capped at three years for a child aged 15 years or over (two years for a single offence) and two years for a child between 10 years and under 15 years of age (one year for a single offence). In contrast, a person may be sentenced to life imprisonment without parole under the Sentencing Act 1991 (Vic).

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516 Children, Youth and Families Act 2005 (Vic) s 361.
517 Sentencing Act 1991 (Vic) s 5(3). See also section 5(4).
518 See Chapter 6 for a discussion of the sentencing principles in the Children’s Court.
519 Fox and Freiberg (1999), above n 96, 827. See also Chapter 6.
520 Children, Youth and Families Act 2005 (Vic) ss 360(1)(j), 412–413.
521 Children, Youth and Families Act 2005 (Vic) ss 360(1)(i), 410–411.
522 Children, Youth and Families Act 2005 (Vic) ss 413(2)–(3).
523 Children, Youth and Families Act 2005 (Vic) ss 411(1)–2.
524 Sentencing Act 1991 (Vic) ss 9–18, 109(1). Note also the operation of ‘indefinite detention’ provisions: Sentencing Act 1991 (Vic) ss 18A–18P.
Other CYF Act sanctions, such as fines, are also less severe than those applicable under the Sentencing Act 1991 (Vic).\(^{525}\) The maximum fine for a child aged 15 years or over is 10 penalty units (five penalty units for a single offence), whereas the maximum fine for a child under 15 years of age is two penalty units (one penalty unit for a single offence).\(^{526}\) Fine amounts must also be less than the amount that can be imposed on an adult for a similar offence.

The development of alternative, less punitive sanctions for young offenders is justified on the basis that young offenders ‘lack the degree of insight, judgement and self-control that is possessed’\(^ {527}\) by adult offenders and do not therefore generally ‘deserve’ the same degree of punishment as adults.\(^ {528}\)

The following section describes the various sentencing orders the Children’s Court can make.

**Dismissal**

If the court finds the child guilty of an offence, it may dismiss the charge with no conviction recorded.\(^ {529}\) In the Children’s Court data set, a matter may also be recorded as ‘dismissed’ where it is not proven.\(^ {530}\) In a small number of cases, the matter may be finalised without a plea or finding of guilt. These cases include those where the matter is ‘struck out’ or sent for committal to another court, or where the accused successfully undertakes a diversion program such as ‘Ropes’.

- **Struck-out:** a charge can be struck out if it is withdrawn by the prosecution or if the magistrate determines that it should not proceed. If all charges in the case are struck out, the case is finalised without a finding of guilt.

- **Comittal elsewhere:** a Children’s Court case involving indictable offences may be sent to a higher court if the Children’s Court considers the case unsuitable to be heard summarily given the existence of ‘exceptional circumstances’.\(^ {531}\) If this occurs, the case in the Children’s Court is finalised without a finding of guilt.

- **‘Ropes’ Program:**\(^ {532}\) one of the conditions to enter this diversion program is to admit responsibility for the offending; however, no formal finding of guilt is declared. If the accused successfully completes the program, charges are dismissed without any finding of guilt.

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\(^{525}\) Compare, for example, Sentencing Act 1991 (Vic) s 109 with Children, Youth and Families Act 2005 (Vic) ss 373–379.

\(^{526}\) Children, Youth and Families Act 2005 (Vic) s 373.

\(^{527}\) Director of Public Prosecutions v TY (No 3) (2007) 18 VR 241, 242 (Bell J).


\(^{529}\) Children, Youth and Families Act 2005 (Vic) s 360(1)(a).

\(^{530}\) See Appendix 1 for a discussion of data methodology. Due to coding problems evident within the data set, which made it difficult to determine whether dismissed or discharged matters were proven or not proven, all cases that were recorded as receiving a dismissal, discharge or ‘convicted and discharged’ disposition were excluded from the Council’s data analysis. Discussions with the Children’s Court revealed that the majority of dismissals and discharges are for proven cases.

\(^{531}\) Children, Youth and Families Act 2005 (Vic) s 356(3)(b). This occurs only very rarely. See Chapter 11 for a discussion of young persons’ matters heard in the higher courts.

\(^{532}\) ‘Ropes’ is discussed in Chapter 4.
Non-accountable undertaking

A non-accountable undertaking (NAU) involves the court ordering a child\textsuperscript{533} to provide an undertaking to do or to refrain from doing particular acts for a specified period of time.\textsuperscript{534} The duration of a non-accountable undertaking is generally six months or less; however, in exceptional circumstances, the undertaking may be for 12 months.

Where a non-accountable undertaking is imposed, no conviction is recorded and the charge against the accused is dismissed. An undertaking may be given in relation to one offence or multiple offences. Conditions may or may not be imposed as part of a non-accountable undertaking.\textsuperscript{535}

Unlike for breach of an accountable undertaking (see below), no action can be taken by the court for breach of a non-accountable undertaking.\textsuperscript{536}

Accountable undertaking

An accountable undertaking (AU) involves the court ordering a child to provide an undertaking of the kind referred to above (see non-accountable undertaking), together with an order that the child be made accountable for any breaches of the undertaking.\textsuperscript{537} No conviction is recorded.

Where an accountable undertaking appears to be breached, the court may direct the accused person and the accused person’s parent (if the child is under 15 years of age) to appear before the court,\textsuperscript{538} with the court to be presided by the same magistrate who ordered the accountable undertaking (if still holding office).\textsuperscript{539} In response to breach, the court may cancel the undertaking, continue or vary the undertaking (the duration of the accountable undertaking cannot, however, be extended) or revoke the order dismissing the charge and impose a fine not exceeding one penalty unit.\textsuperscript{540}

\begin{footnotes}
\textsuperscript{533} If the child is under 15 years of age, a parent or guardian will be required to provide the undertaking: \textit{Children, Youth and Families Act 2005 (Vic) s 363(I)(b)}.
\textsuperscript{534} \textit{Children, Youth and Families Act 2005 (Vic) ss 360(I)(b), 363–364}.
\textsuperscript{535} \textit{Children, Youth and Families Act 2005 (Vic) s 363}.
\textsuperscript{536} \textit{Children, Youth and Families Act 2005 (Vic) s 364}.
\textsuperscript{537} \textit{Children, Youth and Families Act 2005 (Vic) ss 360(I)(c), 365–366}.
\textsuperscript{538} \textit{Children, Youth and Families Act 2005 (Vic) s 366}.
\textsuperscript{539} \textit{Children, Youth and Families Act 2005 (Vic) s 366(3)(b)(ii)}.
\textsuperscript{540} \textit{Children, Youth and Families Act 2005 (Vic) s 366(5)}.
\end{footnotes}
Good behaviour bond

A good behaviour bond (GBB) is an order that a child be granted an adjournment for up to 12 months (without conviction), during which time the child must remain of good behaviour, enter into a bond for a specified amount, appear before the court if required to do so and observe any other special conditions. Sometimes defence counsel will suggest individual-based conditions, such as continuing to attend a private psychologist.

In exceptional circumstances (and where the child is 15 years or more on the date of adjournment), the adjournment for a good behaviour bond may be for up to 18 months.

An adjournment for a good behaviour bond may be granted if the court considers it 'expedient', having regard to the nature of the offence, the character, including the criminal history, of the child and whether or not the child recorded a guilty plea. During the adjournment, the child will be allowed to 'go at large' in the community – unless the child is serving, or is about to serve, a term of detention for a different offence, in which case the adjournment for the good behaviour bond will occur on discharge from detention. A good behaviour bond may be entered into in relation to one or more offences.

If, after the adjournment, the court is satisfied the child has observed the conditions of the bond, the court must dismiss the charge.

If the child breaches the good behaviour bond by failing to be of good behaviour or failing to observe any condition of the bond, the court may either declare the bond forfeited (and impose no penalty) or proceed with hearing and determining the charge (with the same options to deal with the child as were available before the grant of the adjournment).

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541 Children, Youth and Families Act 2005 (Vic) ss 360(1)(d), 367.
542 Children, Youth and Families Act 2005 (Vic) s 367(3)(c).
543 Children, Youth and Families Act 2005 (Vic) s 367(3). The amount of the bond must not exceed one-half of the maximum fine that may be ordered under the fine provision, section 373 (see ‘Fine’ below).
544 Children, Youth and Families Act 2005 (Vic) ss 367(3)(a)–(b). See also section 369.
545 Children, Youth and Families Act 2005 (Vic) s 367(3)(d).
546 Meeting with Children’s Court of Victoria (23 February 2011).
547 Children, Youth and Families Act 2005 (Vic) s 367(2)(b).
548 Children, Youth and Families Act 2005 (Vic) s 367(1).
549 Children, Youth and Families Act 2005 (Vic) ss 367(5)–(6).
550 Children, Youth and Families Act 2005 (Vic) s 367(4).
551 Children, Youth and Families Act 2005 (Vic) s 368.
552 Children, Youth and Families Act 2005 (Vic) s 371(5).
Fine

Where a child is found guilty of either an indictable or a summary offence, the court may order that a monetary penalty be imposed, with or without recording a conviction.\textsuperscript{553} Fine amounts for specific offences are referred to in penalty units, which are indexed annually.\textsuperscript{554} For the financial year commencing 1 July 2011 the penalty unit amount is $122.14.\textsuperscript{555}

The fine for a particular offence must not exceed five penalty units per offence (for a child aged 15 years or over) or one penalty unit per offence for a child under 15 years of age, and must be lower than the maximum amount that can be imposed on an adult for the same offence.\textsuperscript{556} Where the fine is imposed in respect of more than one offence, the fine cannot be greater than 10 penalty units for a child aged 15 years or over or an aggregate of two penalty units for a child under 15 years of age.\textsuperscript{557} In determining the fine amount, the court must take into account the financial circumstances of the child.\textsuperscript{558} The court must order the fine to be paid by instalments if the child so requests.\textsuperscript{559}

The options available to the court where there has been default of payment of a fine or instalment for more than one month are set out in section 378 of the CYF Act. These include not enforcing the fine, varying the fine or instalment, adjourning proceedings for up to six months, levying unpaid amounts by seizing property or releasing the child on a probation or youth supervision order for up to three months.\textsuperscript{560}

\textsuperscript{553} Children, Youth and Families Act 2005 (Vic) ss 360(1)(e), 373–379.
\textsuperscript{554} See Monetary Units Act 2004 (Vic).
\textsuperscript{556} Children, Youth and Families Act 2005 (Vic) s 373(a).
\textsuperscript{557} Children, Youth and Families Act 2005 (Vic) s 373(b).
\textsuperscript{558} Children, Youth and Families Act 2005 (Vic) s 374.
\textsuperscript{559} Children, Youth and Families Act 2005 (Vic) s 375(2)(a). See generally sections 375–379. Payment may also be by instalments if deemed appropriate by the court: Children, Youth and Families Act 2005 (Vic) s 375(2)(b). The child may, at any time, apply to have a fine varied or paid in instalments or to have more time to pay a fine: Children, Youth and Families Act 2005 (Vic) s 377.
\textsuperscript{560} Children, Youth and Families Act 2005 (Vic) s 378. Release to undertake a probation or youth supervision order cannot extend beyond the child’s twenty-first birthday and must be reduced if part of the fine is paid before the order expires: Children, Youth and Families Act 2005 (Vic) ss 378((1)(f), 379.
Probation

A probation order is the least intensive of the supervisory orders available under the CYF Act and is served by the offender in the community.\footnote{561} A child subject to a probation order must obey a number of conditions for the duration of the order (the duration of the probation order must generally be less than 12 months and cannot extend beyond the child’s twenty-first birthday).\footnote{562}

Orders that must be complied with include reporting to relevant persons when required, such as the assigned Youth Justice officer (contact occurs, on average, once a week),\footnote{563} not reoffending during the specified period, obeying the instructions of the Youth Justice officer, reporting changes such as change of address or school and not leaving the state without permission.\footnote{564}

The court has discretion to impose conditions additional to the mandatory conditions set out above, for example, an order that the child attend school, abstain from alcohol and drugs, reside at a particular place or undergo treatment or counselling.\footnote{565} Generally the court is not active in this area and there are few programs available for young offenders. Young people are ‘very poorly serviced’ in this area.\footnote{566} The court may ask the local Youth Justice branch to advise on appropriate conditions or request an assessment from the Children’s Court Clinic.\footnote{567}

A child must consent to being placed on probation.\footnote{568} Probation may be ordered in relation to one or more offences and may be imposed with or without conviction.\footnote{569}

A probation order may be varied or revoked where, for example, the offender’s circumstances have changed or the person is no longer prepared to comply with the order.\footnote{570}

Where proceedings are commenced for breach of a condition of a probation order,\footnote{571} the court may vary, add or substitute special conditions of the probation order, confirm the order or replace the probation order with any sentence it thinks fit.\footnote{572} In determining the consequences for breach, the court may take into account, among other matters, a report compiled by the Secretary detailing the extent of the person’s compliance.\footnote{573}

\footnote{561} Children, Youth and Families Act 2005 (Vic) ss 360(1)(f), 380–386.
\footnote{562} Children, Youth and Families Act 2005 (Vic) ss 380(1)(b), 382. The duration of the probation order may be up to 18 months if the offence is particularly serious (that is, punishable by imprisonment of more than 10 years), or if the child has been found guilty of more than one offence (to be served concurrently).
\footnote{563} Power (2011), above n 3, [11.1.6] (“Sentencing”). The Youth Justice officer works with the offender to create a client service plan, which details measures the offender will take in addressing problems. See Department of Human Services, Probation: Youth Justice Community-based Order – Information for Young People, Brochure (2010).
\footnote{564} Children, Youth and Families Act 2005 (Vic) s 381.
\footnote{565} Children, Youth and Families Act 2005 (Vic) ss 381(2)–(4).
\footnote{566} Meeting with Children’s Court of Victoria (23 February 2011).
\footnote{567} Meeting with Children’s Court of Victoria (23 February 2011).
\footnote{568} Children, Youth and Families Act 2005 (Vic) s 380(2).
\footnote{569} Children, Youth and Families Act 2005 (Vic) s 380(1).
\footnote{570} Children, Youth and Families Act 2005 (Vic) ss 381(5), 421(2).
\footnote{571} Warnings from the Youth Justice worker may first be issued. See Department of Human Services (2010), above n 563.
\footnote{572} Children, Youth and Families Act 2005 (Vic) s 384(5). If the order has expired, the court can create any sentence it thinks fit: Children, Youth and Families Act 2005 (Vic) s 384(5)(g).
\footnote{573} Children, Youth and Families Act 2005 (Vic) s 384(6). Note that, if found guilty of an additional offence during the term of probation, the court may take into account a Youth Justice report, but it cannot impose a more severe sentence than can be imposed for that particular offence: Children, Youth and Families Act 2005 (Vic) s 383.
Youth supervision order

A child serving a youth supervision order (YSO) is subject to a higher level of supervision than a child undertaking a probation order.\textsuperscript{574} Supervision is community-based and administered by the Department of Human Services Youth Justice Program.

The child must follow a number of mandatory conditions for the duration of the order (the duration of the order is generally less than 12 months and cannot extend beyond the child’s twenty-first birthday).\textsuperscript{575} Mandatory conditions include reporting to relevant Youth Justice personnel as required (reporting may be for up to six hours a week; however, reporting times must, as far as practicable, not interfere with the person’s employment, education, training or religious beliefs or observance),\textsuperscript{576} not reoffending during the youth supervision order period, obeying the instructions of relevant Youth Justice personnel, attending places specified in the youth supervision order, reporting changes such as change of address, school or employment and not leaving the state without permission. If directed to do so, the child must also participate in a community service program or other program.\textsuperscript{577}

Provided the court gives reasons for doing so, the court may also impose additional conditions to those set out above.

A child must consent to the imposition of a youth supervision order. Youth supervision orders may be imposed with or without conviction.\textsuperscript{578} A youth supervision order may be varied or revoked where, for example, the offender’s circumstances have changed or the person is no longer prepared to comply with the order.\textsuperscript{579}

On commencement of proceedings for a breach of a youth supervision order, the Youth Justice unit must prepare a report detailing the extent of the person’s compliance.\textsuperscript{580} The court may take this report and other specified matters into account in determining whether to vary, add or substitute special conditions of the order, direct compliance with the order or replace the order with any sentence it thinks fit.\textsuperscript{581}

If the young person commits a further offence while on a youth supervision order, the court, in determining the person’s sentence for the further offence, may take into account a report compiled by the Youth Justice unit detailing the extent of the person’s compliance with the youth supervision order. The court must not impose a harsher sentence for the fresh offence than could otherwise be imposed.\textsuperscript{582}

Youth supervision orders are generally imposed on young offenders who have previously committed numerous offences (‘persistent offenders’) or those who have committed particularly serious offences. Most of those undertaking a youth supervision order have previously been subject to a probation order.\textsuperscript{583}

\textsuperscript{574} Children, Youth and Families Act 2005 (Vic) ss 360(1)(g), 387–395.

\textsuperscript{575} Children, Youth and Families Act 2005 (Vic) s 387(1). However, the duration of the youth supervision order may be up to 18 months if the offence is punishable by imprisonment of more than 10 years or if the child has been found guilty of more than one offence (to be served concurrently): Children, Youth and Families Act 2005 (Vic) ss 387(1)(b), 388.

\textsuperscript{576} Children, Youth and Families Act 2005 (Vic) s 389(5); Department of Human Services, Youth Supervision Order: Youth Justice Community-based Order – Information for Young People, Brochure (2010).

\textsuperscript{577} Children, Youth and Families Act 2005 (Vic) ss 389(1)(g), (6)–(7).

\textsuperscript{578} Children, Youth and Families Act 2005 (Vic) ss 387(1), (2)(b).

\textsuperscript{579} Children, Youth and Families Act 2005 (Vic) ss 389(4), 421. The order may also be suspended: Children, Youth and Families Act 2005 (Vic) s 390.

\textsuperscript{580} Children, Youth and Families Act 2005 (Vic) s 394(2)(b).

\textsuperscript{581} Children, Youth and Families Act 2005 (Vic) ss 393, 394(1). If the order has expired, the court can create any sentence it thinks fit: Children, Youth and Families Act 2005 (Vic) s 393(g).

\textsuperscript{582} Children, Youth and Families Act 2005 (Vic) s 391.

\textsuperscript{583} Department of Human Services (2010), above n 576.
Youth attendance order

A youth attendance order (YAO) is the most intensive of the community-based supervisory orders available under the CYF Act and is used as a ‘direct alternative’ to imprisonment. A young person may be sentenced to a youth attendance order if convicted of an offence punishable by imprisonment and given the ‘gravity or habitual nature’ of the offender’s behaviour, the young person would otherwise be sentenced to serve time in a youth detention facility. A youth attendance order can only be imposed if the person is 15 years of age or above at the date of sentencing and consents to the order. Prior to imposing a youth attendance order, the court must commission a report from the Department of Human Services to determine if the child is suitable to serve the order.

The objectives of imposing a youth attendance order include taking into account the gravity of the offending behaviour by imposing requirements on the offender, penalising the offender through restrictions on liberty, and providing the offender with opportunities for instruction, guidance and assistance to help them to abide by the law.

Offenders sentenced to a youth attendance order must comply with a number of conditions for the duration of their order, including intensive reporting and attendance requirements (the youth attendance order must not exceed 12 months and cannot extend beyond the offender’s twenty-first birthday). The young person must attend the Youth Justice unit each week for the length of the order, on the dates and times specified by the Youth Justice unit of the Department of Human Services (for a maximum of three attendances and for up to 10 hours per week). If directed, the young person must engage in community service activities (to a maximum of four hours per week).

On those dates and times at which a young person is required to attend the Youth Justice unit or another place, the young person is subject to the ‘control, direction and supervision’ of the relevant Youth Justice personnel and must obey and carry out instructions as requested.

Other mandatory conditions that the young person must comply with include not reoffending during the youth attendance order period, reporting changes such as change of address, school or employment, and not leaving the state without permission. The court may also impose additional ‘special’ conditions, which are the same as those listed for probation orders.

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584 Children, Youth and Families Act 2005 (Vic) ss 360(1)(h), 396–409; Department of Human Services, Youth Attendance Order: Youth Justice Community-based Order – Information for Young People, Brochure (2010).
585 Children, Youth and Families Act 2005 (Vic) ss 397(1), 398(a).
586 Children, Youth and Families Act 2005 (Vic) ss 397(1)(b), 398(c).
587 Children, Youth and Families Act 2005 (Vic) s 398(b).
588 Children, Youth and Families Act 2005 (Vic) s 405.
589 Children, Youth and Families Act 2005 (Vic) s 397(1). Even where the young person is convicted of more than one offence on the same day or in the same proceeding, the aggregate duration of youth attendance orders imposed for those offences must not be greater than 12 months: Children, Youth and Families Act 2005 (Vic) s 400(1)(a). If both a youth attendance order and detention are imposed in relation to separate offences, the aggregate duration of these sentences is capped at three years: Children, Youth and Families Act 2005 (Vic) s 400(1)(b). For rules of concurrency where there was a pre-existing incomplete youth attendance order, see Children, Youth and Families Act 2005 (Vic) ss 400(2)–(3).
590 Children, Youth and Families Act 2005 (Vic) s 402. In specifying reporting times, the relevant personnel must, as far as practicable, not interfere with the person’s place of employment, education, training or religious beliefs or observance: Children, Youth and Families Act 2005 (Vic) s 402(4).
591 Children, Youth and Families Act 2005 (Vic) s 402(1).
592 Children, Youth and Families Act 2005 (Vic) ss 402(1)(b), 407.
593 Children, Youth and Families Act 2005 (Vic) ss 399(1)(b), 406.
594 Children, Youth and Families Act 2005 (Vic) s 399(3). The ‘special’ conditions listed for probation orders, which also apply to youth attendance orders, are given in Children, Youth and Families Act 2005 (Vic) ss 381(3)–(4).
A youth attendance order may be breached, for example, if the person reoffends while the order is in force or fails to comply with conditions, such as a failure to comply with the reasonable directions of a relevant Youth Justice worker or the failure to attend the Youth Justice unit when required without reasonable excuse. In response to breach, the court may vary the youth attendance order; direct compliance with the youth attendance order or replace the youth attendance order with any sentence it thinks fit, for example, ordering the child to be detained in a youth justice centre. In determining the consequence of breach, the court must take into account a report compiled by the Department of Human Services detailing the extent of the offender’s compliance with the youth attendance order.

Youth attendance orders are generally reserved for very persistent offenders and those found guilty of a serious offence. According to Judge Grant of the Children’s Court, if a young person has in the past breached probation or a youth supervision order, a youth attendance order is unlikely to be successful.

### Detention orders

#### Youth residential centre order

A youth residential centre order (YRCO) is the custodial order of ‘last resort’ for children under 15 years of age (as at the date of sentencing) who are sentenced under the CYF Act. A child may be detained in a youth residential centre (YRC) if the offence for which a child is found guilty is punishable by imprisonment (other than by fine default), the court has considered a pre-sentence report and the offence committed is ‘sufficiently serious’ that no other sentence is appropriate.

Under the CYF Act, the maximum period of detention for a child under 15 years of age is one year for a single offence and two years as an aggregate term (where the young person is convicted of more than one offence on the same day or at the same proceeding). The term imposed must not be greater than the maximum term of imprisonment for an adult committing the same crime. The Children’s Court has no power to order a non-parole period. Parole is determined administratively by the Youth Residential Board.

Where a court sentences a child to a youth residential centre order, it must provide reasons for doing so. The court may also make recommendations relating to the child’s management while in detention.

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595 *Children, Youth and Families Act 2005 (Vic)* s 408(1).
596 *Children, Youth and Families Act 2005 (Vic)* s 408(2).
597 *Children, Youth and Families Act 2005 (Vic)* s 408(5).
598 Department of Human Services (2010), above n 584.
599 Meeting with Children’s Court of Victoria (23 February 2011). See also Reece Walters, ‘Alternatives to Youth Imprisonment: Evaluating the Victorian Youth Attendance Order’ (1996) 29(2) *Australian and New Zealand Journal of Criminology* 166. Walters states that non-compliance rates for youth attendance orders are high.
600 *Children, Youth and Families Act 2005 (Vic)* ss 360(1)(c), 410–411.
601 *Children, Youth and Families Act 2005 (Vic)* s 410(1).
602 *Children, Youth and Families Act 2005 (Vic)* s 411.
603 *Children, Youth and Families Act 2005 (Vic)* s 411.
604 This may be compared with the power of adult courts to set non-parole periods pursuant to *Sentencing Act 1991 (Vic)* s 11.
605 *Children, Youth and Families Act 2005 (Vic)* s 454(1). See discussion in Chapter 12.
606 *Children, Youth and Families Act 2005 (Vic)* s 410(2).
607 *Children, Youth and Families Act 2005 (Vic)* s 411(4).
Time in custody is served at the Parkville youth residential centre. Males and females are detained in separate facilities (females over the age of 15 years on youth justice centre orders also reside at the Parkville youth residential centre). While detained, children are required to attend school and participate in programs, such as drug, alcohol and anger-management counselling, to address behaviour that may have contributed to their offending. Misbehaviour may lead to the reduction of privileges and where behaviour is particularly serious, the child may be brought before the Youth Residential Board. The Board may warn the child and can transfer the child to a youth justice centre.

Youth justice centre order

For children aged 15 years or above but under the age of 21 years at the date of sentencing, the most severe sanction that may be imposed under the CYF Act is an order of detention in a youth justice centre (YJC). Prior to the implementation of the CYF Act, this order was referred to as a ‘youth training centre order’.

A child may be detained in a youth justice centre if the offence for which a child is found guilty is punishable by imprisonment (other than by fine default), the court has considered a pre-sentence report and the court considers no other sentence appropriate.

Under the CYF Act, the maximum period of detention for a child above 15 years of age is two years for a single offence and three years as an aggregate term (where the young person is convicted of more than one offence on the same day or at the same proceeding). The term imposed must not be greater than the maximum term of imprisonment for an adult committing the same crime.

The Children’s Court has no power to order a non-parole period. Parole is determined administratively by the Youth Parole Board (see Chapter 12).

Where a court sentences a child to a youth justice centre order, it must provide reasons for doing so. The court may also make recommendations relating to the child’s management while in detention.

Males between 15 and 17 years of age are detained in the Melbourne youth justice centre in Parkville, while those between 18 and 20 years of age are housed in the Malmsbury youth justice centre. The relatively small number of females between the ages of 15 and 20 years serving a youth justice centre order are detained alongside younger females serving youth residential centre orders in the Parkville youth residential unit.

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608 Detention facilities are established under Children, Youth and Families Act 2005 (Vic) ss 3, 478.
609 Department of Human Services, Youth Residential Order: Youth Justice Custodial Order – Information for Young People, Brochure (2010).
610 Children, Youth and Families Act 2005 (Vic) ss 464–466. There are restrictions to ‘exceptional circumstances’ where the child is under the age of 14 years: Children, Youth and Families Act 2005 (Vic) s 465. See also Department of Human Services (2010), above n 609.
611 Children and Young Persons Act 1989 (Vic) ss 137(1)(j), 188.
612 Children, Youth and Families Act 2005 (Vic) s 412(1).
613 Children, Youth and Families Act 2005 (Vic) s 413(1)–(2).
614 Children, Youth and Families Act 2005 (Vic) s 413(2).
615 This is compared with the power of adult courts to set non-parole periods pursuant to Sentencing Act 1991 (Vic) s 11.
616 Children, Youth and Families Act 2005 (Vic) s 458(1).
617 Children, Youth and Families Act 2005 (Vic) s 412(2).
618 Children, Youth and Families Act 2005 (Vic) s 413(5).
619 Some slightly older offenders may also be detained in youth justice facilities. Depending on the length of the sentence, the likelihood for parole and the behaviour of the offender, the Youth Parole Board may decide not to transfer to adult prison a young offender who has just turned 21 – for example, if the young offender only has a few months of the sentence left to serve: Meeting with Youth Parole Board (21 June 2011). See Appendix 2 for a list of attendees.
While detained, young people are required to participate in TAFE courses and programs that address their offending behaviour. As with misbehaviour in a youth residential centre, in a youth justice centre a seriously misbehaving child subject to a youth justice centre order may be required to face the relevant Board (in this case, the Youth Parole Board), who may warn the child to improve his or her behaviour. Where the Youth Parole Board is of the opinion that the child (aged 16 years or more) cannot be ‘properly controlled’ and is threatening the ‘good order and safe operation’ of the youth justice centre (among other requirements in section 467), the child may be transferred to an adult prison.

Concurrent or cumulative sentences

Where an offender is found guilty of multiple charges that attract a sentence of detention, Children’s Court magistrates generally provide a sentence for each individual charge, before determining whether the sentences be served concurrently (simultaneously) or cumulatively (consecutively). As under the Sentencing Act 1991 (Vic), there is a presumption in favour of concurrency in the CYF Act. There is, however, no aggregate sentencing provision in the CYF Act.

Young offenders sentenced in other courts

Custody in a youth detention facility may be ordered by the County Court or the Supreme Court. Detention in a youth justice centre may also be ordered under the Sentencing Act 1991 (Vic) for persons between 18 and 20 years of age, inclusive, at the time of sentencing, pursuant to Victoria’s (unique) ‘dual track’ system.

Like the Children’s Court, other courts that sentence young offenders to youth detention orders, under either the CYF Act or sections 32–34 of the Sentencing Act 1991 (Vic), have no power to order parole. Parole is determined administratively by the Youth Residential Board or Youth Parole Board.

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620 Department of Human Services, Youth Justice Centre Order: Youth Justice Custodial Order – Information for Young People, Brochure (2010).
621 Children, Youth and Families Act 2005 (Vic) ss 467–469. See also Chapter 12.
622 Where a court imposes a less severe sentence for an offence by virtue of a guilty plea and the child is subsequently sentenced to a youth attendance order, a youth residential centre order or a youth justice centre order, the court is required to record in respect of each offence the sentence that it would have imposed but for the guilty plea: Children, Youth and Families Act 2005 (Vic) s 362A(1).
623 Sentencing Act 1991 (Vic) s 16. Subject to certain exemptions, where a court is imposing a sentence of imprisonment for more than one offence under the Sentencing Act 1991 (Vic) (the court must impose a separate sentence for each), the sentences are served concurrently unless the court directs otherwise.
624 Unless the court otherwise provides, it is presumed that any period of detention in a youth justice centre for an offence shall be concurrent with any period of detention in respect of other offences the child is convicted of in the same proceedings: Children, Youth and Families Act 2005 (Vic) ss 411(1)(a), 413(3)(a).
625 This is compared with the Sentencing Act 1991 (Vic) s 9. See further Power (2011), above n 3, [11.1.7] (‘Sentencing’): ‘In the writer’s opinion the provisions of ss 410–413 of the CYFA do not permit a Court to impose an aggregate sentence of detention on multiple charges’.
626 See Chapter 11.
627 See Chapter 12.
628 Children, Youth and Families Act 2005 (Vic) ss 454(1), 458(1). See also Chapter 12.
Recording conviction

Regardless of the sanction to which a conviction is tied, the ‘recording of a criminal conviction is a significant act of legal and social censure … by which a person’s legal status is officially and, under present Victorian law, irretrievably altered’.629 As conviction affects an offender’s legal capacity, it is recognised as being ‘in the nature of a penalty’.630 The consequences of conviction are therefore considered a matter to which the court should have regard in sentencing.

As stated by Fox and Freiberg:

concern with stigma is evocative of the recognition … that, as a conviction itself is a significant source of legal and social stigma, to formally record a conviction preliminary to some further sanction may amount to excessive punishment.631

The consequence of conviction is recognised as a penalty in its own right – the ‘diminution of the offender’s legal rights and capacities … follow automatically from the fact of conviction and are not necessarily tied to the particular sanction’ imposed on the offender.632

Only the three most severe sanctions (youth attendance order, youth justice centre order and youth residential centre order) compel the recording of a conviction. Convictions are never attached to non-accountable undertakings, accountable undertakings or good behaviour bonds (or dismissals). Where an order of probation, youth supervision or a fine is imposed, the magistrate has discretion whether or not to record a conviction. However, the CYF Act does not provide guidance to the court as to how this discretion is to be exercised. The factors referred to in section 8(1) of the Sentencing Act 1991 (Vic) have been applied by the Children’s Court in exercising this discretion – although acknowledgement of the factors in section 362 are also referred to as part of this process.633

Section 8(1) of the Sentencing Act 1991 (Vic) provides that ‘[i]n exercising its discretion whether or not to record a conviction, a court must have regard to all of the circumstances of the case’. The circumstances listed by section 8(1) include, but are not limited to, the nature of the offence, the offender’s character and prior history and the impact of the conviction on the ‘offender’s economic or social wellbeing or on his or her employment prospects’.

Future reference to findings of guilt

There are some evidential limitations in relation to findings of guilt and appearances in the Children’s Court. Evidence that a person has appeared before the Criminal Division charged with an offence, or that a protection application has been made in respect of that person in the Family Division, may only be presented in a subsequent matter up to three years from the date of that appearance or application, unless:

- the previous appearance or application is relevant to the facts in issue in the proceeding; or
- the person is found guilty of an offence, in which case evidence of such may be presented in subsequent proceedings up to 10 years later.634

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630 R v P and ors [2007] VChC 3 (5 November 2007) [31] (Judge Grant); R v M and others [2008] VChC 4 (12 February 2008) [31] (Judge Grant). See, for example, the comments by Judge Grant as to the impact of conviction on the ability to obtain an American visa: R v P and ors [2007] VChC 3 (5 November 2007) [37].
631 Fox and Freiberg (1999), above n 96, 830.
634 Children, Youth and Families Act 2005 (Vic) ss 584(2)–(3).
Victoria Police provides criminal history information for the purposes of employment, occupation-related licensing and registration and voluntary work. Information about previous convictions as well as findings of guilt without conviction may be released.635

Findings of guilt made in relation to young people are released according to the following rules:

- If an offence resulted in imprisonment or detention for longer than 30 months, details of the offence will always be released.
- For child offenders (under 18 years when last found guilty of an offence), details may be released for five years.
- If the last offence fits the criteria for release, then all findings of guilt will be released (including offences by young people).
- If the individual is awaiting a court outcome on an offence, the charges will be released.636

The intent behind Victoria Police’s Information Release Policy would appear to be the consolidation and release of information that is in any event accessible to the public.637 However, the Information Release Policy may have the effect of undermining the intent behind section 8 of the Sentencing Act 1991 (Vic), which is that a conviction, or rather all the negative and ongoing consequences of a conviction (which can be particularly severe for a young person just starting out in employment), should be applied to deserving cases only. It may also undermine some of the Children’s Court sentencing principles, in particular ‘the need to minimise the stigma to the child resulting from a court determination’.638 If a magistrate chooses to utilise the discretion not to record a conviction against a child, there are generally compelling reasons for this.

Orders in addition to sentence

In addition to imposing a sanction under section 360(1) of the CYF Act, the court may order a child to make restitution, pay compensation or pay costs; however, this cannot be a ‘special condition’ of another sentencing order.639 Compensation orders are capped at $1,000.640

The court may also impose a disqualification on a child or make orders in respect of property and other ‘things’ connected with an offence irrespective of whether the child is convicted.641

636 Ibid. This is a selection of the rules contained in the policy. There are some exceptions to these rules that allow records to be released when more than 10 years have elapsed, for example, where the records check is for the purposes of employment in prisons or police forces. There is also a very broad general exception that reads: ‘[i]n other exceptional circumstances where the release of information is in the interest of crime prevention or the administration of justice’.
637 Information about criminal records is also held by the courts, media, government departments, statutory authorities, credit reference agencies and others.
638 Children, Youth and Families Act 2005 (Vic) s 362(1)(d). See Chapter 6 for a discussion of the sentencing principles and in particular for a discussion on stigma.
639 Children, Youth and Families Act 2005 (Vic) ss 360(3)–(4), 417.
640 Email from Judge Paul Grant, Children’s Court of Victoria, to Sentencing Advisory Council (19 September 2011).
641 Children, Youth and Families Act 2005 (Vic) s 360(5).
Chapter 8
Offence distribution

This chapter examines the distribution of principal proven offences for young offenders in the Children’s Court over the ten-year period from 2000 to 2009. It begins with an overview of the number and rate of criminal cases finalised in the Children’s Court over the period, broken down by gender and age. Next is an examination of Children’s Court finalisation rates by offence category, discussed in the context of police records of alleged offences for young people, nationwide victimisation rates and nationwide recorded assault rates. The chapter goes on to outline the most frequent principal proven offences.

The offences sentenced by the court are classified in this report into six broad categories.

**Offences against the person** include offences such as assaults involving threats or minor physical contact and those involving the infliction of serious injury. Causing injury is the most common offence for this category.

**Offences against property** include offences involving deception, theft, trespass and property damage. Theft and burglary are two of the more common offences in this category.

**Driving offences** include offences carried out by the driver or controller of a vehicle, or by a passenger where the driver could reasonably be expected to control the passenger’s behaviour (for example, a passenger failing to wear a seat belt). The majority of these offences relate to motor vehicles, although a number relate to other vehicles such as bicycles. Driving offences that result in injury to a person are counted as offences against the person, while driving offences resulting in property damage are counted as property offences. Driving without a licence is a common offence for this category.

**Transit ticketing offences** include failing to display a public transport ticket to an inspector, or using a concession card without proper entitlement.

**Transit non-ticketing offences** include offences on public transport that are not related to ticketing but are similar to public order offences. A violent offence occurring on public transport would be categorised as

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642 The principal proven offence is the offence in a case that attracts the most serious sentence (within the sentencing hierarchy) at the initial sentencing hearing. Other factors are used to determine the principal proven offence if two or more offences in the same case receive equally severe sentence types. For a detailed explanation of the Council’s data methodology, see Appendix 1.
an offence against the person, while property damage (for example, graffiti on public transport) would be
categorised as a property offence. Placing feet on public transport or station seats is a common offence in
this category.

Other offences include offences that do not fit into any of the above categories. Examples include public
order offences (not on public transport), drug and/or alcohol possession and justice offences. Consumption
or possession of alcohol while under age is a common offence for this category.

Data overview

Figure 10 shows the number of cases finalised\(^{643}\) by the Children’s Court for the 2000–09 period by
each calendar year. The number of finalised cases includes all cases that were proven,\(^{644}\) diverted\(^{645}\) or
unproven.\(^{646}\) The Council has chosen to exclude some Children’s Court matters from all of its analyses due
to unreliability of, or other problems with, the data. The main exclusions are matters dismissed or discharged
and some matters involving breach offences.\(^ {647}\)

Figure 10: Number of cases finalised in the Children’s Court, by year of finalisation

![Graph showing the number of cases finalised in the Children’s Court, by year of finalisation.](image)

Note: The percentages noted in Figure 10 refer to the percentage of cases that resulted in a guilty plea or a
finding of guilt. The dotted line appears at 1 July 2005, when the Children, Youth and Families Act 2005 (Vic)
came into effect and the age jurisdiction of the court increased to include individuals who are 17 years of age.

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\(^{643}\) If several cases are consolidated and sentenced as one, they would only be counted once in Figure 10. As most
cases have multiple charges, some charges in a case might be finalised during different calendar years, which could
result in some double-counting. This possibility was examined but was not found to occur in any of the cases listed.

\(^{644}\) Proven cases include those receiving any of the sanctions described in Chapter 7 (apart from dismissals or
discharges) for the principal proven offence. Cases where the principal proven offence is given a dismissal, discharge
or conviction and discharge have been excluded from all data analysis (see Appendix 1).

\(^{645}\) The only court-sanctioned diversion program for which there is relatively reliable data in the Children’s Court is
the ‘Ropes’ Program (see Chapter 4).

\(^{646}\) Unproven cases include those where all charges were struck out (for example, where the prosecution dropped
all charges), contested matters in which the defendant was found not guilty and cases sent for committal to the
County Court or the Supreme Court.

\(^{647}\) See ‘Data methodology’ in Appendix 1 for details.
Figure 10 shows that the number of cases was relatively steady at around 6,000 between 2000 and 2005, before increasing significantly in subsequent years, particularly in 2007, when the number of finalised matters exceeded 14,000. The increase in number of matters finalised post-2005 is likely to be largely due to the increase in age jurisdiction of the Children’s Court on 1 July 2005, which allowed the court to hear cases in which the accused was aged 17 at the time of the alleged offence. The spike in the number of cases heard during 2007 is due to the lengthy delay in introducing CAYPIN5 to the Children’s Court, which led to a large influx of transit matters being heard in open court that year.

During the 2000–09 period, the vast majority of cases finalised in the Children’s Court were ‘proven’, that is, involved a guilty plea or a finding of guilt (82.6%). This varied on a yearly basis, ranging from 88.1% of cases in 2000, to 75.7% of cases in 2009. The percentage of unproven cases remained relatively steady between 2006 (16.5%) and 2009 (15.3%); however, the percentage of proven cases in the Children’s Court decreased to below 80% in 2007, and declined in the two subsequent years. This is likely to be largely due to the increased use of the ‘Ropes’ Program during these years.648 The ‘Ropes’ Program was used to finalise 0.4% of cases in 2006;649 however, by 2009 this had increased to 9.0%.650 ‘Ropes’ matters are the only matters in the ‘diverted’ category in Figure 10.

Figure 11 shows the number of cases proven in the Children’s Court by both calendar year and gender. Males made up the majority (74.4%) of offenders for proven cases in the Children’s Court.

Figure 11: Number of proven cases in the Children’s Court, by gender of offender and year of finalisation

648 See Chapter 4 for a description of the ‘Ropes’ Program.
649 Reliable data on the use of the ‘Ropes’ Program prior to 2006 are not available.
650 In 2007, the percentage of cases finalised through ‘Ropes’ was 2.9%, and in 2008 the figure was 6.0%.
Figure 12 shows the rate of males and females (per 100,000 of the appropriate gender) who had their cases finalised in the Children’s Court from 2000 to 2009. Throughout the period, the finalisation rate for females (per 100,000) in the Children’s Court was lower than that for males, regardless of whether the case was proven or not. Both genders experienced a large spike in the rate of cases being heard by the Children’s Court during 2007, which is due to the high number of transit cases brought before the court during that year. Apart from this spike, the rate of proven cases for females has not increased at all over the 10 years and the rate for males has increased only marginally. The rate of proven cases for males increased from 1,658 per 100,000 in 2000 to 1,798 per 100,000 in 2009 (an increase of 8.4%), while total cases for males increased from 1,864 per 100,000 in 2000 to 2,333 per 100,000 in 2009 (an increase of 25.1%). The rate of proven cases for females increased insignificantly (0.6%), while the rate of total cases for females increased from 592 per 100,000 in 2000 to 716 per 100,000 in 2009 (an increase of 21.0%).

Figure 12: Rate of cases proven or finalised in the Children’s Court, by year and gender

Source: Sentencing Advisory Council’s analysis of Australian Bureau of Statistics population data.

651 For the purposes of comparison, the Council obtained data on the gender of people with proven cases in the adult jurisdiction (including the Magistrates’, County and Supreme Courts of Victoria) from 2005 to 2009 (earlier data were not available). Unlike the Children’s Court jurisdiction, in the adult courts the largest percentage increase in proven cases occurred for female offenders. Proven cases involving males increased from 2,835 per 100,000 in 2005 to 3,052 per 100,000 in 2009 (an increase of 7.7%), while female cases increased from 592 per 100,000 in 2005 to 730 per 100,000 in 2009 (an increase of 23.4%). In the corresponding period, proven cases for females in the Children’s Court increased from 409 per 100,000 in 2005 to 508 per 100,000 in 2009 (an increase of 24.3%). Proven cases for males in the Children’s Court increased more sharply from 1,316 per 100,000 in 2005 to 1,798 per 100,000 in 2009 (an increase of 36.6%). See Sentencing Advisory Council’s analysis of Department of Justice unpublished statistics and Australian Bureau of Statistics population data (see ‘Population rates’ in Appendix 1 for details of the Australian Bureau of Statistics sources used to calculate population).

652 Prior to 1 July 2005, the population between the ages of 10 and 16 years was used, while after 1 July 2005, the population between the ages of 10 and 17 years was used. See ‘Population rates’ in Appendix 1 for details of the age groups used to calculate the rate of young alleged offenders.
Figure 13 shows the percentage of males and females with proven offences in the Children’s Court, according to age at the time of the principal proven offence. The most common age for the commission of principal proven offences was 16 years of age for both males and females.

There were no substantial gender differences across the various ages, although female young offenders were slightly more likely than males to commit the principal proven offences at the age of 15 or 16 years and slightly less likely at younger ages. Very few children aged 10, 11 and 12 years were dealt with by the court over the period in question. A participant at the Council’s roundtable observed that this figure raises a question as to whether the age of criminal responsibility should be increased to, for example, the age of 12 years, given that so few children between 10 and 11 years of age are actually dealt with by the court.653

Figure 13: Percentage of young offenders by gender and age at time of principal proven offence, 2000–09

Note: Figure 13 only displays the age at which the offender committed the principal proven offence. If the offender committed other offences in the same case at a different age, then this would not be included in the figure (to prevent double-counting).

653 Stakeholder Roundtable Meeting (24 March 2011).
Figure 14 displays the principal proven offences sentenced in the Children’s Court during 2000–09, according to the offence groups.

Property offences, followed by transit ticketing offences, represent the largest proportion of the graph, at 32.1% and 31.1% of total principal proven offences respectively. Offences against the person was the next largest category, making up 17.0% of total principal proven offences.

Figures 15 and 16 show the breakdown of offence categories by gender:

The most prominent difference between the male and female pie charts is that transit ticketing offences make up just over half of all principal proven offences by females, compared with only 24% by males. Male young offenders were also more likely than females to be sentenced for a property offence or offence against the person as the principal proven offence, with the percentage of property offences for males 1.5 times greater than for females (35.1% for males versus 23.3% for females). The difference between males and females was not as great for offences against the person, with these offences making up 18.3% of all principal proven offences for males and 13.3% for females.
Children’s Court finalisation rates – all offence categories

Figure 17 displays the rate of principal proven offence categories finalised (that is, sentenced) in the Children’s Court, per 100,000 of Victoria’s eligible population.654 This graph shows that principal proven offences in the transit ticketing and property categories consistently outstripped other offence categories from 2000 to 2009.

The large spike in transit offences sentenced in the Children’s Court in 2007 was due to a delay in the implementation of the Children and Young Persons Infringement Notice System (CAYPINS).655 Legislation for the system was enacted in 2005. Prosecuting authorities delayed issuing proceedings in the expectation that the system would come into operation; however, that did not occur until November and December 2007. This meant that, during 2007, prosecuting authorities had to proceed with the cases that had initially been held back (awaiting CAYPINS), resulting in the spike in that year. Since CAYPINS came into operation, only a small number of transit offences proceed through open court.

Figure 17: Rate of young people sentenced, by category of principal proven offence and year of sentencing656

Source: Sentencing Advisory Council’s analysis of Australian Bureau of Statistics population data.

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654 See commentary on Australian Bureau of Statistics population data: above, n 652.
655 See discussion of CAYPINS in Chapter 5.
656 See commentary on Australian Bureau of Statistics population data: above n 652.
In Figure 18, transit ticketing offences are excluded to provide a better picture of the trends. It can be seen that the rate of finalisation of property offences in the Children’s Court has decreased over the ten-year period, whereas the rate for offences against the person has increased. As discussed below, the most common principal proven offences against the person dealt with by the Victorian Children’s Court were various assault and causing injury offences.\textsuperscript{657}

The trends presented in Figure 18 are consistent with Victoria Police crime statistics relating to young people, nationwide recorded assault rates and nationwide victimisation statistics.\textsuperscript{658}

\textbf{Figure 18: Rate of young people sentenced, by category of principal proven offence and year of sentencing, excluding all transit ticketing offences}\textsuperscript{659}

\begin{figure}
\centering
\includegraphics[width=\textwidth]{figure18.png}
\caption{Rate of young people sentenced, by category of principal proven offence and year of sentencing, excluding all transit ticketing offences.}
\end{figure}

Source: Sentencing Advisory Council’s analysis of Australian Bureau of Statistics population data.

\textsuperscript{657} See Table 6 (page 110).
\textsuperscript{658} It is important to note, however, that Figure 18 shows sentencing rates, which may be quite different from offending rates. This is discussed later in this chapter.
\textsuperscript{659} The commentary on Australian Bureau of Statistics population data applies: see above n 652.
Victoria Police crime statistics reveal an increase in police processing of assault-type offences and corresponding decrease in processing of property offences between 2000–01 and 2009–10 for young people, based on alleged offender counts. Alleged offender counts in police statistics do not represent distinct individuals, but rather offending incidents. Therefore, if a young person is dealt with by police three times in one year, the young person will be counted three times in the statistics. The inclusion of those aged 17 years in the Children’s Court jurisdiction from 1 July 2005 would have had a large effect on the number of alleged offences after that date. In 2000–01, there were 2,004 alleged assault-category offences by young people processed by police (7.8% of all alleged offences by young people processed). In 2009–10, the figure had risen to 4,972, which represents 13.9% of all alleged offences by young people processed. According to the Australian Institute of Criminology, nationwide recorded assault rates (for all offenders – adults and children) increased steadily from the late 1990s.

Nationwide assault victimisation rates also demonstrate an increase. Figure 19 (based on the number of victims of alleged crimes reported to police nationwide, not distinguishing between adult and young people’s offending) shows that the victimisation rate for assaults has been on the increase nationwide since 1994. The rates for other offences against the person have remained relatively steady in comparison.

Figure 19: Nationwide victimisation rates for offences against the person (per 100,000 people), by year offence was recorded by police

Source: Australian Institute of Criminology online data.

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660 Victoria Police, Crimes Statistics 2000/01 (2001); Victoria Police (2010), above n 134. Police data on assaults for distinct alleged offenders were not available. These data are based on incidents rather than distinct individuals.

661 Items in the ‘assault’ category include offences such as causing injury, unlawful assault, affray and assault police. For a complete list of offences, see Victoria Police (2010), above n 134, 143–144 (Table A.1).


In contrast, the number of alleged property offences for which young people were processed by Victorian police decreased as a proportion of all alleged offences from 2000–01 to 2009–10.\textsuperscript{664} Young people were processed for 18,491 alleged property offences during 2000–01 (71.9\% of alleged offences by young people processed) and 22,982 alleged offences during 2009–10 (64.1\%), or a percentage decrease of 7.8\% in the overall share of all alleged offences by young people. Figure 20 reveals that nationwide property victimisation rates involving motor vehicle thefts or unlawful entries remained relatively steady from 1994 to 2001, before declining and reaching the lowest point in 2009. Victimisation rates for ‘other thefts’ followed a slightly different pattern but also show a steady decline from 2001.

Figure 18 relates to the rate of court finalisations (i.e. sentencing) for various case types in the Children’s Court and not to actual offending rates.\textsuperscript{665} Court finalisation rates are influenced by a variety of factors other than offending rates, for example, reporting rates and changes in police policies, charging practices and diversion practices. Therefore, from a statistical point of view, the relationship between court finalisation rates and actual offending rates is unclear. The Australian Institute of Criminology cautions that increases in rates of recorded violent crime ‘are not necessarily an indicator of increasing violence in Australia’.\textsuperscript{666}

\textbf{Figure 20:} Nationwide victimisation rates for property offences (per 100,000 people), by the year the offence was recorded by police

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure20.png}
\caption{Nationwide victimisation rates for property offences (per 100,000 people), by the year the offence was recorded by police}
\end{figure}

Source: Australian Institute of Criminology online data.

\textsuperscript{664} They did, however, increase numerically. The ‘property’ category includes offences under the arson, property damage, burglary, deception, handle stolen goods and theft sub-categories. For a complete list of offences, see Victoria Police (2010), above n 134, 145–148 (Table A.1).

\textsuperscript{665} Actual rates of offending are impossible to measure and are generally estimated based on police arrest and processing figures and victimisation surveys. Much crime goes unreported or undetected. See generally Bricknell (2008), above n 662.

\textsuperscript{666} Bricknell (2008), above n 662, 5. A literature review on violent offending by young people (looking at changes in rates over time and the possible reasons for these) is beyond the scope of this paper.
Participants in a roundtable discussion held by the Council made some suggestions as to possible reasons for the trends seen in Figure 18. Some suggested factors unrelated to rates of offending, such as diversion, charging practices and reporting rates. For example, one participant thought that more theft matters were being diverted in recent years and that this is having an effect on the sentencing statistics – particularly after the commencement of the ‘Ropes’ Program:

> if you’re talking about theft and that’s a big proportion [of property offences], they often occur … early on in a young person’s offending career and if you get them early on a good diversion program, that’s when that stops them from [further offending].

Another suggestion from a roundtable participant was that police are now more likely to charge ‘bag snatchers’ with assault or robbery, that is, offences against the person rather than property offences.

A possible further explanation for the increase in offences against the person is that people may now be more willing to report assault-type incidents than they once were. As one roundtable participant said:

> I would suspect that … people are feeling more confident about going to police or more determined to go to police or encouraged to actually go to police if something’s happened to you … [such as assault].

Another commented:

> there is a far greater willingness to report what was once possibly hushed up … [the example given here related to an incident occurring at a school].

Other participants thought that bullying – once considered part of the ‘private’ domain – has in recent times moved into the public domain, with corresponding increased police involvement and potential for assault charges.

There was, however, general agreement among roundtable participants that for various reasons, actual offending rates for property offences and offences against the person have changed over time – the former decreasing and the latter increasing. One participant suggested that it is much more difficult to steal cars in recent years due to technological advances, which may be reflected in lower rates of theft. Several participants were of the view that while in earlier years young offenders may have stolen cars and committed shop thefts, they are now more likely to target expensive portable technology, such as mobile phones and laptops. This would translate to a higher rate of ‘standover’-type offences such as robbery, which involve violence or the threat of violence (and are thus classed as offences against the person). As one participant said:

> it strikes me that a lot of the offending is the pursuit of adrenalin and you might have got that once from robbing the tuck shop at the local footy oval and instead of doing that you’ve thought it out with a group of friends, and [are] standing over someone taking their phone. It’s the same, same instinct; it just shows up differently.

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667 Stakeholder Roundtable Meeting (24 March 2011).
668 ‘Ropes’ is discussed in Chapter 4.
669 Stakeholder Roundtable Meeting (24 March 2011). Robbery is examined in detail below.
Person and property offences – gender differences

Figure 21 shows the rate (per 100,000 young people of the relevant gender) of males and females sentenced in the Children’s Court for a principal proven offence against the person. Male and female rates are shown on two separate axes, with males on the left-hand side and females on the right-hand side. The graph is presented this way because the male rates are significantly higher and would have obscured any changes in over time in the female rate had they shared the same axis. Males consistently had a higher rate than females of being sentenced for offences against the person during the entire period from 2000 to 2009.

Male rates started at 258 per 100,000 in 2000 and remained steady until 2005, before increasing in subsequent years and reaching 485 per 100,000 in 2009. The 2009 male rate is 87.8% higher than the 2000 rate. Female rates started at 76 per 100,000 in 2000, increasing gradually over the rest of the period to 121 per 100,000 in 2009. The 2009 female rate is 60.5% higher than the 2000 rate.

Figure 21: Rate of young people sentenced for committing principal proven offences against the person, by year and gender

Source: Sentencing Advisory Council’s analysis of Australian Bureau of Statistics population data.

670 The commentary on Australian Bureau of Statistics population data applies here: see above n 652.
Victoria Police statistics show an upward trend in the percentage of alleged male and female offenders (both young offenders and adult offenders) processed for crimes against the person. In 2000–01, alleged crimes against the person made up 11% of all alleged offending by young females. This had risen to 17.3% in 2009–10. The percentages for adult females were 9.8% in 2000–01 and 15.9% in 2009–10. For young males, alleged crimes against the person made up 11% of all offences for which they were processed in 2000–01 (similar to young females), but by 2009–10 they comprised 20%. For adult males, the percentages were 17% of all processed offences in 2000–01 and 23% in 2009–10.671

Alleged assault-category offences by young males increased from 1,527 in 2000–01 (7.5% of all young male alleged offences) to 3,776 in 2009–10 (13.5% of all young male alleged offences). Alleged assault-category offences by females numbered 467 in 2000–01 (8.8% of all young female alleged offences) and 1,191 in 2009–10 (15.2% of all young female alleged offences).672

Although Figure 21 shows a steeper increase in the male rate of sentencing for offences against the person than for females, some stakeholders commented specifically on violent offending among young females.673 One participant at the Council’s roundtable meeting said: ‘[o]bviously there has been an increase in violent offences committed by females’. Another participant commented on the importance of drugs in this increased violent offending by young females:

They’re mainly violent offences … I think … a lot of them are … under the influence of drugs and they’re wanting money … robbing people … predominantly.674

There is much research on the issue of violent offending by young people; however, a literature review is outside the scope of this project.

Figure 22 (page 104) shows the rate (per 100,000 people of the relevant gender) of males and females sentenced in the Children’s Court for a principal proven property offence, again with males and females on separate axes to better display any changes over time to the female rates.

In 2000, both males and females had relatively high sentencing rates for property offences (although the male rate was far higher than the female rate), with rates gradually declining in subsequent years. The period after 2005 shows a slow increase in the rate of sentencing principal proven property offences for males, although it has remained lower than its highest levels in 2000. As the rate calculations take into account the inclusion of individuals 17 years of age from mid 2005, this increase cannot be wholly explained by the change in age jurisdiction. The rate for females experienced a slow decline over the ten-year period, although there is evidence of slight growth between 2007 and 2009.

The decrease in the male rate of sentencing for principal proven property offences (821 per 100,000 people in 2000, to 628 per 100,000 in 2009, or a decrease of 23.5% of its value from 2000) was steeper than the decrease in the female rate (185 per 100,000 people in 2000, to 150 per 100,000 in 2009 or a decrease of 19.2% of its value from 2000).

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671 Sentencing Advisory Council’s analysis of Victoria Police (2001), above n 660, 36. See Table 4.1 – Alleged Offenders Processed by Offence Category, Age Category and Sex, 2000/01. Sentencing Advisory Council’s analysis of Victoria Police (2010), above n 134, 36. See Table 4.1 – Alleged Offenders Processed by Offence Category, Age Category and Sex, 2009/10.

672 Victoria Police (2001), above n 660, 36; Victoria Police (2010), above n 134, 36. Given that these figures are based on alleged offender counts, it is not possible to convert them to rates.

673 Stakeholder Roundtable Meeting (24 March 2011).

674 Stakeholder Roundtable Meeting (24 March 2011). According to research, unlike in earlier periods, young females now binge drink at similar rates to young males and are ‘closing the gap in the use of some illicit drugs’: Najman et al. (2009), above n 32, 378 (citations omitted). These authors suggest that there may now be greater acceptance of aggressive behaviours in young females than there has been in the past.
According to Victoria Police data, male young alleged offenders experienced a sharper decrease in alleged property offences (71.0% of all young male alleged offences processed in 2000–01 to 63.0% in 2009–10, a loss of 8.0%) than young females (75.4% of all young female alleged offences in 2000–01 to 68.0% in 2009–10, a loss of 7.3%).\textsuperscript{675}

**Figure 22:** Rate, per 100,000 young people, sentenced for committing principal proven offences against property, by year and gender\textsuperscript{676}

Source: Sentencing Advisory Council’s analysis of Australian Bureau of Statistics population data.

\textsuperscript{675} Victoria Police (2001), above n 660; Victoria Police (2010), above n 134. Given that these figures are based on alleged offender counts, it is not possible to convert them to rates.

\textsuperscript{676} The commentary on Australian Bureau of Statistics population data applies here: above n 652.
Most frequent principal proven offences

Table 1 displays the 10 most frequently sentenced principal proven offences in the Children’s Court for the 2000–09 period. Apart from the combination of all transit ticketing offences, the two most frequently sentenced individual offences are property offences (theft and burglary). Together these two offences account for 22.0% of all principal proven offences sentenced in the Children’s Court over the period. The most frequently sentenced principal proven offence against the person is causing injury, which was the third most frequently sentenced offence within the Children’s Court, and accounts for 5.5% of all principal proven offences, a lower frequency than the two higher listed property offences.

Table 1: Ten most frequent principal proven offences sentenced in the Children’s Court, 2000–09

<table>
<thead>
<tr>
<th>Act and section</th>
<th>Offence name</th>
<th>Type of offence</th>
<th>Young offenders sentenced as principal offence (number)</th>
<th>Young offenders sentenced as principal offence (% of total persons)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Crimes Act 1958 (Vic) s 74</td>
<td>Theft</td>
<td>Property</td>
<td>9,633</td>
<td>14.7</td>
</tr>
<tr>
<td>2 Crimes Act 1958 (Vic) s 76(1)</td>
<td>Burglary</td>
<td>Property</td>
<td>4,772</td>
<td>7.3</td>
</tr>
<tr>
<td>3 Crimes Act 1958 (Vic) s 18</td>
<td>Causing injury – intentionally or recklessly</td>
<td>Person</td>
<td>3,592</td>
<td>5.5</td>
</tr>
<tr>
<td>4 Crimes Act 1958 (Vic) s 197(1)</td>
<td>Criminal damage (intentionally damage or destroy property)</td>
<td>Property</td>
<td>2,528</td>
<td>3.9</td>
</tr>
<tr>
<td>5 Summary Offences Act 1966 (Vic) s 23</td>
<td>Unlawful (common) assault</td>
<td>Person</td>
<td>1,829</td>
<td>2.8</td>
</tr>
<tr>
<td>6 Liquor Control Reform Act 1998 (Vic) s 123(1)(b)</td>
<td>Consume or possess liquor while under 18</td>
<td>Other</td>
<td>1,767</td>
<td>2.7</td>
</tr>
<tr>
<td>7 Road Safety Act 1986 (Vic) s 18(1)(a)</td>
<td>Unlicensed driving</td>
<td>Driving</td>
<td>1,262</td>
<td>1.9</td>
</tr>
<tr>
<td>8 Summary Offences Act 1966 (Vic) s 24(2)</td>
<td>Aggravated assault (kicking, in company or with weapon)</td>
<td>Person</td>
<td>1,026</td>
<td>1.6</td>
</tr>
<tr>
<td>9 Road Safety Act 1986 (Vic) s 65</td>
<td>Careless driving</td>
<td>Driving</td>
<td>997</td>
<td>1.5</td>
</tr>
<tr>
<td>10 Transport Act 1983 (Vic) s 222(3)(e)</td>
<td>Place feet on furniture (public transport vehicle or premises)</td>
<td>Transit non-ticket</td>
<td>918</td>
<td>1.4</td>
</tr>
<tr>
<td><strong>Total for these 10 offences</strong></td>
<td></td>
<td></td>
<td><strong>28,324</strong></td>
<td><strong>43.2</strong></td>
</tr>
<tr>
<td><strong>(without transit ticketing offences)</strong></td>
<td></td>
<td></td>
<td><strong>15,923</strong></td>
<td></td>
</tr>
<tr>
<td><strong>All transit ticketing offences</strong></td>
<td></td>
<td></td>
<td><strong>20,401</strong></td>
<td><strong>31.1</strong></td>
</tr>
</tbody>
</table>

a The percentage of total offences may not match the sum of individual offences due to rounding.

b Transit ticketing offences were aggregated into one category as they consist of several separate but similar offences relating to ticketing on public transport and have less variation than offences in any other category.

677 Crimes Act 1958 (Vic) s 18 refers to causing injury ‘intentionally or recklessly’. The section originally created a single offence; however, after an amendment to specify two separate maximum penalties (10 years’ imprisonment if the injury was caused intentionally and five years’ imprisonment if the injury was caused recklessly), the section has been held to create two distinct offences. Any references to ‘causing injury’ in this report refer to both offences.
These 10 most frequently sentenced principal proven offences (excluding transit ticketing offences) accounted for 43.2% of all offences sentenced by the Children's Court. When combined with all transit ticketing offences, these offences accounted for 74.3%.

In order to examine whether there are any major differences in the distribution for the year 2000 and the distribution for 2009, tables were produced for the 10 most frequently sentenced offences for those two years. These are set out in Tables 2 and 3 below.

**Table 2:** Ten most frequent principal proven offences sentenced in the Children's Court during the 2000 calendar year

<table>
<thead>
<tr>
<th>Act and section</th>
<th>Offence name</th>
<th>Type of offence</th>
<th>Young offenders sentenced as principal offence (number)</th>
<th>Young offenders sentenced as principal offence (% of total persons)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Crimes Act 1958 (Vic) s 74</td>
<td>Theft</td>
<td>Property</td>
<td>1,135</td>
</tr>
<tr>
<td>2</td>
<td>Crimes Act 1958 (Vic) s 76.1</td>
<td>Burglary</td>
<td>Property</td>
<td>514</td>
</tr>
<tr>
<td>3</td>
<td>Crimes Act 1958 (Vic) s 18</td>
<td>Intentionally or recklessly causing injury</td>
<td>Person</td>
<td>215</td>
</tr>
<tr>
<td>4</td>
<td>Crimes Act 1958 (Vic) s 197.1</td>
<td>Criminal damage (intentionally damage or destroy property)</td>
<td>Property</td>
<td>187</td>
</tr>
<tr>
<td>5</td>
<td>Summary Offences Act 1966 (Vic) s 23</td>
<td>Unlawful (common) assault</td>
<td>Person</td>
<td>137</td>
</tr>
<tr>
<td>6</td>
<td>Road Safety Act 1986 (Vic) s 18.1.A</td>
<td>Unlicenced driving</td>
<td>Driving</td>
<td>133</td>
</tr>
<tr>
<td>7</td>
<td>Drugs, Poisons and Controlled Substances Act 1981 (Vic) s 71.1</td>
<td>Traffick a drug of dependence – unspecified quantity</td>
<td>Other</td>
<td>94</td>
</tr>
<tr>
<td>8</td>
<td>Summary Offences Act 1966 (Vic) s 9.1.c</td>
<td>Wilfully injure or damage property (damage valued less than $5,000)</td>
<td>Property</td>
<td>88</td>
</tr>
<tr>
<td>9</td>
<td>Summary Offences Act 1966 (Vic) s 24.2</td>
<td>Aggravated assault (kicking, in company or with weapon)</td>
<td>Person</td>
<td>85</td>
</tr>
<tr>
<td>10</td>
<td>Liquor Control Act 1987 (Vic) s 131.1.b Control of Weapons Act 1990 (Vic) s 6.1</td>
<td>Consume or possess liquor while under 18 Possess, carry or use controlled weapon – no lawful excuse</td>
<td>Other Other</td>
<td>68 68</td>
</tr>
</tbody>
</table>

The percentage of total offences may not match the sum of individual offences due to rounding.

Transit ticketing offences were aggregated into one category as they consist of several separate but similar offences relating to ticketing on public transport and have less variation than offences in any other category.

The tables for 2000 and 2009 show some differences in the offences processed by the Children's Court in these years. Although eight of the most frequent offences appear in both years, a major difference is that theft decreased as a percentage of all principal proven offences from 22.9% in 2000 to 13.5% in 2009, and
some offences against the person made up a higher proportion of all principal proven offences in 2009. For example, causing injury made up 4.3% of principal proven offences in 2000 but more than doubled to 9.3% in 2009, while common assault went from 2.8% of principal proven offences in 2000 to 4% in 2009.678

Comparing the number of young offenders sentenced for under age liquor offences for the years 2000 and 2009 reveals that these offences increased in the share of all principal proven offences, from 1.4% in 2000 to 4.9% in 2009.679 Violent offences, such as causing injury and common and aggravated assault, also appeared in the 10 most frequently sentenced offences lists for both years.

Table 3: Ten most frequent principal proven offences sentenced in the Children’s Court during the 2009 calendar year.

<table>
<thead>
<tr>
<th>Act and section</th>
<th>Offence name</th>
<th>Type of offence</th>
<th>Young offenders sentenced as principal offence (number)</th>
<th>Young offenders sentenced as principal offence (% of total persons)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Crimes Act 1958 (Vic) s 74</td>
<td>Theft</td>
<td>Property</td>
<td>866</td>
</tr>
<tr>
<td>2</td>
<td>Crimes Act 1958 (Vic) s 18</td>
<td>Intentionally or recklessly causing injury</td>
<td>Person</td>
<td>595</td>
</tr>
<tr>
<td>3</td>
<td>Crimes Act 1958 (Vic) s 76.1</td>
<td>Burglary</td>
<td>Property</td>
<td>474</td>
</tr>
<tr>
<td>4</td>
<td>Crimes Act 1958 (Vic) s 197.1</td>
<td>Criminal damage (intentionally damage or destroy property)</td>
<td>Property</td>
<td>339</td>
</tr>
<tr>
<td>5</td>
<td>Liquor Control Reform Act 1998 (Vic) s 123.1.b</td>
<td>Consume or possess liquor while under 18</td>
<td>Other</td>
<td>317</td>
</tr>
<tr>
<td>6</td>
<td>Summary Offences Act 1966 (Vic) s 23</td>
<td>Unlawful (common) assault</td>
<td>Person</td>
<td>256</td>
</tr>
<tr>
<td>7</td>
<td>Road Safety (Drivers) Regulations 1999 (Vic) r 213.1.b</td>
<td>Learner driver using vehicle without experienced driver</td>
<td>Driving</td>
<td>201</td>
</tr>
<tr>
<td>8</td>
<td>Road Safety Act 1986 (Vic) s 65</td>
<td>Careless driving</td>
<td>Driving</td>
<td>126</td>
</tr>
<tr>
<td>9</td>
<td>Road Safety Act 1986 (Vic) s 18.1.A</td>
<td>Unlicenced driving</td>
<td>Driving</td>
<td>100</td>
</tr>
<tr>
<td>10</td>
<td>Control of Weapons Act 1990 (Vic) s 6.1</td>
<td>Possess, carry or use controlled weapon – no lawful excuse</td>
<td>Other</td>
<td>100</td>
</tr>
<tr>
<td></td>
<td>Summary Offences Act 1966 (Vic) s 24.2</td>
<td>Aggravated assault (kicking, in company or with weapon)</td>
<td>Person</td>
<td>99</td>
</tr>
</tbody>
</table>

| Total top 10 offences (without transit ticketing offences)* | 3,473 | 54.1 |
| All transit ticketing offences | Transit ticketing* | 909 | 14.2 |

a The percentage of total offences may not match the sum of individual offences due to rounding.

b Transit ticketing offences were aggregated into one category as they consist of several separate but similar offences relating to ticketing on public transport and have less variation than offences in any other category.

678 This trend – of a decrease in property offences and concomitant increase in offences against the person – is evident when all 10 years’ worth of data are examined. See pages 102–104.

679 There is a discussion of ‘consume or possess liquor while under 18 years’ in Chapter 9, pages 155–156, Figure 66.
Ten most frequent male and female principal proven offences

Tables 4 and 5 show the 10 most frequently sentenced principal proven offences according to the gender of the offender. The list for male offenders contains two offences that do not occur in the list for females (unlicensed driving and careless driving) while females had ‘place feet on public transport furniture’ and ‘assault police’ as two unique offences. The 10 most frequent principal proven offences (not including transit ticketing offences) for males account for 46.7% of all principal proven offences for males over the ten-year period. For females, the offences account for 34.7% of all principal proven offences due to the high percentage of transit ticketing offences.

### Table 4: Ten most frequent principal proven offences sentenced in the Children’s Court, committed by male offenders, 2000–09

<table>
<thead>
<tr>
<th>Act and section</th>
<th>Offence name</th>
<th>Type of offence</th>
<th>Males sentenced as principal offence (number)</th>
<th>Males sentenced as principal offence (% of total males)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td><em>Crimes Act 1958 (Vic) s 74</em></td>
<td>Theft</td>
<td>Property</td>
<td>7,207</td>
</tr>
<tr>
<td>2</td>
<td><em>Crimes Act 1958 (Vic) s 76.1</em></td>
<td>Burglary</td>
<td>Property</td>
<td>4,272</td>
</tr>
<tr>
<td>3</td>
<td><em>Crimes Act 1958 (Vic) s 18</em></td>
<td>Intentionally or recklessly causing injury</td>
<td>Person</td>
<td>2,753</td>
</tr>
<tr>
<td>4</td>
<td><em>Crimes Act 1958 (Vic) s 197.1</em></td>
<td>Criminal damage (intentionally damage or destroy property)</td>
<td>Property</td>
<td>2,206</td>
</tr>
<tr>
<td>5</td>
<td><em>Liquor Control Reform Act 1998 (Vic) s 123.1.b</em></td>
<td>Consume or possess liquor while under 18</td>
<td>Other</td>
<td>1,438</td>
</tr>
<tr>
<td>6</td>
<td><em>Summary Offences Act 1966 (Vic) s 23</em></td>
<td>Unlawful (common) assault</td>
<td>Person</td>
<td>1,353</td>
</tr>
<tr>
<td>7</td>
<td><em>Road Safety Act 1986 (Vic) s 18.1.A</em></td>
<td>Unlicenced driving</td>
<td>Driving</td>
<td>1,156</td>
</tr>
<tr>
<td>8</td>
<td><em>Road Safety Act 1986 (Vic) s 65</em></td>
<td>Careless driving</td>
<td>Driving</td>
<td>886</td>
</tr>
<tr>
<td>9</td>
<td><em>Summary Offences Act 1966 (Vic) s 24.2</em></td>
<td>Aggravated assault (kicking, in company or with weapon)</td>
<td>Person</td>
<td>777</td>
</tr>
<tr>
<td>10</td>
<td><em>Road Safety (Drivers) Regulations 1999 (Vic) r 213.1.b</em></td>
<td>Learner driver using vehicle without experienced driver</td>
<td>Driving</td>
<td>723</td>
</tr>
</tbody>
</table>

**Total top 10 offences committed by males (without transit ticketing offences)**

**22,771** 46.7

**All transit ticketing offences**

**11,825** 24.2

---

a The percentage of total offences may not match the sum of individual offences due to rounding.

b Transit ticketing offences were aggregated into one category as they consist of several separate but similar offences relating to ticketing on public transport and have less variation than offences in any other category.

Of the offences displayed in both tables, a far higher percentage of females than males were sentenced for transit ticketing offences as the principal proven offence (51% of females compared with 24.2% males). Other offences for which females were proportionately more frequently sentenced than males were unlawful (common) assault (2.83% for females, 2.77% for males), place feet on seats (a transit non-ticketing offence: 2.3% of females compared with 1.1% of males) and assault police (from the *Summary Offences Act 1966 (Vic)*: 1.1% of females compared with 0.8% of
Unlawful (common) assault, placing feet on seats and assaulting police were also among the 10 most frequently sentenced offences for which females outstripped males in the rate of increase over the ten-year period. For females, unlawful (common) assault increased from 3.4% of all principal proven offences in 2000 to 4.9% in 2009; place feet on seat offences increased from 0.6% of all principal proven offences in 2000 to 0.9% in 2009; while assault police had increased from 1.1% of all principal proven offences in 2000 to 1.6% in 2009.

For the remainder of the most frequently sentenced offences common to males and females, a higher proportion of male than female offenders was sentenced for each offence, although there were similarities. For example, theft made up 14.8% of all principal proven offences by males compared with 14.4% for females; burglary was 8.8% for males versus 3% for females; criminal damage was 4.5% for males versus 1.9% for females; and consume or possess liquor while under 18 was 2.9% for males compared with 2.2% for females.

Table 5: Ten most frequent principal proven offences sentenced in the Children’s Court, committed by female offenders, 2000–09

<table>
<thead>
<tr>
<th>Act and section</th>
<th>Offence name</th>
<th>Type of offence</th>
<th>Females sentenced as principal offence (number)</th>
<th>Females sentenced as principal offence (% of total females)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td><em>Crimes Act 1958 (Vic)</em> s 74</td>
<td>Theft Property</td>
<td>2,426</td>
<td>14.4</td>
</tr>
<tr>
<td>2</td>
<td><em>Crimes Act 1958 (Vic)</em> s 18</td>
<td>Intentionally or recklessly causing injury Person</td>
<td>839</td>
<td>5.0</td>
</tr>
<tr>
<td>3</td>
<td><em>Crimes Act 1958 (Vic)</em> s 76.1</td>
<td>Burglary Property</td>
<td>500</td>
<td>3.0</td>
</tr>
<tr>
<td>4</td>
<td><em>Summary Offences Act 1966 (Vic)</em> s 23</td>
<td>Unlawful (common) assault Person</td>
<td>476</td>
<td>2.8</td>
</tr>
<tr>
<td>5</td>
<td><em>Transport Act 1983 (Vic)</em> s 222.3.e</td>
<td>Place feet on furniture (public transport vehicle or premises) Transit non-ticket</td>
<td>379</td>
<td>2.3</td>
</tr>
<tr>
<td>6</td>
<td><em>Liquor Control Reform Act 1998 (Vic)</em> s 123.1.b</td>
<td>Consume or possess liquor while under 18 Other</td>
<td>329</td>
<td>2.0</td>
</tr>
<tr>
<td>7</td>
<td><em>Crimes Act 1958 (Vic)</em> s 197.1</td>
<td>Criminal damage (intentionally damage or destroy property) Property</td>
<td>322</td>
<td>1.9</td>
</tr>
<tr>
<td>8</td>
<td><em>Summary Offences Act 1966 (Vic)</em> s 24.2</td>
<td>Aggravated assault (kicking, in company or with weapon) Person</td>
<td>249</td>
<td>1.5</td>
</tr>
<tr>
<td>9</td>
<td><em>Summary Offences Act 1966 (Vic)</em> s 52.1</td>
<td>Assault police Person</td>
<td>190</td>
<td>1.1</td>
</tr>
<tr>
<td>10</td>
<td><em>Road Safety (Drivers) Regulations 1999 (Vic)</em> r 213.1.b</td>
<td>Learner driver using vehicle without experienced driver Driving</td>
<td>129</td>
<td>0.8</td>
</tr>
<tr>
<td><strong>Total top 10 offences committed by females (without transit ticketing offences)</strong></td>
<td></td>
<td></td>
<td><strong>5,839</strong></td>
<td><strong>34.7</strong></td>
</tr>
<tr>
<td><strong>All transit ticketing offences</strong></td>
<td>Transit ticketing</td>
<td></td>
<td><strong>8,576</strong></td>
<td><strong>51.0</strong></td>
</tr>
</tbody>
</table>

*a* The percentage of total offences may not match the sum of individual offences due to rounding.

*b* Transit ticketing offences were aggregated into one category as they consist of several separate but similar offences relating to ticketing on public transport and have less variation than offences in any other category.

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680 Some of the principal proven offences outside the 10 most frequently sentenced offences for which females were proportionately sentenced more than males include using offensive or indecent language in public (0.6% for females, 0.5% for males) and obtain property by deception (0.7% for females, 0.4% for males) among others.
Ten most frequent principal proven offences against the person

Table 6 displays the 10 most frequent principal proven offences against the person sentenced in the Children’s Court from 2000 to 2009.

The most common types of offences on this list are assaults or cause injuries, which accounted for six of the 10 listed offences and contributed to a combined total of 12.0% of total principal proven offences. The most frequent offence was causing injury, accounting for 5.5% of all principal proven offences, followed by unlawful assault (2.8%) and aggravated assault (1.6%). Robbery (sixth on the list) and armed robbery (seventh) contributed to a combined total of 1.7% of all principal proven offences. Other types of offences against the person, such as reckless conduct and make threat to kill, appeared eighth and ninth on the list. Intentionally causing serious injury appeared tenth, making up 0.3% of all principal proven offences sentenced in the Children’s Court from 2000 to 2009.

Table 6: Ten most frequent principal proven offences against the person sentenced in the Children’s Court, 2000–09

<table>
<thead>
<tr>
<th>Act and section</th>
<th>Offence name</th>
<th>Offences against the person as principal offence (number)</th>
<th>Offences against the person as principal offence (% of all principal proven offences)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Crimes Act 1958 (Vic) s 18</td>
<td>Intentionally or recklessly causing injury</td>
<td>3,592</td>
</tr>
<tr>
<td>2</td>
<td>Summary Offences Act 1966 (Vic) s 23</td>
<td>Unlawful (common) assault</td>
<td>1,829</td>
</tr>
<tr>
<td>3</td>
<td>Summary Offences Act 1966 (Vic) s 24.2</td>
<td>Aggravated assault (kicking, in company or with weapon)</td>
<td>1,026</td>
</tr>
<tr>
<td>4</td>
<td>Crimes Act 1958 (Vic) s 17</td>
<td>Recklessly causing serious injury</td>
<td>641</td>
</tr>
<tr>
<td>5</td>
<td>Summary Offences Act 1966 (Vic) s 52.1</td>
<td>Assault police</td>
<td>596</td>
</tr>
<tr>
<td>6</td>
<td>Crimes Act 1958 (Vic) s 75</td>
<td>Robbery</td>
<td>578</td>
</tr>
<tr>
<td>7</td>
<td>Crimes Act 1958 (Vic) s 75A</td>
<td>Armed robbery</td>
<td>523</td>
</tr>
<tr>
<td>8</td>
<td>Crimes Act 1958 (Vic) s 23</td>
<td>Reckless conduct endangering serious injury</td>
<td>311</td>
</tr>
<tr>
<td>9</td>
<td>Crimes Act 1958 (Vic) s 20</td>
<td>Make threat to kill</td>
<td>252</td>
</tr>
<tr>
<td>10</td>
<td>Crimes Act 1958 (Vic) s 16</td>
<td>Intentionally causing serious injury</td>
<td>191</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Total top 10 offences against the person*</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>9,539</td>
<td>14.5</td>
</tr>
</tbody>
</table>

---

*The percentage of total offences may not match the sum of individual offences due to rounding.

**Assaults and injuries includes the offences of causing injury, unlawful assault, aggravated assault, assault police and intentionally or recklessly causing serious injury.**
Ten most frequent principal proven property offences

Table 7 displays the 10 most frequent principal proven offences against property sentenced in the Children’s Court from 2000 to 2009.

The 10 most common principal proven property offences account for 30.2% of all principal proven offences from 2000 to 2009. Offences relating to stolen goods feature prominently. Theft, handle or receive stolen goods, attempted theft and obtain property by deception accounted for a combined total of 16.6% of total principal proven offences (and appeared on the list first, fifth, sixth and seventh, respectively). Burglary and trespassing offences\(^{682}\) accounted for 8.3% of principal proven offences within Table 7. Other types of offences listed in Table 7 include property damage offences,\(^{683}\) which, when combined, contributed to a total of 4.8% of all principal proven offences, and forgery offences for vehicle or driving-related documents (equal sixth with attempted theft).

Table 7: Ten most frequent principal proven offences against property sentenced in the Children’s Court, 2000–09

<table>
<thead>
<tr>
<th>Act and section</th>
<th>Offence name</th>
<th>Offences against property as principal offence (number)</th>
<th>Offences against property as principal offence (% of all principal offences)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td><em>Crimes Act 1958 (Vic) s 74</em></td>
<td>Theft</td>
<td>9,633</td>
</tr>
<tr>
<td>2</td>
<td><em>Crimes Act 1958 (Vic) s 76.1</em></td>
<td>Burglary</td>
<td>4,772</td>
</tr>
<tr>
<td>3</td>
<td><em>Crimes Act 1958 (Vic) s 197.1</em></td>
<td>Criminal damage (intentionally damage or destroy property)</td>
<td>2,528</td>
</tr>
<tr>
<td>4</td>
<td><em>Summary Offences Act 1966 (Vic) s 9.1.c</em></td>
<td>Wilfully injure or damage property (damage valued less than $5,000)</td>
<td>622</td>
</tr>
<tr>
<td>5</td>
<td><em>Crimes Act 1958 (Vic) s 88.1</em></td>
<td>Handle or receive stolen goods</td>
<td>573</td>
</tr>
<tr>
<td>6</td>
<td><em>Road Safety Act 1986 (Vic) s 72.1.b</em></td>
<td>Fraudulently alter or use driving-related documents or ID</td>
<td>336</td>
</tr>
<tr>
<td></td>
<td><em>Crimes Act 1958 (Vic) s 321m</em></td>
<td>Attempted theft</td>
<td>336</td>
</tr>
<tr>
<td>7</td>
<td><em>Crimes Act 1958 (Vic) s 81.1</em></td>
<td>Obtain property by deception</td>
<td>329</td>
</tr>
<tr>
<td>8</td>
<td><em>Summary Offences Act 1966 (Vic) s 9.1.e</em></td>
<td>Enter private or scheduled public place – no authority or lawful excuse</td>
<td>244</td>
</tr>
<tr>
<td>9</td>
<td><em>Crimes Act 1958 (Vic) s 76.1.a</em></td>
<td>Enter building – intent to steal</td>
<td>232</td>
</tr>
<tr>
<td>10</td>
<td><em>Crimes Act 1958 (Vic) s 77.1</em></td>
<td>Aggravated burglary</td>
<td>190</td>
</tr>
<tr>
<td></td>
<td><strong>Total top 10 offences against property</strong></td>
<td><strong>19,795</strong></td>
<td><strong>30.2</strong></td>
</tr>
</tbody>
</table>

\(^{682}\) Offences relating to burglary and trespass include burglary (ranked second), enter private place or scheduled public place without permission or lawful excuse (eighth), enter building – intent to steal (ninth) and aggravated burglary (tenth).

\(^{683}\) Criminal damage (intentionally damage or destroy property) was ranked third, and wilfully damage property (damage less than $5000 value) was ranked fourth.

\(^{a}\) The percentage of total offences may not match the sum of individual offences due to rounding.
Sentencing children and young people in Victoria
Chapter 9
Sentence distribution

This chapter looks at the overall distribution of sanctions in the Children's Court over the decade 2000–09 and examines the sentencing distributions and trends for each offence category – property offences, offences against the person, transit ticketing and transit non-ticketing, driving offences and other offences. This includes data for the most frequent individual principal proven offences in each category and offences of particular interest. There is also a section on breach offences.

Distribution of sentences by principal proven offence

Figure 23 shows the distribution of sentences imposed by the Children's Court during the 2000–09 period for all principal proven offences, apart from transit ticketing and transit non-ticketing offences. Sentences are grouped into the following categories: undertakings/bonds (includes accountable and non-accountable undertakings, good behaviour bonds), fines, supervisory orders (includes probation, youth supervision orders and youth attendance orders) and detention orders (youth residential centre and youth justice centre orders).

Figure 23: Distribution of sentencing for principal proven offences, excluding all transit ticketing and transit non-ticketing offences, 2000–09

- Undertaking/bond: 51.4%
- Fine: 18.9%
- Supervisory order: 25.6%
- Detention order: 4.1%

Transit ticketing and non-ticketing offences were largely sentenced through the use of fines. Of all the transit principal proven offences sentenced within the Children's Court between 2000 and 2009, 96.7% were sentenced with fines. They have been omitted to prevent a skewing of the data.
Sentencing children and young people in Victoria

The most prevalent category of sentencing order used for Children’s Court offences was undertakings/bonds. Undertakings/bonds comprised just over half of the sentences imposed from 2000 to 2009. This category was followed by the categories supervisory orders (25.6%) and fines (18.9%). Custodial orders were made in only 4.1% of cases. The large percentage of principal proven offences given non-custodial sentences reflects the rehabilitative focus of the Children’s Court. It is possible that group conferencing has also contributed – at least in recent years – to the small percentage of custodial orders, as the CYF Act requires the court to impose a less severe sanction than it would otherwise have imposed if an offender successfully completes group conferencing.685

A participant in the Council’s roundtable commented that the large proportion of undertakings/bonds might indicate the need for a statewide diversion program for children:

nearly 50% of people are being dealt with by undertakings or bonds and so, if you had a good statewide diversion program that was available to young people … then you would be diverting some of those people away from court.686

This participant qualified the statement, however, with the comment that some of those receiving these undertakings/bonds may not be suitable for diversion as they may have received an undertaking or bond following successful completion of group conferencing, which would have moved the sanction ‘from supervisory orders down the scale’.687

Undertakings cannot have attached conditions whereas good behaviour bonds can, although according to stakeholders the Council consulted, only a small percentage do (around 10% according to one roundtable participant). Some examples participants gave of conditions commonly attached to bonds are drug and alcohol counselling, road trauma awareness courses and a requirement to ‘comply with the group conference outcome plan’.688 Generally defence counsel will suggest conditions, and these may be individual-based, for example, continuing to attend a psychologist for counselling. According to Children’s Court staff with whom the Council consulted, the court is not proactive in this area, and there are few programs available for children.689 In regional areas, if the court has a relationship with particular programs, it may refer children to these as conditions of orders. For example, the Dandenong Children’s Court has a relationship with the ‘One Ocean’ project, which is specifically targeted towards ‘at risk’ Polynesian youth.690 Young people are ‘very poorly served’ in this area, and there are often long waiting lists (up to three months) to obtain a needs assessment from the Children’s Court Clinic.691

Stakeholders were generally unimpressed with fines as a sentencing option for children. One participant in the roundtable commented:

Well I think [in regards to fines] they’re absolutely useless generally, and most of the fines that are being imposed are imposed for transit offenders, ex parte offenders. Sometimes a 17 year old who’s got employment and has had a bit of a history in the courts … you might say, ‘Well you can pay a fine for your offending because you’re in a position to pay it’, but it’s not a very good sanction for a young person.

There appeared to be general consensus among roundtable participants on this point.

685 Children, Youth and Families Act 2005 (Vic) s 362(3).
687 Stakeholder Roundtable Meeting (24 March 2011).
688 Stakeholder Roundtable Meeting (24 March 2011).
689 Meeting with Children’s Court of Victoria (23 February 2011).
690 Meeting with Victoria Police (15 April 2011).
691 Meeting with Children’s Court of Victoria (23 February 2011).
A Dandenong police prosecutor with whom the Council spoke commented that fines are generally only appropriate for driving offences as they have ‘no rehabilitative effect’. Representatives from the Youth Affairs Council of Victoria and the Youth Referral and Independent Persons Program described fines for children as ‘discriminatory’ and ‘ridiculous’ (discriminatory in the sense that they discriminate in favour of children whose parents can afford to pay them). They also commented that fines may in some circumstances lead to an escalation in criminal offending, whereby the fine may ‘push them further into that cycle of poverty and debt’. Although no data on fine payment are available, it is likely that a large proportion of fines remain unpaid.

Figure 24 displays the types of sentencing orders given to children by the Children’s Court, according to the year of sentencing. There do not appear to be any major changes in the sentencing distribution between 2000 and 2009, although supervisory orders appear to have been on a slight upward trend since about mid 2005, when the court’s jurisdiction was extended to cover individuals aged 17 years (however, the percentage given supervisory orders in 2000 is much the same as that for 2009).

The distribution of sentencing orders was analysed for females and males separately (excluding all transit offences), in order to determine whether there had been any real shifts over time. The sentencing distribution for both genders showed a slight increase in the use of fines and a slight decrease in the use of undertakings/bonds. Females also showed a slight decrease in receiving detention orders.

Figure 24: Type of sentences given for principal proven offences, excluding all transit ticketing and transit non-ticketing offences, by year of sentencing

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692 Meeting with Victoria Police (15 April 2011).
693 Meeting with Youth Affairs Council of Victoria and Youth Referral and Independent Persons Program (7 April 2011).
Figure 25 examines the rate of young people receiving each sentence type for the principal proven offences (per 100,000 of the relevant age population). Undertakings/bonds were imposed at the highest rates and detention at the lowest. The rates for all sentence types increased over the ten-year period: undertakings/bonds (449 per 100,000 in 2000 to 476 per 100,000 in 2009), supervisory orders (233 per 100,000 in 2000 to 270 per 100,000 in 2009) and fines (146 per 100,000 in 2000 to 193 per 100,000 in 2009). Detention increased only very slightly (39 per 100,000 in 2000 to 43 per 100,000 in 2009).

Figure 26 examines the rate of young males receiving each sentence type for the principal proven offences (per 100,000 of the relevant age population), while Figure 27 does the same for young females. Regardless of gender, undertakings/bonds were imposed at the highest rates and detention at the lowest. The rates for all sentence types increased over the 10 years for males, although detention rates increased only slightly.694 Females experienced an increase in the rate of each type of sentence, with the exception of detention.695

Figure 25: Rate (per 100,000 young people of relevant age group) given each type of sentence for principal proven offences, excluding transit ticketing and non-ticketing offences, by year of sentencing696

Source: Sentencing Advisory Council’s analysis of Australian Bureau of Statistics population data.

694 Undertakings/bonds: 698 per 100,000 in 2000 to 728 per 100,000 in 2009; supervisory orders: 392 per 100,000 in 2000 to 455 per 100,000 in 2009; fines: 252 per 100,000 in 2000 to 323 per 100,000 in 2009; detention: 65 per 100,000 in 2000 to 78 per 100,000 in 2009.

695 Undertakings/bonds: 191 per 100,000 in 2000 to 209 per 100,000 in 2009; supervisory orders: 68 per 100,000 in 2000 to 75 per 100,000 in 2009; fines: 37 per 100,000 in 2000 to 55 per 100,000 in 2009; detention: 11 per 100,000 in 2000 to 7 per 100,000 in 2009.

696 See commentary on Australian Bureau of Statistics population data: above n 652.
Figure 26: Rate (per 100,000 male young people of relevant age group) given each type of sentence for principal proven offences, excluding transit ticketing and non-ticketing offences, by year of sentencing.

Figure 27: Rate (per 100,000 female young people of relevant age group) given each type of sentence for principal proven offences, excluding transit ticketing and non-ticketing offences, by year of sentencing.
Distribution of sentences within offence categories

For each offence category, some general data are presented. Graphs show the number of young offenders (by age) sentenced within that offence category over the 10 years and the sentence distribution for the offence category. A selection of the most frequently sentenced individual offences within each category follows, although in some cases there is discussion of offences that are outside the 10 most frequently sentenced offences for the category, due to particular interest among stakeholders or notable data findings. No data are available to allow the effect of prior convictions on sentencing to be analysed.697

In the Children’s Court, indictable offences are triable summarily pursuant to section 356 of the CYF Act, apart from the excluded offences listed in section 516(1)(b).

Property offences

Figure 28 shows the distribution of offenders sentenced for committing a property offence as the principal proven offence, according to the year of sentencing and age at the time of committing the offence. Throughout the 2000–09 period, the majority of offenders sentenced for committing a principal proven offence against property were 16 years of age (31.2%) or 15 years of age (26.0%), although after 1 July 2005, a significant number of offenders aged 17 years at the time of committing the offences also appeared before the Children’s Court for sentencing.

Figure 28: Number of young offenders sentenced for property offences as the principal proven offence, by year of sentencing and age at the time of offence

Note: Offenders whose age was unknown at the time of committing the offence were excluded from this figure.

697 Prior offending and recidivism are discussed in Chapter 2.
Figure 28 also shows a change in the age distribution of offending for property offences in the two trend lines, which trace the numbers of offenders aged 16 years or below at the time of committing the offence (the bottom black line) compared with offenders aged 17 years or below at the time of committing the offence. The number of offenders aged 16 years or below who committed an offence against property has been decreasing over the 2000–09 period; however, the overall number of principal proven property offences has remained relatively steady due to the inclusion of offenders aged 17 years in the Children’s Court after 1 July 2005.

Prior to 1 July 2005, the most common age for children to commit a property offence (which was later sentenced as the principal proven offence in a case) was 16 years (35.5% of male property offenders and 32.5% of female property offenders), followed by children aged 15 years (28.8% male, 30.2% female), then those aged 14 years (19.2% male, 22.0% female). The inclusion of offenders aged 17 years sentenced in the court after 1 July 2005 affected the age distribution of offenders but in slightly different ways for females and males. Male offenders sentenced after 1 July 2005 were most commonly 17 years of age at the time of committing the offence (26.6%), although this was closely followed by males who were aged 16 (26.5%) and 15 years (21.3%). On the other hand, the majority of females were still aged 16 (25.7%) or 15 (24.9%), with females 17 years of age the third most frequently sentenced (20.5%).

Figure 29 shows the sentencing pattern for offenders who committed property offences as the principal proven offences. The most frequently ordered sanction was a good behaviour bond (44.3%), followed by an accountable undertaking (17.8%) and probation (16.8%).

Male offenders who committed property offences as the principal proven offence were more likely than females to receive probation (17.6% for males, 13.3% for females), a fine (11.1% for males, 6.7% for females), a youth supervision order (5.6% for males, 2.3% for females) or a youth detention order (4.0% for males, 1.4% for females). Females were more likely than males to receive an accountable undertaking (25.3% for females, 16.1% for males) or good behaviour bond (48.1% for females, 43.5% for males). The difference in the distribution of sanctions reflects the different offence distribution for females and males.

Figure 29: Sentencing distribution for principal proven offences against property, 2000–09

![Figure 29: Sentencing distribution for principal proven offences against property, 2000–09](image)

*Youth detention includes people sentenced to a youth residential facility or to a youth training or youth justice facility.
Sentencing distribution for most frequent property offences

Theft, burglary and criminal damage are the three most frequent principal proven property offences in the Children’s Court, in descending order of frequency. As seen in Table 7, these offences make up 14.7%, 7.3% and 3.9% respectively of all principal proven offences sentenced in the court over the ten-year period. The following is an analysis of the sentencing patterns for these three offences.

**Theft**

Theft is the most common type of property offence. Table 7 indicates that theft accounted for 14.7% of all principal proven offences in the Children’s Court over the 10 years from 2000 to 2009. Over this period, the court sentenced 9,633 theft offences (as the principal proven offence).

Figure 30 shows the distribution of offenders who committed theft as the principal proven offence, according to the year of sentencing and age at the time of committing the offence. The number of people sentenced for theft as the principal proven offence has been on a downward trend throughout the 2000–09 period. This decrease is more apparent with offenders aged 16 years or under at the time of committing theft. The inclusion of offenders aged 17 years from 1 July 2005 has ‘topped up’ the number of people sentenced for theft, although the total number of people sentenced for theft as the principal proven offence in 2009 was still lower than the number sentenced in 2000. Roundtable participants were of the opinion that young offenders are moving away from the traditional ‘juvenile offences’ of car and shop thefts, due to the improved security enabled by modern technology.

![Figure 30: Number of young offenders sentenced for the principal proven offence of theft, by year of sentencing and age at time of offence](image)

Note: Offenders whose age was unknown at the time of committing the offence were excluded from this figure.

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698 Under the *Crimes Act 1958* (Vic) s 72, a person commits theft if that person dishonestly takes any property belonging to another person with the intention of permanently depriving that person of the property. It carries a maximum penalty of 10 years’ imprisonment and is an indictable offence that is triable summarily.

Figure 31 shows the distribution of sentences for theft throughout 2000–09. The most frequently imposed sanction was good behaviour bonds (45.2%), followed by accountable undertakings (23%) and probation (13.6%). A small percentage of people received a custodial sentence (3.1%) for theft as the principal proven offence. The latter are almost certainly entrenched, recidivist offenders who have exhausted the lesser sanctions.

The distribution of sentence types for theft remained stable over the 10 years.

Figure 31: Sentencing distribution for the principal proven offence of theft, 2000–09

*Youth detention includes people sentenced to a youth residential facility (the light grey portion of the graph) or to a youth training or youth justice facility (the dark grey portion of the graph).

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700 See discussion of recidivism among young offenders in Chapter 2.
Burglary

Burglary, second on the list of most frequent principal proven property offences, accounted for 7.3% of all principal proven offences in the Children’s Court. This translated to 4,772 principal proven burglary offences over the 10 years, as indicated by Table 7.

Figure 32 shows the distribution of offenders sentenced for burglary as the principal proven offence, according to the year of sentencing and age at the time of the offence. With the inclusion of offenders aged 17 years from 2005 onwards, the number of people sentenced for burglary as the principal proven offence has remained relatively steady over the 2000–09 period. However, the number of offenders aged 16 years and under sentenced for burglary has been decreasing over time. Similar explanations to those relevant to property offences overall apply to this trend.

Figure 32: Number of young offenders sentenced for the principal proven offence of burglary, by year of sentencing and age at time of offence

Note: Offenders whose age was unknown at the time of committing the offence were excluded from this figure.

Under the Crimes Act 1958 (Vic) s 76, a person is guilty of burglary if that person enters a building or part of a building as a trespasser and intends to steal, assault a person in the building or damage the building or property in the building. It carries a maximum penalty of 10 years’ imprisonment and is an indictable offence that is triable summarily.
Figure 33 shows the distribution of sentences throughout 2000–09 for offenders convicted of burglary as the principal proven offence. Burglary was mainly sentenced through the use of good behaviour bonds (43.5%) or probation (27.3%). A moderate percentage of children received youth supervision orders (9.0%) and accountable undertakings (8.7%), while a small percentage received a custodial sentence (5.3%) for this principal proven offence.

An examination of the sentence type distribution over time reveals some fluctuations in the use of bonds and undertakings and supervisory orders (such that an increase in one corresponds to a decrease in the other). Fines appear to have decreased slightly in terms of the percentage share over the 10 years.

Figure 33: Sentencing distribution for the principal proven offence of burglary, 2000–09

- Unaccountable undertaking: 0.6%
- Accountable undertaking: 8.7%
- Good behaviour bond: 43.5%
- Fine: 4.4%
- Probation: 27.3%
- Youth supervision order: 9.0%
- Youth attendance order: 1.3%
- Youth detention*: 5.3%

*Youth detention includes people sentenced to a youth residential facility (the light grey portion of the graph) or to a youth training or youth justice facility (the dark grey portion of the graph).
Criminal damage (intentionally damage or destroy property)

Criminal damage\(^{702}\) is the third most frequently sentenced property offence in the Children’s Court in the 2000–09 period. Table 7 shows that criminal damage makes up 3.9% of all principal proven offences (or 2,528 offences in total).

Figure 34 shows the distribution of offenders sentenced for committing criminal damage as the principal proven offence, according to the year of sentencing and age at the time of the offence. The number of children sentenced for criminal damage as the principal proven offence has increased over time, although some of this increase can be attributed to the inclusion of offenders aged 17 years in the Children’s Court jurisdiction after 1 July 2005.

Figure 34: Number of young offenders sentenced for the principal proven offence of criminal damage, by year of sentencing and age at time of offence

<table>
<thead>
<tr>
<th>Year of sentencing</th>
<th>Number of young offenders sentenced for principal proven offence</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>100</td>
</tr>
<tr>
<td>2001</td>
<td>200</td>
</tr>
<tr>
<td>2002</td>
<td>300</td>
</tr>
<tr>
<td>2003</td>
<td>400</td>
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<tr>
<td>2004</td>
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<td>2006</td>
<td>700</td>
</tr>
<tr>
<td>2007</td>
<td>800</td>
</tr>
<tr>
<td>2008</td>
<td>900</td>
</tr>
<tr>
<td>2009</td>
<td>1,000</td>
</tr>
</tbody>
</table>

Trend for 10 to 17 year olds
Trend for 10 to 16 year olds
Change in age jurisdiction of court (1 July 2005)

Note: Offenders whose age was unknown at the time of committing the offence were excluded from this figure.

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\(^{702}\) Under the Crimes Act 1958 (Vic) s 197, a person is guilty of this offence if that person intentionally and without lawful excuse destroys or damages any property. It carries a maximum penalty of 10 years’ imprisonment. It is an indictable offence that is triable summarily.
Figure 35 shows the distribution of sentences over the 2000–09 period for offenders who had committed criminal damage as the principal proven offence. Sentences for criminal damage were dominated by good behaviour bonds (50.9%), although a moderate percentage of people received an accountable undertaking (16.0%) or probation (14.2%). Only a small percentage of children received a custodial sentence (2.4%) for this principal proven offence.

Sentence types for this offence have remained relatively stable over time.

**Figure 35:** Sentencing distribution for the principal proven offence of criminal damage, 2000–09

*Youth detention includes people sentenced to a youth residential facility (the light grey portion of the graph) or to a youth training or youth justice facility (the dark grey portion of the graph).
Offences against the person

Figure 36 shows the distribution of offenders sentenced for committing offences against the person as the principal proven offence, according to the year of sentencing and age at the time of committing the offence. The number of children sentenced for offences against the person as the principal proven offence has increased over the period in question. Some of this increase can be attributed to the inclusion of offenders aged 17 years in the Children’s Court jurisdiction from 1 July 2005; however, the following graph shows that even had these 17 year olds not been included, there would still have been an increase (occurring from 2006 onwards) for the younger children.

The age distribution of young offenders committing offences against the person as the principal proven offence varied slightly according to gender and whether the sentence was handed down before or after 1 July 2005. Males sentenced prior to 1 July 2005 were mainly 16 (40.8%), 15 (28.6%) or 14 (18.6%) years of age at the time of committing the principal proven offence. The majority of males sentenced after 1 July 2005 were aged 17 (30.2%), 16 (28.8%) or 15 years (20.4%) at the time of committing the offence. Females sentenced prior to 1 July 2005 were mainly aged 15 (33.7%), 16 (31.7%) or 14 years (21.0%) at the time of committing the offence, while females sentenced after 1 July 2005 were aged 15 (27.3%), 16 (26.5%) or 17 years (20.2%). The change in age distribution for offenders sentenced after 1 July 2005 is similar to the pattern seen for offenders sentenced for property offences generally, with offenders aged 17 years tending to become the majority age group for male offenders, but less so for female offenders.

Figure 37 displays the sentencing distribution for offences against the person as the principal proven offence. The most frequently imposed sentence for offences against the person was good behaviour bonds (34.8%), followed by probation (29.1%) and youth supervision orders (12.7%).

Male offenders who committed offences against the person as the principal proven offence were more likely than females to receive a fine (7.6% for males, 5.1% for females), a youth supervision order (13.7% for males, 9% for females), a youth attendance order (3.1% for males, 1.3% for females) or a youth detention order (9.1% for males, 3.9% for females). Females were more likely than males to receive a good behaviour bond (43.9% for females, 32.5% for males) or an accountable undertaking (8.2% for females, 4.3% for males). The higher proportion of lower-level sanctions for females is likely to reflect less severe offending but may also be related to fewer prior convictions.

Figure 36: Number of young offenders sentenced for offences against the person as the principal proven offence, by year of sentencing and age at time of offence

Note: Offenders whose age was unknown at the time of committing the offence were excluded from this figure.
As shown in Figure 38, the distribution of sentence types remained relatively steady throughout the whole period, in particular for fines and detention orders. There appears to be an inverse relationship between undertakings/bonds and supervisory orders, whereby if one increases, the other decreases and vice versa. It does appear that from mid 2005 onwards, the use of supervisory orders has increased, with a corresponding decrease in the use of undertakings/bonds.

As discussed above, several stakeholders with whom the Council consulted were concerned about the increase in violent offending among young offenders. However, it would appear that this increase has not led to changes in the Children’s Court sentence distribution for offences against the person. It is possible that the increasing use (compared with other sanction types) of supervisory orders since 2005 is a reflection of a changing distribution of offences against the person in the court.

Figure 37: Sentencing distribution for principal proven offences against the person, 2000–09

*Youth detention includes people sentenced to a youth residential facility or to a youth training or youth justice facility.

Figure 38: Type of sentencing dispositions used for principal proven offences against the person, by year of sentencing
Figures 39 and 40 analyse the female and male sentencing dispositions given for offences against the person over the 2000–09 period. When examined separately, females were more likely to receive an undertaking or bond compared with any other type of sentence, during the whole 2000–09 period (Figure 39), with supervisory orders the second most common type of sentence. In contrast, males had supervisory orders as the most common type of sentence (Figure 40), with undertakings/bonds second most frequent. There are no clear patterns that would indicate an increase or decrease in any of the four types of sentencing dispositions over time, except perhaps for male offenders, for whom supervisory orders appear to have increased slightly from 2006, with undertakings/bonds decreasing from this date.

Figure 39: Type of sentencing dispositions used for principal proven offences against the person for female young offenders, by year of sentencing

![Figure 39](image)

Figure 40: Types of sentencing dispositions used for principal proven offences against the person for male young offenders, by year of sentencing

![Figure 40](image)
Sentencing distribution for most frequent offences against the person

Causing injury, unlawful assault, aggravated assault, recklessly causing serious injury, assault police and robbery were the six most common offences against the person (in that order) sentenced in the Children’s Court over the 2000–09 period (see Table 6). In the following sections, the sentencing patterns for these offences are examined, some in more detail than others, with the addition of the two slightly less frequent offences of affray (eleventh) and intentionally causing serious injury (tenth). In comparison with the other offence categories, offences against the person will be studied more closely, due to the upward trend in sentencing for many of these offences over the ten-year period. The inclusion of affray and intentionally causing serious injury in the following section, despite the fact that they are not on the list of the 10 most frequently sentenced offences within the category, reflects the strong interest in these offences among stakeholders.

Some of the graphs in this section appear to show steep increases in sentencing for particular offences over time. This is likely to be a reflection of the increase in police processing of assault-type offences over the ten-year data period.703 However, offences against the person made up only 17% of all principal proven offences dealt with by the court over the 10 years, compared with 32.1% for property offences. Thus, even the most frequently sentenced offences against the person contributed only marginally to the overall figures. For example, recklessly causing serious injury has shown an increase over the ten-year period and is fourth in the list of the 10 most frequently sentenced offences against the person. Nonetheless, it still only accounts for 1% of all principal proven offences dealt with by the court over the 10 years, which equates to 641 cases, as shown in Table 6.

Cause injury and cause serious injury offences

This section examines four closely related offences: recklessly causing injury, intentionally causing injury, recklessly causing serious injury and intentionally causing serious injury. Table 6 indicates that, together, these four offences accounted for 6.7% of all principal proven offences sentenced in the Children’s Court over the 10 years. The causing serious injury offences have been analysed separately due to strong interest in these offences from stakeholders and the relative seriousness of the offences.

The four offences differ in their degree of harm (injury versus serious injury) and culpability (recklessness versus intention).

The Crimes Act 1958 (Vic) defines ‘injury’ to include ‘unconsciousness, hysteria, pain and any substantial impairment of bodily function’.704 It defines ‘serious injury’ as including ‘a combination of injuries … and the destruction, other than in the course of a medical procedure, of the foetus of a pregnant woman, whether or not the woman suffers any other harm’.705 The courts have rarely sought to elaborate on the definition of serious injury, taking the approach that it is an ordinary English phrase and is therefore a matter of fact rather than law.706 However, the Court of Appeal has contrasted serious injury with injuries that would be commonly regarded as ‘slight, superficial or trifling’.707 In practice, this has set the threshold for serious injury at a relatively low level. The Court of Appeal has held, for example, that two significant black eyes together with grazes around the top of the head and face may be sufficient to constitute serious injury.708

The distinction between intention and recklessness is important. A person is guilty of the intentional versions if that person intended to cause injury, whereas in the reckless versions of the offences, the person needs only to have foreseen that his or her actions would probably cause the relevant level of injury.709

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703 See the discussion in Chapter 8.
704 Crimes Act 1958 (Vic) s 15.
705 Crimes Act 1958 (Vic) s 15.
706 R v Welsh and Flynn (Unreported, Supreme Court of Victoria Court of Criminal Appeal, Crockett, King and Tadgell JJ, 16 October 1987).
707 Ibid 18 (Tadgell J).
Cause injury

Section 18 of the Crimes Act 1958 (Vic) refers to intentionally or recklessly causing injury. The section originally created a single offence; however, after an amendment to specify two separate maximum penalties (10 years’ imprisonment if the injury is caused intentionally and five years’ imprisonment if the injury is caused recklessly), the section has been held to create two distinct offences.710

Table 6 indicates that, together, the two causing injury offences make up 5.5% of all principal proven offences sentenced in the Children’s Court over the 10 years from 2000 to 2009 (3,592 offences in total) and were the highest ranked in the category of offences against the person. Separately, intentionally causing injury accounted for 1.6% of all principal proven offences and recklessly causing injury accounted for 3.8%.711

Figure 41 shows the distribution of young offenders sentenced for causing injury as the principal proven offence, according to the year of sentencing and age at the time of the offence. The number of children sentenced for causing injury as the principal proven offence has increased over time. The inclusion of 17 year old offenders in the Children’s Court jurisdiction from 1 July 2005 is only part of the reason for the increase.712

Figure 41: Number of young offenders sentenced for the principal proven offence of causing injury, by year of sentencing and age at time of offence

Note: Offenders whose age was unknown at the time of committing the offence were excluded from this figure.

710 R v Hossett (1994) 76 A Crim R 19, 24, 32 (Brooking J).
711 There were 12 principal proven offences of causing injury that did not specify whether it was the intentional or reckless version of the offence. The contribution of this subset of causing injury offences to the total principal proven offences was minor.
712 When analysed separately, both the intentionally and the recklessly causing injury categories have increased over time. The intentionally causing injury category experienced an increase in 2003, mainly with 15 and 16 year old offenders, and a second increase in 2007 and 2008 for 16 and 17 year old offenders. The recklessly causing injury category did not begin to increase until the 2006–08 period, with an increase for 15, 16 and 17 year old offenders.
Figure 42 shows the rate (per 100,000 children of the relevant gender) of males and females sentenced in the Children’s Court for the principal proven offence of causing injury. The graph is similar in shape to Figure 21 above, although Figure 42 evidences a steeper increase for both males and females. Like Figure 21, the rates for males and females were placed on two different axes, because the significantly higher male rates obscure any changes in the female rates when sharing the same axis.

Males consistently had a higher rate of being sentenced for the principal proven offence of causing injury over this period, with the rate increasing from 2005. The rate for females also increased over time, but at a more gradual pace until 2007, after which the rate exhibited faster growth. Given that the data rates are adjusted to include 17 year olds from 1 July 2005, these increases cannot be explained solely on the basis that 17 year olds are now included. As can be seen in Figure 41, a greater number of children aged 16 years and under have been sentenced for causing injury from 2007 onwards.\(^{713}\)

The increase in the male rate of sentencing for this offence (70 per 100,000 eligible population in 2000, to 165 per 100,000 in 2009) was numerically greater than the increase in the female rate (24 per 100,000 eligible population in 2000, to 49 per 100,000 in 2009). For males, the 2009 rate was 2.4 times greater than the corresponding 2000 rate, while for females it was two times greater than the 2000 rate.

A participant in the Council’s roundtable meeting commented on these increases as follows:

No one ever commits this offence alone, it’s always in a group I think, and you need to be out in an active group, and it’s ‘group-think’ behaviour I think. So, everyone in the group runs the risk of being the offender.

Figure 43 (page 132) shows the distribution of sentences throughout the 2000–09 period for children who have causing injury as the principal proven offence. The most frequently used sanctions were good behaviour

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713 Analysed separately, the rates graphs for intentionally and recklessly causing injury have a similar shape to the trend line seen in Figure 41. The rate of recklessly causing injury was consistently much higher throughout the period, being between two and three times higher than the rate for intentionally causing injury. Rates for recklessly causing injury increased steeply between 2005 and 2008. Rates for intentionally causing injury increased in 2006–08, but not as steeply.

714 The commentary regarding Australian Bureau of Statistics population data applies here: see above n 652.
bonds (37.9%) and probation (29.1%). A small percentage of children received a custodial sentence (6.8%) for this principal proven offence. These were almost certainly recidivist offenders who had exhausted other sentencing options. The large percentage of bonds could be due in part to the use of group conferencing, successful completion of which leads to the court imposing a lesser sanction than it otherwise would have.715

Figure 43:  
Sentencing distribution for the principal proven offence of causing injury, 2000–09

*Youth detention includes people sentenced to a youth residential facility (the light grey portion of the graph) or to a youth training or youth justice facility (the dark grey portion of the graph).

Figure 44 shows the type of sentences for the principal proven offence of causing injury for each of the years during 2000–09. The types of sentences remained steady throughout most of the period; however, some changes are evident from 2007 onwards, with the percentage of supervisory orders for this offence increasing sharply. Conversely, the undertakings/bonds category moved downwards from 2007 onwards, as did the fines category.

Figure 44:  
Type of sentencing disposition used for the principal proven offence of causing injury by year of sentencing

715 See the discussion of group conferencing in Chapter 6.
**Recklessly causing serious injury**

The offence of recklessly causing serious injury\(^\text{716}\) is ranked fourth in the offences against the person category and accounts for 1.0% of all principal proven offences sentenced in the Children's Court from 2000 to 2009, as indicated in Table 6. There were 641 offences of recklessly causing serious injury (as the principal proven offence) sentenced in the court over the 10 years.

Figure 45 shows the distribution of offenders sentenced for recklessly causing serious injury as the principal proven offence, according to the year of sentencing and age at the time of the offence. The graph shows an upward trend in the number of children sentenced for this principal proven offence over the period, mainly due to the inclusion of 17 year old offenders after 1 July 2005. However, even without the 17 year olds, the number of offenders aged 16 or below still increased (from 37 children in 2000, to 58 in 2009).

**Figure 45:** Number of young offenders sentenced for the principal proven offence of recklessly causing serious injury, by year of sentencing and age at time of offence

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\(^{716}\) *Crimes Act 1958 (Vic)* s 17.
Figure 46 shows the distribution of sentences throughout the 2000–09 period for offenders with recklessly causing serious injury as the principal proven offence. The most common sanction was probation (28.7%), followed by a good behaviour bond (24.5%) or a youth supervision order (22.3%). Custodial sentences were given to a significant percentage of offenders (11.7%).

The percentage of probation orders and fines is very similar to that of the causing injury category (Figure 43 above); however, the percentage of bonds is significantly lower (24.5% compared with 37.9% for the causing injury category). As to be expected, given the greater seriousness of recklessly causing serious injury, the lower percentage of bonds is accompanied by a higher percentage of youth supervision orders (22.3% compared with 12.9% for cause injury) and a higher percentage of youth detention (11.7% compared with 6.8% for the causing injury category).

Figure 46: Sentencing distribution for the principal proven offence of recklessly causing serious injury, 2000–09

*Youth detention includes people sentenced to a youth residential facility (the light grey portion of the graph) or to a youth training or youth justice facility (the dark grey portion of the graph).
Figure 47 shows the type of sentences for the principal proven offence of recklessly causing serious injury for each of the years from 2000 to 2009. Supervisory orders were the main form of sentencing throughout the period, with undertakings/bonds being the second most frequently used type of sentence.

The President of the Children’s Court, Judge Grant, commented that it is unlikely that any of the 24.5% of offenders receiving good behaviour bonds would have had prior convictions for violent offending. He commented that in recent years, the court has been dealing with an increasing number of young females who have committed offences against the person, often with no prior convictions and often involving excess alcohol consumption. There are also increasing numbers of young males with no prior convictions committing relatively serious offences against the person, which is also a fairly recent phenomenon.

Participants at the Council’s roundtable agreed, commenting that the young offenders receiving lower-level sanctions are unlikely to have any prior convictions and are likely to have been alcohol-affected at the time of the offence. One participant thought that those receiving fines for this offence were likely to be 17 year olds, probably working, who can afford to pay a fine.

Figure 47: Type of sentencing disposition used for the principal proven offence of recklessly causing serious injury, by year of sentencing

717 Meeting with Children’s Court of Victoria (23 February 2011).
718 Stakeholder Roundtable Meeting (24 March 2011).
Intentionally causing serious injury

Intentionally causing serious injury\(^{719}\) is tenth on the list of most frequently sentenced offences against the person and accounts for 0.3\% of all principal proven offences dealt with by the Children’s Court over the 10 years from 2000 to 2009, as indicated in Table 6. This amounts to 191 offences over that time.

Figure 48 shows the distribution of young offenders sentenced for intentionally causing serious injury as the principal proven offence, according to the year of sentencing and age at the time of the offence. The graph shows an upward trend in the number of children sentenced for this principal proven offence over the period, mainly due to the inclusion of 17 year old offenders after 1 July 2005. However, excluding the 17 year old individuals reveals that the total number of offenders aged 16 years or under was still increasing (from seven offenders in 2000 to 17 in 2009).

Figure 49 shows the distribution of sentences handed down throughout the 2000–09 period for the principal proven offence of intentionally causing serious injury. The most frequently used sanction for this offence was the youth supervision order (26.7\%), followed by youth detention (25.7\%) and probation (24.6\%). The seriousness of this offence is reflected in the large proportion of offenders (61.8\%) receiving the three most severe sanctions in the sentencing hierarchy, namely youth detention, youth attendance orders and youth supervision orders. This may be compared with the causing injury category (where the most frequently used sanctions are bonds, followed by probation and youth supervision orders) and the recklessly causing serious injury category (where the most frequently used sanctions are probation, followed by bonds and youth supervision orders).

Figure 48: Number of young offenders sentenced for the principal proven offence of intentionally causing serious injury, by year of sentencing and age at time of offence

Note: Offenders whose age was unknown at the time of committing the offence are excluded from this figure.

\(^{719}\) Crimes Act 1958 (Vic) s 16. It is an indictable offence punishable by a maximum penalty (for adults) of 20 years’ imprisonment.
Figure 49: Sentencing distribution for the principal proven offence of intentionally causing serious injury, 2000–09

*Youth detention includes people sentenced to a youth residential facility (the light grey portion of the graph) or to a youth training or youth justice facility (the dark grey portion of the graph).

Figure 50 shows the type of sentences for the principal proven offence of intentionally causing serious injury for each of the years from 2000 to 2009. Supervisory orders were the main form of sentencing throughout the period, ranging from 100% of all sentences for this principal proven offence in 2000, to approximately 60% from 2005 onwards. Detention orders were the second most common type of sentence in 2001 and then continuously from 2005 onwards. Undertakings/bonds and fines were used the least as sentencing options.

Figure 50: Type of sentenced disposition used for the principal proven offence of intentionally causing serious injury, by year of sentencing
Unlawful assault, aggravated assault and assaulting police

Table 6 indicates that the categories of unlawful assault\(^{720}\) (ranked second in the offences against the person category), aggravated assault\(^{721}\) (ranked third) and assault police\(^{722}\) (ranked fifth) made up 2.8%, 1.6% and 0.9% respectively of all principal proven offences sentenced in the Children's Court over the ten-year period. This translates to 1,829 unlawful assaults, 1,026 aggravated assaults and 596 assault police offences sentenced during those 10 years.

The distribution of offenders sentenced for unlawful assault as the principal proven offence remained relatively steady from 2000 to 2005, but increased in subsequent years, partly due to the inclusion of 17 year old offenders in the Children's Court jurisdiction from mid 2005. The number of children sentenced for the principal proven offence of unlawful assault was highest in 2008–09, although this was mainly due to an increase in offenders aged 16 or below in these two years, rather than the inclusion of 17 year old offenders in 2005. A similar pattern can be seen in the age distribution of causing injury (Figure 41). The overall numbers of unlawful assaults increased from 136 children sentenced in 2000 to 252 in 2009 (or 196 in 2009 if including only offenders aged 16 years or under). The distribution of sentences throughout the 2000–09 period for offenders with unlawful assault as the principal proven offence shows that almost half were sentenced to a good behaviour bond (40.2%), while a quarter were sentenced to probation (24.1%). Custodial sentences in a youth detention centre were used in a minority of cases (4.2%).

A similar analysis for aggravated assault shows that the distribution remained reasonably steady over the 10 years. Even when including 17 year old offenders after mid 2005, the number of children sentenced for the principal proven offence of aggravated assault increased only slightly between 2000 and 2009 (from 85 offenders in 2000 to 94 in 2009). The distribution of sentences throughout the 2000–09 period for offenders with aggravated assault as the principal proven offence showed that almost half were sentenced to a good behaviour bond (40.4%), with probation the second most frequently used sentence (28.0%). Custodial sentences in a youth detention centre were used in only a small minority of cases (3.9%).

Assault police showed a steady distribution for offenders aged 16 years or below during the whole 2000–09 period (from 46 offenders in 2000 to 50 offenders in 2009). The main source of increase in this principal proven offence occurred during 2005–08 with the introduction of 17 year old offenders, although the numbers in 2009 remained fairly similar to 2008 levels. With the inclusion of 17 year old offenders, this offence increased from 46 offenders in 2000 to 78 offenders in 2009. Individuals convicted of assaulting police were mainly sentenced to a good behaviour bond (36.7%), probation (23.0%) or a fine (15.4%). Custodial sentences were, again, used only in a minority of cases (4.4%).

\(^{720}\) A person who unlawfully beats or assaults another person is guilty of unlawful (or common) assault. The maximum penalty specified is 15 penalty units or three months' imprisonment: Summary Offences Act 1966 (Vic) s 23.

\(^{721}\) A person who, in company with others, assaults another person, is guilty of the summary offence of aggravated assault, for which there is a maximum penalty of 12 months’ imprisonment. A person who kicks another person or assaults another person with a weapon or instrument is also guilty of aggravated assault, to which there is a maximum of two years’ imprisonment: Summary Offences Act 1966 (Vic) s 24(2). Note that the data only refer to section 24(2) offences.

\(^{722}\) Any person who assaults, resists, obstructs, hinders or delays any member of the police force is guilty of this offence and is liable to a maximum penalty of six months’ imprisonment (or 25 penalty units). The offence also includes inciting or encouraging any other person to assault, resist, obstruct, hinder or delay a member of the police force: Summary Offences Act 1966 (Vic) s 52(f).
Affray

Affray was rarely charged prior to 1 July 2007 (when it became triable summarily. The fact that it ranks eleventh on the list of offences against the person suggests that it has featured prominently in the Children’s Court between 2007 and 2009. Affray accounts for 0.3% of all principal proven offences sentenced by the Children’s Court from 2000 to 2009, where 187 offences of affray (as the principal proven offence) were sentenced in the court over this time.

Affray is a collective offence against public safety that involves unlawful fighting, violence or a display of force that might reasonably cause fear to an innocent member of the public. This offence does not require a member of the public actually to be present, but rather that the fighting, violence or display of force was of a magnitude that a person, if present, would have been afraid. The seriousness of affray – and therefore the likely sentences for it – varies enormously (similar to the offences of intentionally or recklessly causing serious injury). A person may be guilty of affray even if that person has not physically engaged in any threatening behaviour or fighting, but has rather encouraged others or shouted insults or threats. The offence has been described in English case law as follows:

The facts constituting affray and the possible degrees of participation are so variable and cover such a wide area of behaviour that it is very difficult to formulate any helpful sentencing framework. Even if one succeeds, it is equally difficult to fit in a particular case into the framework. The crime of affray may range from the comparatively trivial rowdy scene which arises spontaneously usually at closing time outside a public house: a matter which is terrifying for a short time, but subsides quickly. At the other end of the scale is [a] sort of lengthy pitched battle going on for hours.

A complicating factor for judges and magistrates sentencing affray is that in addition to other offenders being involved, it is often committed alongside other offences (for example, assault or other injury-related offences).

Affray is a common law indictable offence, currently carrying a maximum penalty of five years’ imprisonment and/or a fine of 600 penalty units. From 1 July 2007, affray also became triable summarily in the Magistrates’ Court. Following this, police began charging affray rather than assault in company. The increased use of affray for adults was followed by an increase in the use of affray for young people.

Figure 51 (page 140) shows the distribution of offenders sentenced for affray as the principal proven offence, according to the year of sentencing and age at the time of the offence. The number of children sentenced for affray as the principal proven offence remained largely stable from 2000 to 2005, before experiencing a large increase from 2006 onwards. This increase cannot be fully accounted for by the inclusion of 17 year old offenders in the Children’s Court jurisdiction after 1 July 2005, as there are also large increases in 15 year old offenders (from 2 in 2005 to 14 in 2009) and 16 year old offenders (from 4 in 2005 to 20 in 2009) between 2005 and 2009. What seems highly likely is that the change in police charging practices that has occurred since affray became triable summarily has fuelled this large increase.

Taylor v Director of Public Prosecutions (1973) 57 Cr App R 915, 924–5.
R v Keys and Sween (1986) 8 Cr App R (S) 444, 447 (Lord Lane CJ).
Ibid 446–447.
Crimes Act 1958 (Vic) s 320; Sentencing Act 1991 (Vic) ss 109(1)–(3).
This occurred as a consequence of the amendments to Magistrates’ Court Act 1989 (Vic) s 53(1A), by Courts Legislation (Jurisdiction) Act 2006 (Vic) s 22(1). Note that section 53 of the former Act has now been repealed by section 427(1)(c) of the Criminal Procedure Act 2009 (Vic).
Meeting with Victoria Police (15 April 2011).
Figure 51: Number of young offenders sentenced for the principal proven offence of affray, by year of sentencing and age at time of offence

Note: Offenders whose age was unknown at the time of committing the offence were excluded from this figure.

Figure 52 shows the distribution of sentences for the 2000–09 period for offenders committing affray as the principal proven offence. As expected for an offence covering such a broad variety of offending behaviours, the data show large variations in sentence types for affray over the ten-year period. The most used sanctions for affray were good behaviour bonds (41.2%) and probation (31%). A considerable percentage of children were fined (9.1%) or given a custodial sentence in a youth detention facility (7%).

The types of sentences handed down over the 10 years for the principal proven offence of affray varied widely year to year (due to the small numbers). However, for the majority of years, either undertakings/bonds or supervisory orders were the most frequently used sentence types.

Figure 52: Sentencing distribution for the principal proven offence of affray, 2000–09

*Youth detention includes people sentenced to a youth residential facility (no people) or to a youth training or youth justice facility (the dark grey portion of the graph).
Robbery and armed robbery

Robbery,730 ranked sixth in the offences against the person category, make up 0.9% of all principal proven offences sentenced in the Children’s Court over the ten-year period (see Table 6). In total, 578 principal proven robbery offences were sentenced in the court during that time. Armed robbery731 is ranked seventh in the offences against the person category and accounts for 0.8% of all principal proven offences sentenced in the Children’s Court from 2000 to 2009 (or 523 cases). Together, these two offences make up 1.7% of all principal proven offences sentenced over the 10 years.

Dandenong police prosecutors with whom the Council met were of the opinion that robbery by young people has been increasing in recent times and is now ‘rife’ in their geographical area.732 One prosecutor commented:

People are carrying valuable portables. They [young offenders] are after portable technology – ipods, laptops.733

This prosecutor was of the opinion that young offenders are ‘getting smarter’ and are more likely to rob people in the streets around stations rather than on stations or public transport where there is likely to be CCTV. Such robberies are usually committed in groups rather than by single individuals.734 As discussed above, roundtable participants were also under the impression that young offenders are more likely in recent times to commit robberies aimed at portable technology than in the past, when they would have been more likely to commit shopsteal or car theft. Despite the perceived large increase in robbery offences among stakeholders, robbery nonetheless does not appear in the overall list of the 10 most frequently sentenced offences in the Children’s Court (see Table 1).

Figure 53 (page 142) shows the distribution of offenders sentenced for robbery as the principal proven offence, according to the year of sentencing and age at the time of the offence. The number of children sentenced for robbery as the principal proven offence has fluctuated over time, from years where only a small number of cases appeared before the Children’s Court (2000, 2001 and 2005) to years with a large number of cases (2002, 2003, 2004, 2008 and 2009). The inclusion of 17 year old offenders after 1 July 2005 has increased the number of robbery cases, although interestingly, even without the inclusion of these offenders, the number of younger offenders sentenced for robbery in 2008–09 would have still shown a significant increase compared with the 2005–07 period.

730 Crimes Act 1958 (Vic) s 75(1): A person who uses, or threatens to use, force in order to steal is guilty of robbery. Robbery is an indictable offence under the Crimes Act 1958 (Vic) that currently carries a maximum penalty of 15 years’ imprisonment and/or a fine of 1,800 penalty units: Crimes Act 1958 (Vic) s 75(2); Sentencing Act 1991 (Vic) ss 109(1)–(3).

731 Crimes Act 1958 (Vic) s 75A(1): A person who uses, or threatens to use, force in order to steal, and at the time has with them a firearm, imitation firearm, offensive weapon, explosive or imitation explosive is guilty of armed robbery. Armed robbery is an indictable offence that (for adults) carries a maximum penalty of 25 years’ imprisonment and/or a fine of up to 3,000 penalty units: Crimes Act 1958 (Vic) s 75A(2); Sentencing Act 1991 (Vic) s 109(3A).

732 Meeting with Victoria Police (15 April 2011). The above-mentioned statistics indicate that robbery is not ‘rife’ across Victoria over the 10 years from 2000 to 2009. It may be that it is a more frequently occurring offence in the Dandenong region; however, no regional comparisons have been completed to determine whether this is the case.

733 Meeting with Victoria Police (15 April 2011). This comment is in line with comments made at the Council’s roundtable meeting about improved technology influencing the offending patterns of young people.

734 Meeting with Victoria Police (15 April 2011).
Figure 54 shows the distribution of sentences throughout the 2000–09 period for offenders committing robbery as the principal proven offence. The most frequently used sanction was a good behaviour bond (35.5%), followed closely by probation (31.5%). A considerable percentage of children received a youth supervision order (12.1%) or custody in a youth detention facility (11.8%). The sentencing distribution is similar to that for the recklessly causing serious injury category, although this graph shows a higher percentage of bonds (35.5% compared with 24.5%) and a lower percentage of supervision orders (12.1% compared with 22.3%).

Figure 55 shows the type of sentences for the principal proven offence of robbery for each of the years from 2000 to 2009. In general, the types of sentencing dispositions handed down for the principal proven offence of robbery were in the form of either an undertaking/bond or a supervisory order. Detention orders and fines were used relatively infrequently.

Figure 53: Number of young offenders sentenced for the principal proven offence of robbery, by year of sentencing and age at time of offence

Note: Offenders whose age was unknown at the time of committing the offence were excluded from this figure.
Figure 54: Sentencing distribution for the principal proven offence of robbery, 2000–09

<table>
<thead>
<tr>
<th>Sentence type</th>
<th>Percentage of principal proven offences receiving sentence</th>
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</thead>
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<td>Accountable undertaking</td>
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<td>Good behaviour bond</td>
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<td>2.4</td>
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<tr>
<td>Youth detention*</td>
<td>11.8</td>
</tr>
</tbody>
</table>

*Youth detention includes people sentenced to a youth residential facility (the light grey portion of the graph) or to a youth training or youth justice facility (the dark grey portion of the graph).

Figure 55: Type of sentencing disposition used for the principal proven offence of robbery, by year of sentencing

- Undertaking/bond
- Fine
- Supervisory order
- Detention order

· · · · · Change in age jurisdiction of court (1 July 2005)
Armed robbery

Figure 56 shows the distribution of offenders sentenced for armed robbery as the principal proven offence, according to the year of sentencing and age at the time of committing the offence. Apart from a large spike in 2001, the number of children sentenced for armed robbery as the principal proven offence remained relatively steady from 2000 to 2006, before increasing from 2007 onwards.

Due to the low numbers, firm conclusions cannot be drawn from the data. However, it is possible that the increase evident in Figure 56 and to a lesser extent in Figure 53 is part of the trend (commented on by stakeholders) away from property offences traditionally committed by young people and towards ‘standover’ type stealing behaviour, that is, robberies and armed robberies.

The increase in the number of armed robbery cases sentenced in the Children’s Court in 2001 corresponds with the data analysis conducted by the Australian Institute of Criminology on nationwide robbery offences recorded by the police. Figure 57, which displays the nationwide victimisation rates for robbery and armed robbery, shows that rates reached a peak during 2001 (137 per 100,000 people), which was a considerable increase even when compared with rates for 2000 (121.8 per 100,000 people). It is important to note that Figure 57 is based on the number of victims of alleged crimes reported to police nationwide, and does not distinguish between adult and young people’s offending.

The increase in armed robbery cases sentenced in the Children’s Court from 2007 onwards (made up of higher numbers of offenders aged 14, 15 and 16 years, as well as a significant proportion of 17 year old offenders), however, is not reflected in Figure 57. Figure 57 reveals that armed and unarmed robbery have been on the decline since 2001, with rates in 2009 being some of the lowest since 1994.

Figure 56: Number of young offenders sentenced for the principal proven offence of armed robbery, by year of sentencing and age at time of offence

![Graph showing the number of young offenders sentenced for armed robbery by year of sentencing and age at the time of offence.](image)

Note: Offenders whose age was unknown at the time of committing the offence were excluded from this figure.

735 Australian Institute of Criminology (2011), above n 663. The Australian Institute of Criminology graphs were recreated by the Sentencing Advisory Council by downloading relevant statistical data available at the URL. See also Australian Institute of Criminology, ‘Trends in Recorded Robbery’, *Crime Facts Info* 126 (2006).
Figure 57: Nationwide victimisation rates of robbery offences (per 100,000 people), by year recorded by police

Source: Australian Institute of Criminology online data.

Figure 58 shows the distribution of sentences from 2000 to 2009 for offenders who had committed armed robbery as the principal proven offence. The most common sentence for armed robbery as a principal proven offence was probation (35%), followed by youth detention (21.4%), youth supervision orders (18%) or good behaviour bonds (17.4%).

Figure 58: Sentencing distribution for the principal proven offence of armed robbery, 2000–09

*Youth detention includes people sentenced to a youth residential facility (the light grey portion of the graph) or to a youth training or youth justice facility (the dark grey portion of the graph).
The sentencing distribution for armed robbery is quite different from that of robbery, where the most frequently used sanction was a good behaviour bond (35.5%), followed by probation (31.5%) and youth supervision order (12.1%), with only 11.8% being given a custodial order. The significant proportion receiving youth detention for armed robbery is perhaps not surprising, given the relative severity of this offence and its high maximum penalty. It is also likely that these young offenders would have a history of offending behaviour.

With regard to probation being the most common sanction for armed robbery, one participant at the roundtable commented that: ‘if you’ve got a 15 year old committing an armed robbery [detention is] most unlikely unless they have a really long history in the court’.\(^{736}\) This is consistent with the court’s focus on rehabilitation rather than punishment. Judge Grant, President of the Children’s Court, thought it likely that those receiving a good behaviour bond (or lower) for armed robbery were likely either to be first-time offenders or to have successfully completed group conferencing, after which the court is obliged to enter a sentence lower in the hierarchy than that previously considered.\(^{737}\)

Figure 59 shows the type of sentences for the principal proven offence of armed robbery for each of the years from 2000 to 2009. In general, the types of sentencing dispositions handed down for the principal proven offence of armed robbery were mainly in the form of a supervisory order, with the exception of 2007, when supervisory orders and undertakings/bonds were used to sentence a similar percentage of armed robbery cases. Use of supervisory orders has been on the decline since 2000 and reached its lowest point in 2007, before trending upwards again in 2008–09. Conversely, the use of undertakings/bonds increased during the 2000–07 period, before decreasing in subsequent years. The use of detention orders and fines has remained relatively steady over the period.

\(^{736}\) Stakeholder Roundtable Meeting (24 March 2011).

\(^{737}\) Meeting with Children’s Court of Victoria (23 February 2011).
Driving offences

Driving offences made up 7.7% (Figure 14) of all principal proven offences sentenced in the Children’s Court from 2000 to 2009.

Figure 60 shows the distribution of young offenders sentenced for various driving offences as the principal proven offence, according to the year of sentencing and age at the time of the offence. The graph shows an upward trend in the number of children sentenced for this principal proven offence over the period, due to the inclusion of 17 year old offenders after 1 July 2005. When examining offenders aged 16 years or younger at the time of offending, the numbers remain fairly stable during the 2000-05 period, showing a decrease during 2006, then remaining stable at this lower level during the 2006-09 period. Thus, the significant growth in the number of driving offences as a principal proven offence is due to the inclusion of 17 year old offenders in the Children’s Court jurisdiction. Children of this age are likely to have, or be trying to obtain, a learner driver’s permit and therefore are more likely to have opportunities to commit driving offences.

As can be seen from Figure 60, the most likely age group to be sentenced prior to 1 July 2005 was 16 year old offenders (62.2%); however, after 1 July 2005, the majority of offenders were aged 17 (55.2%), followed by 16 (27.7%) and 15 year old offenders (11.0%).

Figure 60: Number of young offenders sentenced for driving offences as the principal proven offence, by year of sentencing and age at time of offence

Note: Offenders whose age was unknown at the time of committing the offence were excluded from this figure.
Figure 61 displays the sentencing distribution for children who committed a driving offence as the principal proven offence. Principal proven driving offences were most commonly sentenced with fines (50.5%), followed by good behaviour bonds (26.7%) or accountable undertakings (11.1%).

Male offenders who committed driving offences as the principal proven offence were slightly more likely to receive a fine compared with females (50.8% for males, 48.6% for females) or probation (6.5% for males, 4.4% for females). Females were more likely to receive a good behaviour bond (29.8% for females, 26.3% for males) or an accountable undertaking (14.2% for females, 10.7% for males). A very small percentage of driving offences were sentenced to detention (1%, or 51 cases). The majority of these were driving at a dangerous speed or in a dangerous manner738 (31 of 51 cases, or 60.8% of driving cases receiving detention), followed by driving while suspended or disqualified739 (8 of 51 cases, or 15.7%) and unlicenced driving740 (6 of 51 cases, or 11.8%).

Figure 61: Sentencing distribution for principal proven driving offences, 2000–09

*Youth detention includes people sentenced to a youth residential facility or to a youth training or youth justice facility.

738 Road Safety Act 1986 (Vic) s 64(1).
739 Road Safety Act 1986 (Vic) s 30(1).
740 Road Safety Act 1986 (Vic) s 18(1)(a).
Distribution of fines with or without conviction

In the Children’s Court, fines (similar to some other sanctions) can be imposed with or without recording a conviction.\textsuperscript{741} Data on convictions and non-convictions were available only for fines, and appear not to be recorded by the court for other sanction types. As many driving offences are sentenced with fines, it is useful to examine this breakdown here.

The vast majority of fines in the Children’s Court were imposed without conviction (97.3% over the 10 years). Male offenders were slightly more likely to receive a fine with conviction (3.3%) than females (1.4%). The probability of receiving a fine with or without a conviction also varies according to the type of principal proven offence that the offender is sentenced for. Figure 62 displays the percentage of fines given with and without a conviction, according to the type of principal proven offence being sentenced. Driving offences had the highest proportion of fines with a conviction (9.3%), while offences against the person or property offences were slightly lower at 7.6% and 7.4% respectively. Transit offences (ticketing and non-ticketing) were typically sentenced through the use of fines; however, they had the lowest percentage of fines with convictions, as would be expected given the minor nature of these offences.\textsuperscript{742}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure62.png}
\caption{Percentage of fines with and without conviction, by type of principal proven offence, 2000–09}
\end{figure}

\textsuperscript{741} Children, Youth and Families Act 2005 (Vic) ss 360(1)(e), 373–379. See also Chapter 7.

\textsuperscript{742} Transit offences are discussed later in this chapter.
Sentencing distribution for most frequent driving offences

Unlicensed driving

Unlicensed driving\(^{743}\) was the highest ranking driving offence (as the principal proven offence) in the Children’s Court over the 10 years from 2000 to 2009. It accounted for 1.9% of all principal proven offences in the court, or 1,262 cases over the 2000–09 period.

Figure 63 shows the distribution of offenders sentenced for unlicensed driving as the principal proven offence, according to the year of sentencing and age at the time of the offence. The number of children sentenced for unlicensed driving remained relatively steady from 2000 to 2005, while the 2006–09 period saw a large decrease in the number of offenders aged 16 years and under.

Figure 63 also shows a change in the age of offending for this principal proven offence. Prior to 1 July 2005, the majority of children sentenced were 16 (57.7%), 15 (30.1%) or 14 (10.0%) years of age. After 1 July 2005, the age of offending had changed so that a reduced percentage were aged 16 (36.4%), or 15 (26.3%), whereas 17 year old offenders made up 24.1%. However, the introduction of 17 year old offenders was not sufficient to prevent the decline in the number of children sentenced for this offence in the 2006–09 period, in comparison with previous years.

An examination of the distribution of sentences during the 2000–09 period for offenders with unlicensed driving as the principal proven offence revealed that over half were sentenced through the use of a fine (60.4%), followed distantly by good behaviour bonds (21.6%) and accountable undertakings (12.8%).

Figure 63: Number of young offenders sentenced for the principal proven offence of unlicensed driving, by year of sentencing and age at time of offence

Note: Offenders whose age was unknown at the time of committing the offence were excluded from this figure.

\(^{743}\) Road Safety Act 1986 (Vic) s 18(1)(a). A person commits the summary offence of unlicensed driving where that person drives without a licence or authorising permit. The offence has three distinct maximum penalties, ranging from 10 penalty units or imprisonment for not more than one month, to 25 penalty units or imprisonment not exceeding three months: see Road Safety Act 1986 (Vic) ss 18(1)–(2). There are other versions of unlicensed driving in section 18 (such as driving in breach of a driver’s licence condition); however, the following data only relate to the offence set out in section 18(1)(a).
Careless driving

Careless driving as a principal proven offence was the second most frequently sentenced driving offence, accounting for 1.5% of all principal proven offences in the court from 2000 to 2009, or 997 cases.

In contrast to unlicensed driving, careless driving as the principal proven offence showed an increase from 2005 onwards, although this increase was wholly due to the inclusion of 17 year old offenders in the jurisdiction. This difference is to be expected, given that 16 and 17 year olds in Victoria are eligible for learner’s permits and therefore are less likely to commit the offence of unlicensed driving. Figure 64 shows that the number of children sentenced for careless driving remained relatively steady each year for the 2000–04 period, before significantly increasing during 2005, and remaining at the higher level during the 2005–09 period (between 109 and 146 children each year). Throughout the whole period, the number of offenders aged 16 or under remained at similar levels. It is interesting to note that unlicensed driving appears seventh and careless driving appears eighth on the list of the 10 most frequently sentenced principal proven offences for males over the 10 years (representing 1,156 and 886 offences respectively), whereas neither offence appears in the list for females (see Tables 4 and 5).

An analysis of the distribution of sentences from 2000 to 2009 for offenders with careless driving as the principal proven offence showed a large percentage of good behaviour bonds (39.6%) and fines (32.1%). The remainder were largely probation (13.7%) and accountable undertakings (7.9%).

Figure 64: Number of young offenders sentenced for the principal proven offence of careless driving, by year of sentencing, and age at time of offence

Note: Offenders whose age was unknown at the time of committing the offence were excluded from this figure.

744 Road Safety Act 1986 (Vic) s 65: A person who drives a motor vehicle carelessly is guilty of the summary offence of careless driving and is liable for a first offence to a penalty of up to 12 penalty units and for a subsequent offence to a penalty of up to 25 penalty units.

745 They are more likely to commit the offence of ‘learner driving motor vehicle without experienced driver’.
Learner driving motor vehicle without experienced driver

A learner driver[^246] who drives without an experienced person sitting beside him or her is guilty of this summary offence.[^247] This offence is limited to 16 and 17 year old offenders in Victoria.

The distribution of offenders sentenced for being a learner driving a motor vehicle without an experienced driver (as the principal proven offence), according to the year of sentencing and age at the time of the offence, showed that the number of sentenced cases (for 16 year olds) remained relatively low during the 10 years. The inclusion of 17 year old offenders in the court’s jurisdiction in mid 2005 dramatically increased the numbers. To give an indication of the increase, approximately 40 offenders aged 16 were sentenced for this offence in 2005, compared with a total of approximately 200 in 2009 (of which 79% were made up of 17 year olds).

Just over half of the cases were sentenced through the use of fines (52.9%). Children who did not receive a fine were most likely to receive either a good behaviour bond (24.4% of cases) or an accountable undertaking (20.5% of cases).

Transit offences

Figure 65 shows the distribution of offenders sentenced for various transit (ticketing and non-ticketing) offences as the principal proven offence, according to the year of sentencing and age at the time of the offence. The number of sentenced cases for these principal proven offences rose steadily from 1,015 cases in 2000 to 2,268 cases in 2003, before decreasing to its lowest level during 2005. The decrease in the number of transit ticketing cases in 2005 is likely to reflect the delay in prosecuting agencies bringing transit ticketing offences before the Children’s Court in anticipation of the introduction of CAYPINS.

The years 2006–07 saw a rise in the number of transit ticketing cases as 17 year old offenders came under the jurisdiction of the Children’s Court. Prosecuting agencies tried to clear the backlog of transit ticketing cases when it was apparent that there were long delays in the introduction of CAYPINS. As the backlog cleared and CAYPINS became operational, the number of transit ticketing cases brought before the Children’s Court decreased significantly (in 2008–09).

[^246]: Road Safety (Drivers) Regulations 2009 (Vic) reg 5 (definition of ‘learner driver’). A learner driver is a person who holds an Australian learner’s permit and does not have an appropriate drivers licence. See also the former Road Safety (Drivers) Regulations 1999 (Vic) reg 104 (definition of ‘learner driver’).

[^247]: Road Safety (Drivers) Regulations 2009 (Vic) reg 46(2); Road Safety (Drivers) Regulations 1999 (Vic) reg 213(1)(b). Until 9 November 2009, the offence was contained in regulation 213(1)(b) of the Road Safety (Drivers) Regulations 1999 (Vic) and carried a maximum penalty of two penalty units. The offence is now contained in regulation 46(2) of the current Road Safety (Drivers) Regulations 2009 (Vic) and carries a maximum penalty of 20 penalty units. The data in this report refer only to offences against regulation 213(1)(b) of the 1999 regulations.
Figure 65 shows that the three main age groups sentenced for transit ticketing offences were 15, 16 and 17 years at the time of offending (there were seldom any younger offenders). This could be due to the higher visibility of the 15 to 17 year age group when travelling on public transport, as well as the greater likelihood of travelling without the company of adult supervision.

For almost all cases involving transit (ticketing and non-ticketing) offences as the principal proven offence, fines were used as the sentencing option (96.7%) with a minority of cases receiving an accountable undertaking (1.7%) or a good behaviour bond (1.3%). When analysing transit ticketing and non-ticketing offences separately, a slightly higher percentage of transit ticketing offences received fines (97.0%) compared with transit non-ticketing offences (93.9%). Conversely, transit non-ticketing offences were slightly more likely to receive an accountable undertaking (3.7%) or good behaviour bond (2.0%) compared with transit ticketing offences (1.5% for accountable undertakings and 1.2% for good behaviour bonds).

The use of fines to sentence transit (ticketing and non-ticketing) offences was slightly less frequent for cases sentenced prior to 1 July 2005, with a correspondingly higher use of undertakings/bonds. For offenders with transit ticketing offences as the principal offence, 94.9% received a fine and 4.8% received an undertaking or bond, while for transit non-ticketing offences 89.4% received a fine, and 10.3% received an undertaking or bond. For cases sentenced after 1 July 2005, 98.2% of transit ticketing cases received a fine and 1.7% received an undertaking or bond, while 96.9% of transit non-ticketing cases received a fine and 2.9% received an undertaking or bond.

Figure 65: Number of young offenders sentenced for transit (ticketing and non-ticketing) as the principal proven offence, by year of sentencing and age at time of offence

Note: Offenders whose age was unknown at the time of committing the offence were excluded from this figure.
Placing feet on furniture of public transport vehicle or station

A person who places his or her feet on the seat of a public transport vehicle, without reasonable excuse, is guilty of this summary offence. An analysis of the distribution of offenders sentenced for placing feet on seats as the principal proven offence according to the year of sentencing and age at the time of the offence showed a large spike in 2007 (related to the delay in CAYPINS). The inclusion of 17 year olds also had an effect. The analysis revealed that the three main age groups sentenced for place feet on seat offences were children aged between 15 and 17 years at the time of offending (there were seldom any younger offenders). This could be due to the higher visibility of the 15 to 17 year old age group when travelling on public transport (often in groups of teenagers), as well as the greater likelihood of travelling without the company of adult supervision at that age.

The rates (per 100,000 children of the relevant gender) of males and females sentenced in the Children's Court for the principal proven offence of placing feet on seats were very similar over the ten-year period, which is unusual (generally males have far higher offending rates than females).

As with other transit (ticketing and non-ticketing offences), fines were used to sentence the vast majority of cases (97.5% of all cases sentenced in 2000–09). A small group of cases received an accountable undertaking (1.5%) or good behaviour bond (0.7%).

The use of fines was greatest during the 2004–09 period when they comprised nearly 100% of all sentences used for placing feet on seat principal proven offences (ranging from a low of 97.9% in 2006 to 100% in 2005 and 2009) but the use was slightly lower during the 2000–03 period (ranging from 66.7% in 2000 to 94.2% in 2003). Conversely, undertakings or bonds were used to sentence a larger percentage of place feet on seat cases in these years (decreasing from 26.7% of cases in 2000 to 5.8% in 2003).

\[748\] Under the Transport Act 1983 (Vic) s 222(3)(e) (version no. 132), as repealed by Rail Safety Act 2006 (Vic) s 123 (version no. 001), a person’s feet must not be placed on any part of the carriage other than the floor, or on other parts of the furniture that are not ‘specifically designed for the placing of feet’. The offence, which was contained in the Transport Act 1983 (Vic) until 1 January 2007, earned a maximum penalty of five penalty units. The offence of placing feet on seats is now dealt with under regulation 27B of the Transport (Conduct) Regulations 2005 (Vic); however, only offences against the former Transport Act 1983 (Vic) are included in the data. There were 44 children sentenced in the Children’s Court in 2009 for the principal proven offence of placing feet on public transport furniture or vehicles as described under regulation 27B of the Transport (Conduct) Regulations 2005 (Vic). No-one in the Children’s Court was sentenced under these regulations prior to 2009, although many may be appearing in the CAYPINS data. The majority of children (43 of 44, or 97.7%) were sentenced to a fine, while one child was given a good behaviour bond.
Other offences

The other offences category comprises offences that could not be placed into one of the main categories described above. As such, they contain a variety of different types of offences, such as drug or alcohol offences or public order or justice offences, among others. Some of the more common other offences include consuming or possessing alcohol while under age (which is the only offence to appear in the 10 most frequently sentenced offences, placed sixth), possessing controlled weapons without lawful excuse and possessing drugs of dependence. These offences are examined in more detail in this section. Other offences made up 9% of all cases sentenced in the Children’s Court over the 10 years from 2000 to 2009.

Cases in which other offences were the principal proven offence were mainly sentenced with fines (45.0%), followed by good behaviour bonds (26.3%), accountable undertakings (11.2%) and probation (9.9%).

Consume or possess liquor while under 18 years of age

The consume or possess liquor while under 18 years of age category was the sixth most frequently sentenced offence in the Children’s Court and accounted for 2.7% of all principal proven offences (which equates to 1,767 actual offences) over the 10 years. For males, it ranked fifth (2.9% or 1,438 principal proven offences over the 10 years) and for females sixth (2% or 329 offences). Figures are displayed in Tables 4 and 5.

Figure 66 (page 156) shows the distribution of offenders sentenced for consuming or possessing liquor while under age as the principal proven offence, according to the year of sentencing and age at the time of the offence. The number of children sentenced for this offence was relatively low during 2000; however, a large increase was observed in 2001. Other large increases are apparent during 2007 and 2009, with large numbers of 17 year old offenders being sentenced for this principal proven offence. Apart from these spikes and the large increase in the number of children sentenced for this offence from 2001, the number of offenders aged 16 or under remained relatively steady during the rest of the period.

One possible reason for the lower number of people sentenced for this offence in 2000 could be due to legislative changes and charging practices, rather than an increase in under age drinking offences. Examination of Table 2 reveals that consuming or possessing alcohol offences (sentenced under section 131(1)(b) of the Liquor Control Act 1987 (Vic)) were of sufficiently high numbers to appear tenth on the list of most frequent principal proven offences sentenced during 2000. Section 131(1)(b) of the Liquor Control Act 1987 (Vic) describes a set of near identical offences for consuming or possessing liquor as the offences described in section 123(1)(b) of the Liquor Control Reform Act 1998 (Vic). Figure 66 only displays those offenders sentenced under the Liquor Control Reform Act 1998 (Vic). If the offences of consuming or possessing alcohol under both sets of legislation were combined together, there would be 110 children sentenced for this principal proven offence in 2000, and 158 sentenced in 2001, making the numbers for these years more comparable with the rest of the period. From 2002 onwards, all children charged with consuming or possessing alcohol as the principal proven offence were charged under the Liquor Control Reform Act 1998 (Vic).

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349 Liquor Control Reform Act 1998 (Vic) s 123(1)(b): A person under the age of 18 who possesses or consumes liquor is guilty of this summary offence, provided that the exclusions set out in the Liquor Control Reform Act 1998 (Vic) do not apply. This part of the report only deals with under age drinking offences sentenced under this legislation. A child may possess or consume liquor as part of a meal if accompanied by a parent or guardian: Liquor Control Reform Act 1998 (Vic) s 123(2)(a).
Figure 66: Number of young offenders sentenced for the principal proven offence of consuming or possessing liquor while under age, by year of sentencing and age at time of offence

Note: Offenders whose age was unknown at the time of committing the offence were excluded from this figure.

Although legislative changes and charging practices are likely to have had an impact on the numbers sentenced for this offence, some participants at the Council’s roundtable meeting thought that alcohol use among young offenders, as opposed to the use of ‘harder’ drugs, has increased in recent years:

The data we have about kids coming to treatment is that … the graph’s pretty flat for everything except alcohol. In that timeframe presentations to us have increased four-fold for alcohol as the nominated drug of [choice] … Heroin’s gone down, cannabis is about the same, amphetamines are about the same, but alcohol’s gone through the roof.

[A]lcohol, unlike other drugs, is more easily available.\textsuperscript{750}

The most common sentence for consuming or possessing alcohol while under age as a principal proven offence appeared to be fines (85.1%). A minority of cases were sentenced with accountable undertakings (6.7%) or good behaviour bonds (5.8%).

The use of fines was highest during the 2004–09 period (ranging from 85.3% in 2008 to 90.6% in 2005) and slightly lower during the 2000–03 period (ranging from 72.2% in 2001 to 83.3% in 2000). Conversely, undertakings/bonds were used more frequently during the 2000–03 period (ranging from 16.7% in 2000 to 27.1% in 2001) and less frequently during the 2004–09 period (ranging from 9.4% in 2005 to 14.1% in 2007–08).

\textsuperscript{750} Stakeholder Roundtable Meeting (24 March 2011).
Possess, carry or use a controlled weapon without lawful excuse

Possess, carry or use a controlled weapon without lawful excuse\(^{751}\) did not appear within the list of the 10 most frequent principal proven offences sentenced in the Children’s Court from 2000 to 2009. It accounted for 1.2% of all principal proven offences (or 784 cases) over the 10 years.

An analysis of the distribution (by number) of offenders sentenced for possessing, carrying or using controlled weapons without a lawful excuse as the principal proven offence was conducted according to the year of sentencing and age at the time of the offence. The analysis shows that the number of children sentenced for this offence has fluctuated a little over time, with a higher number of children aged 16 or under sentenced for the offence from 2000 to 2002 than thereafter. An increase from 2006 was due to the inclusion of 17 year olds in the jurisdiction.

The majority of cases received good behaviour bonds (38.5%). Other sanctions frequently used for this offence include probation (19.1%), fines (18.4%) and accountable undertakings (12.1%).

Possess a drug of dependence

Possessing a drug of dependence\(^ {752}\) accounted for 0.4% of all principal proven offences (or 271 cases) over the 10 years from 2000 to 2009.

The distribution of offenders sentenced for possessing a drug of dependence as the principal proven offence according to the year of sentencing and age at the time of the offence shows large fluctuations over the 10 years. However, the number of children sentenced was very low, so no solid conclusions can be drawn from this. It does appear that more children were sentenced for this offence (as the principal proven offence) during the period from 2000 to 2003, and it is also apparent that 17 year old offenders make up a large proportion of offenders after 2005.

The most frequently used sanction for this offence was the good behaviour bond (43.2%), although a considerable percentage of children received accountable undertakings (26.2%) or fines (15.1%).

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\(^{751}\) Control of Weapons Act 1990 (Vic) s 6(1). A person who possesses, carries or uses a controlled weapon without lawful excuse is guilty of this offence and is liable to be sentenced to 120 penalty units or imprisonment for one year.

\(^{752}\) Drugs, Poisons and Controlled Substances Act 1981 (Vic) s 73(1). A person who has, or attempts to have, in their possession a drug of dependence is guilty of an indictable offence, unless the person has the authority or licence to do so under the Act or its regulations. Penalties for this offence vary depending on the type and quantity of drugs involved. See sections 73(1)(a)–(c).
Breach offences

Unfortunately, the data set does not include data on breaches of sentencing dispositions or data that reveal how such breaches are resentenced. However, data are available for breaches of court orders that are stand-alone offences, which the court has the power to sentence, for example, breach of a family violence intervention order. This section will provide a brief illustration of the distribution of breach offences for which there are sufficient and reliable data available, and sentencing patterns for these offences within the Children’s Court.

A relatively small number of cases (177) over the data period had breach offences as the principal proven offence, although a total of 2,549 cases were sentenced for some form of breach offence.

The two main principal proven breach offences sentenced by the court were breaches of intervention order753 (50.3%) and failure to answer bail754 (45.2%). Other principal proven breach offences include contravention of family violence intervention orders755 (4.0%) and contravention of final stalking intervention orders756 (0.6%).

Figure 67 displays the sentencing distribution for children who had breaches of intervention orders as the principal proven offence. The majority of children received a good behaviour bond (58.4%). This was by far the most commonly used sanction for this offence, with accountable undertakings a distant second (14.6%), followed by fines (11.2%).

753 Crimes (Family Violence) Act 1987 (Vic) s 22.
754 The specified penalty for failure without reasonable cause to answer bail is 12 months’ imprisonment: Bail Act 1977 (Vic) s 30(1).
755 Family Violence Protection Act 2008 (Vic) s 123(2). This Act repealed the Crimes (Family Violence) Act 1987 (Vic) on 8 December 2008. From this date, contravention of family violence intervention order is the relevant offence in the data set.
756 Stalking Intervention Orders Act 2008 (Vic) s 32.
Figure 68 displays the sentencing distribution for the principal proven offence of failing to answer bail. In contrast to breach of an intervention order, failing to answer bail was sentenced in a wider variety of ways. The majority of children received a good behaviour bond (32.5%), although sizeable proportions received a fine (21.3%) or probation (17.5%).

The numbers of young offenders sentenced for other breach offences (as the principal proven offence) were too low to enable analysis of sentence distribution.

Figure 68:  Sentencing distribution for the principal proven offence of failing to answer bail, 2000–09

*Youth detention includes people sentenced to a youth training facility or to a youth justice facility. There were no people sentenced to a youth residential centre during this period.*
Chapter 10
Youth detention

In 2010, the Australian Institute of Criminology reported that, as at 30 June 2008, there were 1,053 young offenders in youth detention facilities across Australia.\textsuperscript{757} Victoria had the lowest rates of detention across all four quarters of 2007–08, and the Northern Territory had the highest.\textsuperscript{758} As will be shown later in this chapter, Victoria’s youth detention rate has not changed significantly between 2000 and 2009.\textsuperscript{759}

Within the Victorian system since the introduction of the \textit{Children and Young Persons Act 1989} (Vic), detention is considered a sanction of last resort. Magistrate Jennifer Bowles comments that since the introduction of the sentencing principles and additional sentencing orders contained in the \textit{Children and Young Persons Act 1989} (Vic), ‘Victoria has consistently [had] a significantly lower proportion of children in custody’.\textsuperscript{760} In Victoria, youth detention is generally imposed only on those who have committed very serious offences or on chronic, high-risk offenders who have continued to offend despite numerous previous interventions. As Judge Grant of the Children’s Court said in 2010:

> Two types of offender receive such an order: Some, with limited criminal history, receive sentences of detention because they commit very serious offences. Other offenders, often described as ‘persistors’, are young people who, having been given opportunities within the community, continue to offend. These young people often come from disadvantaged backgrounds, are not attending school, are using drugs and alcohol, have difficult peer networks and start offending before the age of 14. They require comprehensive and coordinated responses that address their individual needs.\textsuperscript{761}

\textsuperscript{758} Ibid 42.
\textsuperscript{759} See Figures 71 and 73 below.
\textsuperscript{760} Bowles (2011), above n 418, 16.
\textsuperscript{761} Grant (2010), above n 158, 6.
The Australian Institute of Criminology presents time series data on young people in detention, based on a ‘snapshot’ of detention centre populations on 30 June of each year. Figure 69 compares the rate (per 100,000) of 10 to 17 year olds in youth detention in Victoria with the Australia-wide rate for the 2000–08 period. Figure 69 shows that Victoria’s rate was consistently lower than the national rate. Australian rates of youth detention ranged from 25.0 per 100,000 in 2002 to 37.0 per 100,000 in 2008. In comparison, Victorian rates were much lower, ranging from 7.1 per 100,000 in 2006 to 14.4 per 100,000 in 2003. One limitation of these rates data is that they are based on a population snapshot taken on 30 June of each year, and are likely to be an undercount due to the vast majority of young people serving less than one year’s detention.  

**Figure 69:** Rate per 100,000 of 10 to 17 year olds in youth detention facilities on 30 June of each year, 2000 to 2008

Source: Richards and Lyneham (2010).

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762 This is discussed below.
763 Figure 69 includes only 10 to 17 year olds in youth detention facilities without accounting for differences in age jurisdiction of Children's Courts in various states and territories. It includes both the sentenced and the remand population in youth detention, but excludes 10 to 17 year olds in adult custodial facilities. For more details, refer to the discussion of ‘differences among jurisdictions’ juvenile justice systems’ in Richards and Lyneham (2010), above n 757, 3–4.
An alternative and more reliable way to measure the number of young people in detention is to capture the population within youth detention facilities throughout the year, rather than a one-day ‘snapshot’. The Australian Institute of Health and Welfare provides data on the rate of young offenders in a given year placed in youth detention (either sentenced or unsentenced). Figure 70 shows the rates of young offenders placed in detention by state and territory and year. Victoria had the lowest rates of youth detention, followed by Queensland. According to these data, Victoria’s youth detention rate has risen gradually since 2006–07. \(^{764}\) Other states and territories had significantly higher rates of youth detention, the Northern Territory having the highest rates throughout the period. Despite the different counting methods, Figures 69 and 70 show that Victoria has low youth detention rates compared with other states and territories.

**Figure 70:** Rate of young people in detention (per 1,000 offenders aged 10 to 17 years), by state and territory and year \(^{765}\)

![Figure 70: Rate of young people in detention (per 1,000 offenders aged 10 to 17 years), by state and territory and year](image)

Source: Australian Institute of Health and Welfare, Juvenile Justice data.

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\(^{764}\) See Figure 73, which shows the rate of young offenders sentenced to youth detention by the Children’s Court from 2000 to 2009. This figure shows a gradual rise in the male rate since 2005, which could account for the rise seen in Figure 70. However, over the entire 10 years, the female rate appears to have decreased slightly, and the male rate (although it fluctuates throughout) is much the same in 2009 as it was in 2000.

\(^{765}\) The figure includes young offenders under both unsentenced and sentenced forms of detention. Unsentenced detention includes remand or any other form of custody prior to sentencing. Australian Institute of Health and Welfare data for this table include young offenders aged 10 to 17 for every state and territory, including Queensland. Data for Western Australia and the Northern Territory were not available for 2009–10. These figures are based on distinct individuals placed in detention during the year (that is, if the same individual was placed in detention on multiple occasions during the year, that individual would only be counted once). For more details on the research methods, refer to Australian Institute of Health and Welfare, *Juvenile Justice in Australia 2009–10*, Juvenile Justice Series no. 8 (2011), 20–30.
While Figures 69 and 70 display the rates of young people in detention, Figure 71 shows the rates at which the Victorian Children’s Court sentenced young offenders to detention during the 2000–09 period. Detention rates were fairly steady during the decade, reaching a peak of 44 young people per 100,000 during 2003, before declining in 2004. The rates in 2009 are similar to the 2001 and 2003 rates.\footnote{As seen in Figure 25, the rate of youth detention (per 100,000 young offenders) remained very low in comparison with other types of sentences handed down by the Children’s Court.}

The rates displayed in Figure 71 are higher than the rates in Figure 69 (page 162). For example, Figure 71 indicates that 44 per 100,000 young people were sentenced to detention during the 2003 calendar year. Figure 69 displays that only 14.4 per 100,000 young people were inside youth detention facilities on the data collection date of 30 June 2003. Figure 69 is based on the number of sentenced and unsentenced young people in custody as at 30 June of each year, whereas Figure 71 is based on the total number of young people sentenced to youth detention throughout the whole calendar year. As discussed later (see ‘Custodial lengths’), 9.2% of young offenders receiving a sentence of detention during the 2000–09 period were sentenced to between 12 and 13 months’ detention, while only 4.4% were sentenced to 13 months or longer for the principal proven offence. Thus a large portion of young offenders sentenced to detention would not be included in the data set used for Figure 69, because they either completed their sentences prior to 30 June or began their sentences after that date.

Regardless of the type of measurement used, it is clear that Victoria’s youth detention rates are comparatively low. Figure 69 indicates that Victoria’s rate (based on a one day per annum ‘snapshot’) is lower than the Australian average. Figure 25 (page 116), which uses the same data to calculate detention rates as Figure 71, shows that the Children’s Court imposes detention at a very low rate compared with non-custodial sanctions.

\footnote{The commentary on Australian Bureau of Statistics population data applies: see above n 652.}
Figure 72 displays custodial sentence lengths for Victorian young offenders sentenced to youth detention for the principal proven offence. Sentence length varied from one hour to two years and six months. The most common sentence length was between six months and less than 7 months (20.6%).

Sentence length does not necessarily equate to time spent in detention. Unfortunately, the Council did not have access to data on actual time served in detention and the above graph represents sentence length only. Once a young person is sentenced to a period of detention, the offender falls under the jurisdiction of the Youth Parole Board or the Youth Residential Board. The relevant Board will consider eligibility for parole of young persons sentenced to youth detention for a period of six months or more.

Figure 72: Percentage distribution of custodial sentence lengths, for young offenders sentenced to youth detention, for the principal proven offence, 2000–09

*Youth detention includes people sentenced to a youth residential facility or to a youth training or youth justice facility.

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768 One person was sentenced to detention in a youth training centre for one hour for the principal proven offence of driving while that person’s licence was suspended.

Which groups are over-represented in detention?

As the Children’s Court does not record demographic details apart from age and gender, the Council was unable to provide an in-depth statistical analysis of the backgrounds of children who served time in youth detention during the ten-year period from 2000 to 2009. The following is a selection of the main risk factors for over-representation in youth detention. It does not profess to be more than a brief overview of these complex topics.

Gender

The male rate of youth detention vastly outnumbers the rate for females in Victoria, as can be seen in Figure 73. Male rates of detention fluctuated during 2000–09, with the lowest point occurring in 2005 (48 males per 100,000) and the highest points in 2001 and 2003 (79 males per 100,000 for both years). In contrast, the rate of female offenders sentenced to youth detention remained consistently low, ranging from 3 females per 100,000 in 2008 to 12 females per 100,000 in 2000. Figure 73 shows that the number of females in youth detention in Victoria remained steady (at very low levels) during the 2000–09 period, whereas the number of males in detention varied from year to year. The male rate in 2009 was, however, almost identical to that of 2001 and 2003.

According to research by the Australian Institute of Criminology, between 1981 and 2008 both the number and the rate of female young offenders in detention across Australia decreased by a large amount, with most of this decrease occurring during the 1980s, with only minor fluctuations since the 1990s.

Analysis of sentence types over time did not reveal any changes in the distribution of sentences for females over the ten-year period.

Figure 73: Rate of young people sentenced to youth detention by the Children’s Court, by year and gender

Source: Sentencing Advisory Council’s analysis of Australian Bureau of Statistics population data.

Refer also to Figures 26 and 27 (page 117).
Richards and Lyneham (2010), above n 757, 51.
See page 116 and Figure 25. Rate (per 100,000 young offenders of relevant age group) is given for each type of sentence for principal proven offences, excluding transit ticket and non-ticketing offences, by year of sentencing. The rate of supervisory orders (for both males and females) increased from 233 per 100,000 in 2000 to 270 per 100,000 in 2009.
The commentary on Australian Bureau of Statistics population data applies: see above n 652.
Indigenous status

Another group consistently over-represented in Australian detention statistics is Indigenous young offenders. The Australian Institute of Criminology found that for Victoria in 2007–08, Indigenous young offenders were over-represented in detention at a rate of 14:1.774 A 2011 report by the House of Representatives Standing Committee on Aboriginal and Torres Strait Island Affairs indicates that Indigenous young offenders comprise 53% of all young offenders in detention across Australia, with the rates, however, varying considerably between jurisdictions.775 Indigenous young offenders in detention are younger on average than non-Indigenous detainees.776

The Australian Institute of Health and Welfare reports that for 2009–10, the proportion of young Indigenous people in detention in Victoria on an average day was 16%.777 To place these figures in context, population figures for December 2009 estimate that only 1.2% of people in Victoria aged from 10 to 17 years inclusive were of Aboriginal or Torres Strait Islander background.778 The Youth Parole Board, in its 2010–11 annual report, noted ‘with concern’ the continued over-representation of young Aboriginal people in youth detention.779 In 2010–11, 45 young Aboriginal people came under the Boards’ jurisdiction.

Another way to examine how over-represented Indigenous young offenders are in detention is to compare the rate of the Indigenous and non-Indigenous population in detention with the overall population. Figure 74 (page 168) displays the rate of young people aged 10 to 17 who were placed in detention in Victoria from 2006–07 to 2009–10. Indigenous young people consistently had higher rates of detention throughout the period, starting at 7.9 per 1,000 in 2006–07, and increasing to 11.8 per 1,000 in 2009–10. In comparison, the rate of non-Indigenous young people in detention was much lower and remained relatively steady during the period, starting at 0.5 per 1,000 in 2005–06 and increasing very slightly to 0.8 per 1,000 in 2009–10.

A NSW Bureau of Crime Statistics and Research study that tracked a large cohort of young offenders for a period of eight years found significantly higher average rates of reappearance in court (either a Children’s Court or an adult court) for Indigenous defendants (8.3 compared with 2.8 reappearances for non-Indigenous offenders).780 The effect of Indigenous status on the subsequent risk of this reappearance being in an adult court was particularly strong, with Indigenous young people over nine times more likely to appear in an adult court than non-Indigenous young offenders. They were also more likely to receive a prison sentence in an adult court.781

an indigenous male who appears even once in the Children’s Court is almost certain to appear in an adult court within eight years of his first appearance.782

774 Richards and Lyneham (2010), above n 757, 33. The jurisdictions with the highest rate of over-representation for Indigenous young people were the Australian Capital Territory (55 times more likely to be detained than non-Indigenous people) and Western Australia (45 times): ibid 33. The report notes that these figures need to be read with caution, particularly for the Australian Capital Territory, Victoria and Tasmania, due to small numbers of young offenders in detention, small populations of Indigenous young people and/or small numbers of Indigenous young offenders in detention. The Council could not obtain data on Indigenous status from the Children’s Court and therefore could not perform any statistical analysis.

775 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System (2011) [2.14].

776 Ibid.


780 Chen et al. (2005), above n 56, 2.

781 Ibid 4. For Indigenous young offenders, the percentage receiving at least one custodial sentence in an adult court was 36.1% compared with 9.7% non-Indigenous young offenders. Those Indigenous young offenders who had received a custodial sentence in the Children’s Court, or had multiple appearances in the Children’s Court, had an even higher chance of later receiving at least one custodial sentence in an adult court: ibid 6.

782 Ibid 4.
Sentencing children and young people in Victoria

Figure 74: Rate of 10 to 17 year olds (per 1,000 young people of relevant group) in detention in Victoria, by year and Indigenous status.\(^{783}\)

Source: Australian Institute of Health and Welfare, Juvenile Justice data.

Child protection background

One study found a strong correlation between offending by young people and rates of reported parental neglect and abuse.\(^{784}\) A separate study reported a significant correlation between offending and mental health issues, substance abuse, poverty, homelessness and schooling issues (poor achievement, truancy and early leaving).

Participants at the Council’s roundtable commented that a large proportion of young offenders in youth detention either have a current or have had a past child protection order.\(^{785}\) This is reflected in statistics from the 2010–11 annual report of the Youth Parole Board and Youth Residential Board, which reported that of the 155 young people in youth detention in September 2010, 35% had a previous child protection order and 16% had a current order.\(^{786}\) An earlier Victorian study found that over an eight-month period in 2001, 88% of young offenders given a sentence of youth detention had an average of 4.6 child protection notifications each, with 31% having six or more notifications.\(^{787}\) Eighty-six percent had previously been placed in out-of-home care.

No data depicting more broadly young offenders’ child protection backgrounds were available to the Council for this report.

\(^{783}\) This includes young offenders on remand and sentenced forms of detention. These figures are based on distinct individuals in detention during the year (that is, if the same individual was placed in detention on multiple occasions during the year, that individual would only be counted once). For more details on the research methods, refer to Chapter 3, ‘Data and methods’ in Australian Institute of Health and Welfare (2011), above n 765, 20–30.

\(^{784}\) Don Weatherburn and Bronwyn Lind, Social and Economic Stress, Child Neglect and Juvenile Delinquency (1997).

\(^{785}\) Stakeholder Roundtable Meeting (24 March 2011).

\(^{786}\) Youth Parole Board and Youth Residential Board Victoria (2011), above n 779, 20. These figures are based on a ‘snapshot’ survey conducted by the Department of Human Services.

Mental illness and other complex needs

Another common theme in the Council’s consultations was the increasing complexity of the needs of children coming before the Children’s Court. A participant in the Council’s roundtable said:

One of the trends that we’ve been noticing is that we’re getting young people with multiple needs … we’re getting young people with things like mental health [issues], ID [intellectual disability], drug abuse … so … the client group is becoming more complex.

This observation was endorsed by the Youth Affairs Council of Victoria in a separate meeting, where it was noted that children increasingly have multiple difficult issues including homelessness, mental health issues, self-harming and drug dependence.788

According to the 2010–11 annual report of the Youth Parole Board and Youth Residential Board, in September 2010, 88% of young people in detention identified their offence as being related to alcohol or drug use, 34% presented with mental health issues (and a lesser percentage with a mental health diagnosis), 27% presented with intellectual functioning issues and 14% were registered with the Department of Human Services Disability Services.789

Support for young people with mental health issues who are involved with Youth Justice is available through the Adolescent Forensic Health Service, under the auspices of the Royal Children’s Hospital. Clinicians work with young people in custody and are co-located in regional Youth Justice units. In 2010, the Department of Health established the Youth Justice Mental Health Initiative to improve access of young people involved with the Youth Justice program to an appropriate level of mental health treatment and care and to enhance the capacity of Youth Justice staff and mental health staff to respond to young people involved with Youth Justice who require mental health services.790

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788 Meeting with Youth Affairs Council of Victoria and Youth Referral and Independent Persons Program (7 April 2011).
790 Email from Youth Justice, Department of Human Services, to Sentencing Advisory Council, 19 January 2012.
Types of matters receiving detention

Figure 75 shows the distribution of offending categories for young offenders who received a custodial sentence within the 2000–09 period. The majority of custodial sentences were handed down to children who committed offences against the person as the principal proven offence (49.9%), followed by property offences (41%). Custodial sentences were rarely used for the other offence categories. A higher percentage of males sentenced to youth detention received this sentence for committing property offences (41.6% compared with 34.4% for females), while a higher percentage of females sentenced to youth detention received this sentence for committing offences against the person (56.1% compared with 49.3% of males).

Figure 76 shows the distribution of offending categories over time for young offenders receiving a custodial sentence. During the 2000–02 period, the majority of custodial sentences were given to offenders sentenced for property offences as the principal proven offence. However, beginning in 2003 and continuing for the rest of the period, the majority of custodial sentences were handed down for offenders who had committed offences against the person as the principal proven offence.

Figure 77 is slightly different. Instead of examining the types of offences receiving a custodial sentence, this graph displays the percentage of offences within each category receiving a custodial sentence per year. For example, offences against the person receiving a custodial sentence are examined as a percentage of the total number of offences against the person. In 2000, 8% of offences against the person as the principal proven offence were given a custodial sanction, compared with only 4.1% of property offences. Children convicted of offences against the person were the most likely of all offence categories to be given a custodial sentence across all years. Children committing transit offences were the least likely to receive custodial sentences.

Essentially, offenders committing offences against the person make up the largest population of people within youth detention facilities (from 2003 onwards) and this is reflected in the first graph (Figure 76). Children who commit offences against the person are also the most likely to receive a custodial sentence, and this is reflected in the second graph (Figure 77).

Figure 75: Percentage distribution of custodial sentences, by type of principal proven offence, 2000–09
Figure 76: Distribution of custodial sentences, by year of sentencing and type of principal proven offence category

![Graph showing distribution of custodial sentences](image1)

Figure 77: Percentage of each offence category receiving custodial sentences, by year of sentencing

![Graph showing percentage of each offence category](image2)
Custodial lengths

Figure 78 examines the median length of custodial sentences for 2000–09, according to the type of principal proven offence. Principal proven offences against the person had the highest median custodial sentence length (six months), while other offence categories had a median length of three months. The longer sentences for offences against the person are likely to reflect the more serious nature of the offending compared with other categories.\footnote{791}

Principal proven offences against the person and property made up the bulk of offences sentenced to youth detention. In the offences against the person category, of the 897 cases that received detention over the 10 years, causing injury\footnote{792} accounted for 246 cases (27.4%), armed robbery\footnote{793} accounted for 112 cases (12.5%) and unlawful (common) assault\footnote{794} accounted for 77 cases (8.6%). For the property offences category, theft\footnote{795} accounted for 298 of the 736 cases that received detention (40.5%), burglary\footnote{796} accounted for 252 cases (34.2%) and criminal damage\footnote{797} accounted for 61 cases (8.3%). Driving offences receiving detention were predominately driving at a dangerous speed or manner\footnote{798} (31 of 51 cases, or 60.8% of driving cases receiving detention), followed by driving while suspended or disqualified\footnote{799} (8 of 51 cases, or 15.7%) and unlicenced driving\footnote{800} (6 of 51 cases, or 11.8%).

The most common age for young offenders sentenced to detention during 2000–09 was 16 years at the time of committing the principal proven offence (43.6% females and 41.3% males). The second most common age was 15 years (30.8% females and 25.6% males).

There were 79 cases (4.4% of the total cases receiving detention) that received a sentence of detention of 13 months or more for the principal proven offence. The vast majority of these were offences against the person (82.3%), with property offences the second most frequent (10.1%). Table 8 displays the 10 most frequently occurring principal proven offences that were sentenced to more than 13 months’ youth detention.

\footnote{791}{Numbers next to each offence category label represent the number of cases with that principal proven offence type that resulted in a custodial sentence (for the whole 10 years, 2000–09).}
\footnote{792}{Crimes Act 1958 (Vic) s 18.}
\footnote{793}{Crimes Act 1958 (Vic) s 75A.}
\footnote{794}{Summary Offences Act 1966 (Vic) s 23.}
\footnote{795}{Crimes Act 1958 (Vic) s 74.}
\footnote{796}{Crimes Act 1958 (Vic) s 76(1).}
\footnote{797}{Crimes Act 1958 (Vic) s 197(1).}
\footnote{798}{Road Safety Act 1986 (Vic) s 64(1).}
\footnote{799}{Road Safety Act 1986 (Vic) s 30(1).}
\footnote{800}{Road Safety Act 1986 (Vic) s 18(1)(a).}
The offence making up the greatest percentage of these was armed robbery (15 of 79 cases, or 19.0%), followed by intentionally causing serious injury (11 of 79 cases, or 13.9%) and recklessly causing serious injury (9 of 79 cases, or 11.4%).

The longest sentence of detention was 30 months for the principal proven offence of intentionally causing injury. This offender was a female aged 15 years at the time of the offence, who suffered from a psychiatric illness and intellectual disability. She was also sentenced for criminal damage by fire (30 months’ detention) and reckless conduct endangering life (also 30 months’ detention) as co-occurring offences, with the sentences to be served concurrently. Charges of attempted murder and assault in company were struck out, but the former charge suggests that the offending was particularly serious.

Table 8: Ten most frequent principal proven offences sentenced to 13 months or more in youth detention, by number and percentage of cases

<table>
<thead>
<tr>
<th>Principal proven offences</th>
<th>Number of cases</th>
<th>Percentage of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Armed robbery</td>
<td>15</td>
<td>19.0</td>
</tr>
<tr>
<td>Intentionally causing serious injury</td>
<td>11</td>
<td>13.9</td>
</tr>
<tr>
<td>Recklessly causing serious injury</td>
<td>9</td>
<td>11.4</td>
</tr>
<tr>
<td>Intentionally or recklessly causing injury</td>
<td>8</td>
<td>10.1</td>
</tr>
<tr>
<td>Rape</td>
<td>8</td>
<td>10.1</td>
</tr>
<tr>
<td>Burglary</td>
<td>6</td>
<td>7.6</td>
</tr>
<tr>
<td>Robbery</td>
<td>5</td>
<td>6.3</td>
</tr>
<tr>
<td>Sexual penetration with child under 16 years</td>
<td>3</td>
<td>3.8</td>
</tr>
<tr>
<td>Possess controlled weapon – no lawful excuse</td>
<td>3</td>
<td>3.8</td>
</tr>
<tr>
<td>Drive in a dangerous manner</td>
<td>2</td>
<td>2.5</td>
</tr>
<tr>
<td><strong>Total cases sentenced to 13 months or more</strong></td>
<td><strong>79</strong></td>
<td><strong>100.0</strong></td>
</tr>
</tbody>
</table>

Note: Remaining offences could not be displayed in Table 8, because there was only one case for each offence given 13 months or more detention.
Prior convictions and detention

The vast majority of young offenders in youth detention facilities in Victoria have prior convictions. This is particularly so for the under 15 age group. According to the Children’s Court, for the court to sentence a child under the age of 15 to a youth residential centre, that child would most likely have an ‘extensive [criminal] history and have committed some very serious offences’.801 The Department of Human Services makes a similar observation:

Most young people who get a [youth residential centre] sentence will have had a number of community-based orders before, for example, probation and youth supervision order.802

Unfortunately, the Children’s Court database does not record whether an offender has prior convictions, so the Council could not perform any recidivism analyses for children sentenced in the court over the ten-year period under examination. For a general discussion of reoffending by young people, see Chapter 2.

Remand and bail

Although a comprehensive discussion of youth bail and remand is beyond the scope of this report (the following is a brief overview of some of the issues), it is worth noting the impact of remand on youth detention levels overall.

In recent years, there has been growing concern at the ‘large and increasing numbers of children and young people being held in detention on remand rather than released on bail’.803 The Australian Institute of Criminology found that in 2002 around 50% of young people in detention at any one point in time were on remand awaiting trial or sentencing, and by 2007 the figure was almost 60%.804 The proportion of young people on remand in 2007–08 was the highest since these data were initially collected (1981).805

In Victoria, the percentage of young people on remand appears to be lower than the national average. The Australian Institute of Health and Welfare reports that in 2009–10 the percentage of all young offenders on remand on an average day in Victoria was 28.7%.806 When confined to only 10 to 17 year olds, the figure was 55.8%.807

801 Meeting with Children’s Court of Victoria (23 February 2011).
802 Department of Human Services (2010), above n 609.
805 Richards and Lyneham (2010), above n 757, 39.
806 Sentencing Advisory Council’s analysis of Table 7.1 and Table D20 of Australian Institute of Health and Welfare (2011), above n 765, 113. This was far lower than any other state or territory; however, these figures did not include data for Western Australia or the Northern Territory.
807 Sentencing Advisory Council’s analysis of Table 7.1 and Table D23a of Australian Institute of Health and Welfare (2011), above n 765, 113. The Melbourne youth justice centre in Parkville is a remand centre as well as a detention centre housing males aged 15 to 18 years.
Youth detention

The Australian Institute of Health and Welfare reports that almost 51.8% (or 45.9% if Western Australia and the Northern Territory are excluded) of young people on remand on an average day across the country were Aboriginal or Torres Strait Islander, who were particularly over-represented in the younger age groups (56.3% of those aged 10–13 years, and 45.9% of those aged 14–17 years). Many young people on remand do not go on to be sentenced to youth detention, but rather are on remand because of an inability to meet strict bail conditions. The main factor identified here is the unavailability of appropriate accommodation for young offenders awaiting sentencing. Children’s Courts are sometimes forced to remand young people due to the lack of available, appropriate accommodation, for example, in situations where the young person has experienced family violence. Youth Justice staff at the Melbourne Children’s Court commented that it can be difficult to find residential unit vacancies for young people awaiting trial or sentence, particularly for young people aged 17 years and over. Under the Children, Youth and Families Act 2005 (Vic), the court cannot refuse a child bail on the sole ground that the child has no or inadequate accommodation. The Victorian Law Reform Commission expressed concern in its 2007 review of the Bail Act 1977 (Vic), that ‘bail conditions more onerous than sentencing orders are sometimes imposed on children’, often ‘without organising support for the child’. The Commission recommended that a child-specific bail support program be established in the Children’s Court. The Department of Human Services has been running (since June 2010) an intensive bail support program, although this program is funded only in the North and West Metropolitan Region and the Southern Metropolitan Region (see Chapter 5).

For young people with no family support or other adult supervision available, who also have mental health issues, the situation in terms of accommodation and treatment options is particularly dire. A recent Jesuit Social Services report on young people on remand in Victoria points out:

It is broadly recognised by police, social workers, magistrates and others that remand is increasingly being used to accommodate Victorians with health and social problems associated with engagement in crime, including mental health problems, alcohol and drug addictions and homelessness.

Young offenders are even more poorly serviced in the area of mental health and intellectual disability than adult offenders, and waiting lists can extend to three months just to obtain a ‘needs’ assessment.

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808 Sentencing Advisory Council’s analysis of Table D20 of Australian Institute of Health and Welfare (2011), above n 765.
809 Sentencing Advisory Council’s analysis of Table D23a of Australian Institute of Health and Welfare (2011), above n 765. Percentages quoted exclude Western Australian and Northern Territory data, which were not available.
811 Ibid [7.110].
813 Meeting with Department of Human Services (2 December 2010).
814 Children, Youth and Families Act 2005 (Vic) s 346(9).
816 Ericson and Vinson (2010), above n 503, 11. This report focuses on 18 to 21 year olds on remand; however, similar considerations apply for the younger age groups.
817 Meeting with Children’s Court of Victoria (23 February 2011).
Chapter 11
Sentencing child offenders in the higher courts

Higher courts may sentence a child under either the Children, Youth and Families Act 2005 (Vic) (‘CYF Act’) (with some sentencing restrictions) or the Sentencing Act 1991 (Vic) – the offender is both a ‘child’ for the purposes of the CYF Act\(^{818}\) and a ‘young offender’ for the purposes of the Sentencing Act 1991 (Vic)\(^ {819}\). It follows that higher courts are not limited to the sentencing dispositions contained in the CYF Act, under which three years’ detention is the most severe sanction\(^{820}\). The court may elect to sentence a child under the Sentencing Act 1991 (Vic), pursuant to which a sentence of imprisonment of up to the adult statutory maximum (life) is available\(^ {821}\).

The County and Supreme Courts\(^ {822}\) have jurisdiction to hear and determine:

- seven indictable offences excluded from the jurisdiction of the Children’s Court (referred to in this chapter as ‘explicitly excluded offences’);
- indictable offences that the Children’s Court considers unsuitable to be heard summarily given the existence of ‘exceptional circumstances’, and those to which the child (or, in certain circumstances, a parent) objects to being heard summarily; and
- appeals from the Children’s Court\(^ {823}\).

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\(^{818}\) Children, Youth and Families Act 2005 (Vic) s 3 (definition of ‘child’).

\(^{819}\) Sentencing Act 1991 (Vic) s 3 (definition of ‘young offender’). A ‘young offender’ under the Act is defined as a person under the age of 21 at the time of sentencing.

\(^{820}\) Three years’ detention is the maximum aggregate term for children aged 15 years or above: Children, Youth and Families Act 2005 (Vic) s 413(3).

\(^{821}\) Life imprisonment without parole is recognised as the most severe sanction under the Sentencing Act 1991 (Vic) ss 9–18, 109(1). Note also the operation of ‘indefinite detention’: Sentencing Act 1991 (Vic) ss 18A–18P.

\(^{822}\) It is also possible for an offender, who is a child at the time of the offence but above 19 years of age at the time of proceedings, to be sentenced by the Magistrates’ Court. However, this depends on the existence of exceptional circumstances, having regard to the factors set out in section 516(5) of the Children, Youth and Families Act 2005 (Vic). See also Children, Youth and Families Act 2005 (Vic) ss 516(6), 516A (joint committal proceedings). See further Chapter 6.
The seven fatal offences that are explicitly excluded from the jurisdiction of the Children’s Court are murder, attempted murder, manslaughter, child homicide, defensive homicide, arson causing death and culpable driving causing death.  

Underlying the exclusion of these offences is the concern that courts need broader sentencing powers when dealing with particularly serious offences committed by children:

Recent cases involving children charged with serious crimes have highlighted the need for such cases to be heard in the higher courts before a jury and in circumstances where the judge has full sentencing power if the child is convicted … the community is entitled to expect that [such cases] be dealt with in courts equipped with the full range of sentencing dispositions open to them.

The majority of children sentenced in the higher courts from 2000 to 2009 were charged – at least, initially – with serious offences explicitly excluded from the jurisdiction of the Children’s Court.

In some circumstances, children who are not charged with explicitly excluded offences may also have their cases heard in the higher courts. Chapter 5 sets out the process by which the Children’s Court may, in ‘exceptional circumstances’ decline its own summary jurisdiction in favour of the wider range of sentencing options available in a higher court. Very few matters proceed on this basis. Children (or in certain instances, their parents) may object to a matter being heard summarily by the Children’s Court. Such an objection is foreseeable where the child hopes to obtain acquittal by jury; however, objections to matters being heard summarily are very rare.

This chapter describes the sentencing powers of the County and Supreme Courts in relation to young offenders and presents data on offence and sentence distribution in those courts for the 2000–09 period. Given the rarity of appeals from the Children’s Court and difficulty in accessing data, appeals data are not included in this report.

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823 Determinations of the Children’s Court may be appealed to higher courts on the basis of sentence and questions of law: Children, Youth and Families Act 2005 (Vic) ch 5, pt 5.4. See, for example, Director of Public Prosecutions v MN; Director of Public Prosecutions v JC; Director of Public Prosecutions v JW (2009) 26 VR 563, which concerned an appeal to the County Court by the Director of Public Prosecutions on two questions of law; NG v IP [2009] VSC 199 (25 May 2009), which concerned an appeal pursuant to section 427 of the CYF Act. The Children’s Court can also reserve questions of law for the Supreme Court: Children, Youth and Families Act 2005 (Vic) s 533.

824 Children, Youth and Families Act 2005 (Vic) s 516(1)(b).


826 See Figures 80 and 81 below.

827 See also Children, Youth and Families Act 2005 (Vic) s 356(3)(b).


829 Children, Youth and Families Act 2005 (Vic) ss 356(3)–(4).

830 Power (2011), above n 3, [10.1] (‘Criminal Division Procedure’).
Sentencing under the CYF Act in the higher courts

The County and Supreme Courts have authority to sentence a child for an indictable offence under the CYF Act. This includes the power to impose any sentence that the Children’s Court may impose, except for youth justice centre and youth residential centre orders,831 which may only be made by the County and Supreme Courts under the Sentencing Act 1991 (Vic).832

In imposing a sanction under the CYF Act, some judges specifically refer to the applicability of the CYF Act sentencing principles.833 In CNK v The Queen,834 the Court of Appeal examined the CYF Act sentencing principles in some detail. The court concluded that the offender – a child acquitted in the Supreme Court of attempted murder (an offence specifically excluded from jurisdiction), but convicted of offences within the jurisdiction of the Children’s Court – should be sentenced ‘as if the sentencing were exclusively governed by the provisions of the CYF Act’.835 On this approach, although a child sentenced in a higher court does not have access to the specialist jurisdiction established for children, the child will still be sentenced under the framework set out in the CYF Act rather than the framework set out in the Sentencing Act 1991 (Vic).836 As discussed in Chapter 6, these sentencing frameworks are entirely different.

There are relatively few recorded cases of children being sentenced in the higher courts to sanctions under the CYF Act (or the former Children and Young Persons Act 1989 (Vic)).837 Of the offenders sentenced in the higher courts in the 2000–2009 period in relation to an offence explicitly excluded from the jurisdiction of the Children’s Court, only one offender (who was sentenced for manslaughter) received a sanction imposed under the CYF Act.838

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831 Children, Youth and Families Act 2005 (Vic) s 586.
833 The Court of Appeal discussed the CYF Act sentencing principles in detail in CNK v The Queen [2011] VSCA 228 (10 August 2011). See also R v PP [2002] VSC 578 (23 December 2002) [28] (Nettle J). Note, however; the sentence was overturned by the Court of Appeal in R v PP (2003) 142 A Crim R 369. See also R v King; R v Ngyoune [2007] VSC 144 (17 December 2007) [19] (Teague J); R v G [2004] (Unreported, County Court of Victoria, Judge Gaynor, 30 September 2004).
834 CNK v The Queen [2011] VSCA 228 (10 August 2011).
835 Ibid [82].
836 According to the Court of Appeal in CNK v The Queen [2011] VSCA 228 (10 August 2011), a child sentenced under the CYF Act in a higher court should be subject to a maximum of two years in custody, not three years, as is available under section 32(3)(b) of the Sentencing Act 1991 (Vic). This is because ‘[a]ny other result would have the effect of treating the applicant unequally with any other child in like circumstances, solely because [the child] had been proceeded against, unsuccessfully/ for a specifically excluded offence (in this case, murder): ibid [86]. If, however, a higher court decides to impose a custodial sentence on a child (who is ‘entitled’ to be sentenced in accordance with the CYF Act), although the principles of the CYF Act are relevant, the custodial order must be made pursuant to sections 32–35 of the Sentencing Act 1991 (Vic).
Three young offenders were sentenced in the higher courts under the CYF Act for offences other than the explicitly excluded ones:

- A 12 year old child (age at time of offence) who pleaded guilty to burglary and assisting an offender.\(^{839}\) The child was sentenced to a youth supervision order.
- A 16 year old (age at time of offence) who pleaded guilty to trafficking methamphetamine and cannabis. The offender – the only one in the case under 18 years – was involved with a number of adult co-offenders in a drug trafficking operation.\(^{840}\) He was sentenced to a youth attendance order.
- A child (aged 13 and intoxicated at the time of offending) who was found guilty of sexual penetration with a child under 16 and of committing indecent acts in the presence of and with a child under 16.\(^{841}\) He received a youth attendance order.

**Sentencing young offenders under the **Sentencing Act** 1991 (Vic)**

The County and Supreme Courts may sentence a child under section 7(1) of the **Sentencing Act 1991** (Vic), taking into account the purposes, principles and factors set out in section 5 of that Act.\(^{842}\) Higher courts sentencing of children under the **Sentencing Act 1991** (Vic) may also be guided by factors set out in the CYF Act.\(^{843}\)

**Sentencing purposes and factors taken into account**

The sentencing purposes set out in section 5(1) of the **Sentencing Act 1991** (Vic) include the punishment of the offender, deterrence of either the offender or others from committing similar offences, rehabilitation, denunciation and protection of the community.\(^{844}\) The weight to be attached to each purpose depends upon the particular circumstances of each case; however, the principle of rehabilitation is particularly persuasive in the sentencing of children.\(^{845}\)

Also taken into account in the determination of sentence under the **Sentencing Act 1991** (Vic) are the statutory maximum penalty prescribed for the offence, current sentencing practices, the offender’s degree of responsibility for the offence, the previous character of the offender (including prior offences)\(^{846}\) and any aggravating or mitigating circumstances.\(^{847}\)

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\(^{839}\) R v TSL [2000] VSC 357 (31 July 2000). The offender whom the child assisted was her 15 year old sister, who pleaded guilty to manslaughter part way into the trial. This case is discussed further later in this chapter.

\(^{840}\) R v BW [2011] (Unreported, County Court of Victoria, Judge Chettle, 14 December 2007).

\(^{841}\) R v CG [2004] (Unreported, County Court of Victoria, Judge Gaynor, 30 September 2004) [22]–[23].

\(^{842}\) Director of Public Prosecutions v SJK; Director of Public Prosecutions v GAS [2002] VSCA 131 (26 August 2002); Power (2011), above n 3 (Acts Regulations Rules').

\(^{843}\) For example, R v KMW; R v RJB [2002] VSC 93 (15 March 2002) (Coldrey J), a manslaughter case involving offenders aged 14 and 16 years. ‘Guidance as to the matters a court should take into account in sentencing persons of your age is also provided by s.139 of the Children (Young Persons) Act (1989). I have regard to those factors’: ibid [57].

\(^{844}\) **Sentencing Act 1991** (Vic) s 5(1).


\(^{846}\) Children’s Court prior convictions are likely to ‘carry less weight at sentencing than equivalent adult priors’: Fox and Freiberg (1999), above n 96, 866.

\(^{847}\) **Sentencing Act 1991** (Vic) s 5(2)(g).
As a general proposition, the youthfulness of the offender is a 'primary consideration' in sentencing that ‘calls for rehabilitation to be in the forefront of the factors that govern the sentencing disposition’. As observed by Batt JA:

In the case of a youthful offender rehabilitation is usually far more important than general deterrence … because punishment may in fact lead to further offending. Thus, for example, individualised treatment focusing on rehabilitation is to be preferred. (Rehabilitation benefits the community as well as the offender.)

It follows that even though the child is outside the jurisdiction of the Children’s Court, a child sentenced in an adult court is still often ‘entitled to benefit from the mitigatory effects of youthfulness under general sentencing principles’.

The characterisation of youth as a mitigating factor is, however, a general proposition only and not of ‘universal or automatic application’. The offender’s youth and prospects for rehabilitation ‘must be subjugated to other considerations’ where the offending is, for example, particularly grave. In such instances, youth and rehabilitation take a ‘back seat’ to ‘general deterrence, specific deterrence and denunciation of the conduct’. As stated by O’Bryan AJA:

‘with very serious offences such as murder, armed robbery and rape, the age of the offender is reducing to an alarming level. The youthful offender can no longer expect to trade on his or her youth in such cases for the elements of deterrence, condemnation and just punishment are significant matters.’

Custodial orders in the higher courts

Under the Sentencing Act 1991 (Vic), a child may be sentenced in a higher court to detention in a youth justice or youth residential centre, or may be sentenced to imprisonment in an adult facility. Youth detention orders may only be made by higher courts pursuant to sections 32 to 35 of the Sentencing Act 1991 (Vic). Section 32 provides that the maximum period of detention in respect of a child is three years if directed by the County Court or the Supreme Court – whether the offender is subject to a youth justice centre order or a youth residential centre order and regardless of the number of offences for which the child is convicted in the same proceeding.
Imprisonment in an adult facility should only be imposed on a child in exceptional circumstances. As stated by Batt JA on behalf of the Court of Appeal in *R v Mills*:

A youthful offender is not to be sent to adult prison if such a disposition can be avoided … The benchmark of what is serious as justifying adult imprisonment may be quite high in the case of a youthful offender; and, where the offender has not previously been incarcerated, a shorter term of imprisonment may be justified.

Imprisonment is not reserved only for ‘evil’ children:

There is no bright line distinction between evil children and others. What is required in every case is a sound discretionary judgment that gives appropriate weight, and usually great weight, to youthful immaturity, the better prospects that a young person has for rehabilitation and the desirability of keeping such offenders out of the adult prison system. Those considerations reinforce and complement the common law principle of parsimony and statutory provisions such as s.5(3) and (4) of the *Sentencing Act*.

The use of adult incarceration as a last resort corresponds with the importance of the principle of rehabilitation in sentencing children. Prison ‘does not [generally] provide an atmosphere conducive to rehabilitation’. Rehabilitation may be better pursued by non-custodial options, or if the child must be detained, through youth justice centre or youth residential centre orders. If imprisonment is necessary, in order to satisfy the objective of rehabilitation, the preference is for a ‘shorter length than might otherwise be the case and … a shorter than usual non-parole period’.

In the case of *R v PP*, the 15 year old offender was found not guilty of murder but guilty of manslaughter. He had no prior convictions. He had stabbed the victim, a 16 year old youth, twice in the back during the course of a melee. He was initially sentenced to six years’ imprisonment with a non-parole period of four years; however, on appeal this was reduced to five years’ imprisonment with a non-parole period of two and a half years. Justice Callaway (with whom Justices Winneke and Buchanan agreed) explained the reasons for the necessity of a period of imprisonment rather than youth detention as follows:

The difficulty was that all the relevant purposes of sentencing could not be achieved by three years’ detention in a youth training centre. Notwithstanding the applicant’s age, this was a bad example of manslaughter by unlawful and dangerous act … Just punishment, tempered by reference to the applicant’s immaturity, was required and general deterrence was not irrelevant. There is a public interest in deterring violent fights and the use of lethal weapons … A maximum of three years’ loss of liberty was not enough.

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858 *R v Mills* [1998] 4 VR 235. This case involved a young offender who was aged 20 years and six months at the time of offending and 21 at the time of sentencing. The principles enunciated in that case are also relevant (and perhaps more relevant) to young offenders sentenced by higher courts.

859 Ibid 241. See also the *Convention on the Rights of the Child*, art 37(c), which states: ‘every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interests not to do so’.

860 *R v PP* (2003) 142 A Crim R 369, 374. In this case, the offender was aged 15 at the time of the offence.


862 Director of Public Prosecutions v TY (No 3) (2007) 18 VR 241, 242 (Bell J) (citations omitted).


864 Ibid 375–376.
Offence and sentence distribution in the higher courts

Offence distribution

From 2000 to 2009, 29 children were sentenced in the Supreme Court and nine in the County Court. Figure 79 displays the number of cases involving child offenders sentenced for each year from 2000 to 2009 according to the sentencing court.

Of these 38 children, 32 were male (84.2%) and six female (15.8%). Female offenders ranged in age from 12 to 16 years at the time of committing the offences, while males ranged from 13 to 17 years. The 38 children were sentenced for a total of 72 offences.

Figure 80 (page 184) shows the principal proven offence distribution across the County and Supreme Courts. Almost all were offences against the person. Manslaughter as the principal proven offence comprised almost half (47.4%) of all cases, followed by murder and intentionally causing serious injury (10.5% each). Figure 80 shows that most of the offence types were sentenced exclusively in either the County Court or the Supreme Court. The only offence that appeared in both courts was intentionally causing serious injury.

Interestingly, the only offences in this graph that are specifically excluded from the Children’s Court jurisdiction are murder, manslaughter and culpable driving causing death (23 cases). The remaining 15 cases involved principal proven offences that are within the jurisdiction of the Children’s Court. Only three of these were sentenced under the CYF Act.

There are a number of possible reasons why these cases appeared in the higher courts: the Children’s Court excluded its own jurisdiction on the basis of ‘exceptional circumstances’, the child (or parent) requested a transfer to a higher court, or the child was tried for but found not guilty of one of the explicitly excluded offences.

See Appendix 1 for a discussion about the methodology related to the identification of children in the higher courts.
Figure 80: Percentage distribution of principal proven offences committed by child offenders, by sentencing Court, 2000–09

<table>
<thead>
<tr>
<th>Type of offence</th>
<th>Percentage of sentenced offences</th>
</tr>
</thead>
<tbody>
<tr>
<td>Manslaughter (n = 18)</td>
<td>47.4</td>
</tr>
<tr>
<td>Murder (n = 4)</td>
<td>10.5</td>
</tr>
<tr>
<td>Causing serious injury intentionally</td>
<td>7.9</td>
</tr>
<tr>
<td>Indecent act with a child under 16 years (n = 2)</td>
<td>5.3</td>
</tr>
<tr>
<td>Culpable driving (n = 1)</td>
<td>2.6</td>
</tr>
<tr>
<td>Attempted burglary (n = 1)</td>
<td>2.6</td>
</tr>
<tr>
<td>Accessory – manslaughter (n = 1)</td>
<td>2.6</td>
</tr>
<tr>
<td>Rape (n = 1)</td>
<td>2.6</td>
</tr>
<tr>
<td>Indecent assault (n = 1)</td>
<td>2.6</td>
</tr>
<tr>
<td>Sexual penetration with a child under 16 years (n = 1)</td>
<td>2.6</td>
</tr>
<tr>
<td>Burglary (n = 1)</td>
<td>2.6</td>
</tr>
<tr>
<td>Traffick in a drug of dependence – non-commercial (n = 1)</td>
<td>2.6</td>
</tr>
<tr>
<td>Import prohibited drugs – commercial quantity* (n = 1)</td>
<td>2.6</td>
</tr>
<tr>
<td>Affray (n = 1)</td>
<td>2.6</td>
</tr>
</tbody>
</table>

*Sentenced under Customs Act 1901 (Cth).

Source: Department of Justice (Victoria), unpublished statistics.

Of the 15 children sentenced in the higher courts for principal proven offences that would normally fall within the Children's Court jurisdiction, six were originally charged with excluded offences, but were subsequently found guilty of less severe offences. Only one of these offenders was sentenced under the CYF Act: the case of *R v TSL*.866

*R v TSL* involved a burglary and killing by two sisters (a 12 year old and a 15 year old). The victim, who was home at the time, grabbed the 12 year old. The 15 year old stabbed the victim repeatedly in an attempt to release her sister. It appears from the sentencing remarks that the sisters were initially prosecuted for murder in the Supreme Court (although the murder charge is clear only for the 15 year old), and it was not until part way into the hearing that the murder charges were withdrawn. This occurred after the 15 year old offered to plead guilty to manslaughter. The 12 year old was sentenced under the CYF Act for burglary and assisting an offender.

Four of the remaining five offenders originally tried for excluded offences were sentenced to custodial terms under the Sentencing Act 1991 (Vic). According to the Court of Appeal, where the offences of which the offender is convicted are all within the jurisdiction of the Children's Court, the offender should be sentenced ‘as if the sentencing were exclusively governed by the provisions of the CYF Act’. However, where the higher court decides to impose a custodial sentence on a child (who is ‘entitled’ to be sentenced in accordance with the CYF Act), although the principles of the CYF Act are still applicable to the sentencing of that child, the custodial order must be made pursuant to the Sentencing Act 1991 (Vic).

It is also possible that the child in these cases pleaded not guilty and requested a jury hearing in the higher courts. There were four cases in which the offender pleaded not guilty; however, an inspection of the sentencing remarks revealed nothing to confirm that the child had requested the case be heard in the higher courts and it is just as possible that these cases were transferred on the basis of ‘exceptional circumstances’. Magistrate Peter Power has described such cases as ‘virtually unprecedented’.

Some of the nine other cases involving non-excluded offences may have been considered by the Children’s Court unsuitable to be determined summarily given the existence of ‘exceptional circumstances’. Unfortunately, this is not mentioned in the sentencing remarks, so it is not possible to determine definitively.

It is likely that one such case was excluded from the Children’s Court jurisdiction on the basis of exceptional circumstances. This case involved a particularly vicious rape and intentionally causing serious injury by a 15 year old on an elderly woman. The offender had appeared before the Children’s Court on seven prior occasions for various offences. He had been sentenced previously to a youth supervision order for four charges of rape and one count of attempted sexual penetration with a child under 16. Another case that may have been excluded based on exceptional circumstances is a commercial drug trafficking case involving a significant quantity of narcotics and a number of adult co-offenders. The fact of adult co-offenders is, however, not ordinarily sufficient to justify a young person (child) appearing in the higher courts. Another offender was sentenced for being an accessory to manslaughter. In this instance, given that the offender was an accessory to an offence involving another person’s death, this may have been sufficient for the Children’s Court to deem the case unsuitable to be heard summarily.

Figure 81 (page 186) displays every offence sentenced in the higher courts committed by child offenders (n = 72), regardless of whether it was the principal proven offence or not. Most offences were offences against the person. Manslaughter remained the most frequently sentenced type of offence, although making up a lower percentage of the overall total (25.0%), with intentionally causing serious injury making up the second largest proportion of the overall total (9.7%).

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867 The sentencing remarks for the fifth case are incomplete and it has not been possible to tell whether the offender was sentenced under the CYF Act or the Sentencing Act 1991 (Vic). The offender was convicted of intentionally causing serious injury and sentenced to 12 months’ probation.

868 CNK v The Queen [2011] VSCA 228 (10 August 2011) [82].


870 Power (2011), above n 3, [10.1] (‘Criminal Division Procedure’).

871 Children, Youth and Families Act 2005 (Vic) s 356(3)(b). See also the discussion of ‘exceptional circumstances’ in Chapter 5.

872 R v JED [2007] VSC 348 (21 September 2007). The offender pleaded guilty to ‘two counts of rape, one count of intentionally causing serious injury, one count of threat to kill, one count of indecent assault and one count of common law assault’: ibid [1]. The offender was sentenced to 13 years’ imprisonment with a non-parole period of eight years.

873 R v BW [2011] (Unreported, County Court of Victoria, Judge Chettle, 14 December 2007).

Figure 81: Percentage distribution of all offences (principal and non-principal proven offences) committed by child offenders, by sentencing court, 2000–09

<table>
<thead>
<tr>
<th>Type of Offence</th>
<th>Percentage of Sentenced Offences</th>
<th>Supreme Court</th>
<th>County Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>Manslaughter (n = 18)</td>
<td>25.0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Causing serious injury intentionally (n = 7)</td>
<td>8.3</td>
<td>1.4</td>
<td></td>
</tr>
<tr>
<td>Theft (n = 6)</td>
<td>8.3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Indecent act – within presence of a child under 16 (n = 6)</td>
<td>8.3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Robbery (n = 5)</td>
<td>6.9</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Murder (n = 4)</td>
<td>5.6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Affray (n = 3)</td>
<td>4.2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Causing injury intentionally (n = 3)</td>
<td>4.2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Culpable driving (n = 3)</td>
<td>4.2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Indecent assault (n = 2)</td>
<td>1.4</td>
<td>1.4</td>
<td></td>
</tr>
<tr>
<td>Rape (n = 2)</td>
<td>2.8</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Traffic in a drug of dependence – non-commercial quantity (n = 2)</td>
<td>2.8</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Accessory – manslaughter (n = 1)</td>
<td>1.4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Aggravated burglary (n = 1)</td>
<td>1.4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Aid and abet – import heroin (trafficable quantity)* (n = 1)</td>
<td>1.4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Armed Robbery (n = 1)</td>
<td>1.4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assist offender (n = 1)</td>
<td>1.4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Attempted burglary (n = 1)</td>
<td>1.4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Burglary (n = 1)</td>
<td>1.4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Common Law assault (n = 1)</td>
<td>1.4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Import prohibited drugs – commercial quantity* (n = 1)</td>
<td>1.4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Make threat to kill (n = 1)</td>
<td>1.4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sexual penetration with a child under 16 (n = 1)</td>
<td>1.4</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*Sentenced under Customs Act 1901 (Cth).

Source: Department of Justice (Victoria), unpublished statistics.
Sentence distribution

Figure 82 displays the sentence distribution for the 38 principal proven offences in higher court cases involving child offenders. Seventy-one percent resulted in a custodial sentence (23.7% detention in a youth training centre and 47.4% adult prison). The high percentage of custodial sentences is not surprising, given that manslaughter and murder made up a large percentage of the principal proven offences for which children were sentenced in the higher courts (Figure 80).

Custodial sentences were imposed for all murder and culpable driving cases, and most of the cases involving manslaughter (15 out of 18 manslaughter cases). Of the manslaughter cases that did not receive a custodial sentence, two children were sentenced to an adjourned undertaking with conviction and one received a youth attendance order.

Figure 82: Sentence distribution, for both principal proven offence and case, involving child offenders sentenced in the Supreme Court, 2000–09

Source: Department of Justice (Victoria), unpublished statistics.

875 The equivalent graph for the total effective sentence for the case (as opposed to the individual charge) was not displayed, as it was found to be identical to the sentencing distribution in Figure 82.

876 R v KMW; R v RJB [2002] VSC 93 (15 March 2002).

In one of the cases that did not involve a custodial sentence, the two offenders (aged 14 and 16 at the time of the offence) were involved in a family violence incident in which, the judge noted, ‘it is clear that both of you … feared that [the deceased] was on the way to becoming violent’\textsuperscript{878} and that ‘at some stage you were both struck by the deceased with the hockey stick’.\textsuperscript{879} The judge remarked that the offending was ‘committed … both in unusual and traumatic circumstances and under great stress. Your reactions were, to a considerable extent, governed by your youthful immaturity’\textsuperscript{880} and that ‘there is nothing to be gained by sentencing you to any further period of detention’.\textsuperscript{881} They were given adjourned undertakings with convictions.

In the other such case, the 15 year old offender received a youth attendance order under the CYF Act rather than a sentence of detention under the Sentencing Act 1991 (Vic) because the offending was ‘at the lower end of the scale of manslaughter cases’\textsuperscript{882} and there were a number of mitigating factors. Mitigating circumstances included the youthful age of the offender, the fact he had acted out of character and had good prospects of rehabilitation that ‘might well’ be adversely affected by ‘a custodial sentence – even of short duration’.\textsuperscript{883} The offender was also genuinely remorseful and had pleaded guilty in circumstances where another person in his position might have been ‘tempted to trust his fate to the jury’.\textsuperscript{884}

Figure 83 displays the custodial sentence lengths for the principal proven offences of murder, manslaughter and culpable driving causing death (20 cases). These offences were chosen for display due to the very serious nature of the offending, and because, of the offences sentenced in the higher courts in 2000–09, they are the only ones that cannot be heard in the Children’s Court.

\textbf{Figure 83:} Length and type of custodial sentence given to children in the higher courts for murder, manslaughter and culpable driving, 2000–09

\begin{figure}
\centering
\includegraphics[width=\textwidth]{figure83.png}
\caption{Length and type of custodial sentence given to children in the higher courts for murder, manslaughter and culpable driving, 2000–09}
\end{figure}

\begin{itemize}
\item \textsuperscript{878} R v KMW; R v RJB [2002] VSC 93 (15 March 2002) [27].
\item \textsuperscript{879} Ibid [39].
\item \textsuperscript{880} Ibid [97].
\item \textsuperscript{881} Ibid [98].
\item \textsuperscript{882} R v OJS [2009] VSC 265 (30 June 2009) [30] (Kaye J).
\item \textsuperscript{883} Ibid.
\item \textsuperscript{884} Ibid [25].
\end{itemize}
Figure 83 and Table 9 show that custodial sentences for manslaughter were more varied than for murder, and were usually shorter. Custodial sentences for manslaughter ranged from two years and six months, to nine years, with the majority of sentences between three and six years. Custodial sentences for murder ranged from eight to 16 years,\(^885\) while the only culpable driving case was sentenced to three years.\(^886\)

Table 9: Distribution of custodial sentence lengths for principal proven offences of murder, manslaughter and culpable driving sentenced in the higher courts, 2000–09

<table>
<thead>
<tr>
<th>Sentence duration</th>
<th>Murder</th>
<th>Manslaughter</th>
<th>Culpable driving</th>
</tr>
</thead>
<tbody>
<tr>
<td>2 years, 6 months</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3 years</td>
<td></td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>5 years</td>
<td></td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>5 years, 6 months</td>
<td></td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>6 years</td>
<td></td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>7 years</td>
<td></td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>8 years</td>
<td>1</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>9 years</td>
<td></td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>14 years</td>
<td></td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>16 years</td>
<td></td>
<td>1</td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>4</td>
<td>15</td>
<td>1</td>
</tr>
</tbody>
</table>

Source: Department of Justice (Victoria), unpublished statistics.

\(^885\) The case sentenced to 16 years’ imprisonment was *R v JPD* [2001] VSC 204 (8 June 2001). This case involved a violent home invasion, resulting in the murder of the elderly victim. The 15 year old offender had entered the house, planning to use threats of violence to steal the victim’s car. The offender was homeless at the time of offending and had a history of substance abuse, disruptive behaviour in school and a deteriorating relationship with his parents. The judge sentenced the offender to a total effective sentence of 16 years, with a minimum non-parole period of 12 years. Justice Vincent stated: ‘Not only was the death of your victim occasioned by the commission of an extremely violent attack upon her, but it took place within her own home, to which she had admitted you on trust. It occurred in the course of a planned armed robbery, upon a person who was selected by reason of her age and vulnerability, and which was carried out for no better reason than your desire to secure her motor vehicle’; ibid [15]. Justice Vincent stated that the offender would have received a much longer sentence had he been older; ibid [29].

\(^886\) *R v MM* (Unreported, County Court of Victoria, Judge Duckett, 12 September 2005). This case involved a 15 year old who received three years’ youth detention for a culpable driving incident in which three passengers died. During sentencing, the judge took into consideration that the offender was remorseful, had fallen into depression and had suicidal thoughts after the accident. The offender had not been in any trouble prior to, or since, the accident.
Sentencing children and young people in Victoria
Chapter 12
Sentencing young adult offenders under ‘dual track’

Young (under 21 year old) offenders in the ‘dual track’ system

The ‘dual track’ system is unique to Victoria. Under this system, mainstream adult courts can sentence young offenders (defined in the Sentencing Act 1991 (Vic) to be under 21 years at the time of sentencing) in particular circumstances to serve their custodial sentence in a youth detention centre as a direct alternative to a sentence of imprisonment.

The court must be satisfied that there are reasonable prospects for the rehabilitation of the offender or that the offender is particularly impressionable, immature or likely to be subjected to undesirable influences in an adult prison. In determining whether to make a youth detention order the court must have regard to the nature of the offence and the age, character and past history of the young offender.

The maximum period for which a court may direct a young offender be detained in a youth justice centre is two years for the Magistrates’ Court or three years for the County or Supreme Court. These maxima apply regardless of how many offences the young offender is convicted of in the same proceeding.

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887 Sentencing Act 1991 (Vic) s 3.
888 Sentencing Act 1991 (Vic) s 32 (inserted in 1997 by the Sentencing and Other Acts (Amendment) Act 1997 (Vic) s s 16(2), 17(3)). Section 32(2A) provides that a court must not make a youth justice centre order in respect of a young offender who is under the age of 15 years at the time of sentencing, and section 32(2B) provides that a court must not make a youth residential centre order in respect of a young offender who is 15 years or over at the time of sentencing.
889 Sentencing Act 1991 (Vic) s 32(1). The court is obliged to receive a pre-sentence report.
890 Sentencing Act 1991 (Vic) s 32(2).
891 Sentencing Act 1991 (Vic) s 32(3).
Male offenders sentenced under the ‘dual track’ system serve their sentences at the Malmsbury youth justice centre, which has five residential units (two of which are secure and three open site), housing up to 90 young men.\footnote{Sherilyn Hanson, Youth Justice in Victoria: The Benefits of Victoria’s Youth Justice System and the Challenges Ahead (2009) 5.} Female offenders serve their sentences at the Parkville youth residential centre.\footnote{Judge Bourke of the Youth Parole Board commented that an offender may be held in youth detention beyond that offender’s twenty-first birthday: Meeting with Judge Bourke, Chair of Youth Parole and Youth Residential Boards (21 June 2011).}

The system is intended to prevent vulnerable offenders from entering the adult prison system at a young age. Vincent J enunciated the principle as follows:

\[\text{[I]ncarceration of a young person in the adult prison system, carrying as it does a real potential to cause damage of a kind which both the offender and the community may pay dearly in the long term, should not be ordered unless the court is satisfied that the powerful factors which have been accepted by the legislature and the courts as requiring and justifying the existence of a separate youth correctional system have been clearly displaced in importance in favour of the adoption of a more punitive approach.}\footnote{R v Misokka [1995] VSC 215 (9 November 1995) 10. See also R v Mills [1998] 4 VR 235, where Batt JA discusses the considerations applicable to sentencing youthful offenders to adult prison.}

\[\text{Curran and Stary write:}\]

\[\text{[O]ften young people who offend have become involved in drugs, are at a developmental age when awareness of consequences of their actions is limited, have had very few positive influences in their lives or have themselves been the victim of some form of physical, sexual or psychological abuse … To place a young offender in an adult prison often fails to adequately address those issues and, more often than not, simply has the effect of temporarily removing the young person from the community without any effective attempts at rehabilitation.}\footnote{Curran and Stary (2003), above n 34, 45. See also the discussion of specific and general deterrence in Chapter 6. In a separate paper, Liz Curran wrote: ‘The juvenile justice system … is better at achieving its aims of offering opportunities and assistance to the development of juvenile offenders rather than merely detaining them’. See Liz Curran, ‘Juvenile Justice – Ways Forward to Enhance Opportunities’ (Paper presented at the National Conference of Community Legal Centres, Hobart, 1 September 2003), 7.}

The ‘dual track’ system received general support at the Council’s roundtable. One participant said:

\[\text{Well I can’t think of too many disadvantages of the system … I think this is another reason why Victoria is so good compared to all the other States and we should be acknowledging how lucky we are, really, to have this system …}\]

Approximately half of the young adult offenders aged 18 to 20 years given a custodial sentence between 2005 and 2009 were sent to a youth detention facility.

Figure 84 shows the number of people who were 18 to 20 years of age at the time of sentencing, according to whether they were sentenced to a youth or adult custodial facility. The number of 18 to 20 year olds sentenced to a youth facility (youth training or youth justice centres) ranged from 144 in 2008 to 249 in 2005. The percentage of 18 to 20 year olds sentenced to a youth detention facility was lowest during 2008 (44.9%) and highest during 2007 (53.1%).

To illustrate the application of the legislative criteria for ‘dual track’, two case studies are presented. The first is a case in which the judge sentenced the young offender to two years’ youth detention and the second is one where the young offender was sentenced to adult imprisonment. Both fact scenarios are drawn from actual cases sentenced in the latter part of 2009 in the Victorian County Court; however, names have been changed for privacy reasons.
Figure 84: Number of offenders aged 18 to 20 years at time of sentencing given custodial sentences within the Magistrates’, County or Supreme Courts, 2005 to 2009

Source: Department of Justice (Victoria), unpublished statistics.

Case study 1 – recklessly causing serious injury (held suitable for youth detention)

Tyler had several minor prior convictions and one conviction for sexual penetration with a child under 16, but no history of violent offending. He had been diagnosed with attention deficit disorder, had been drinking alcohol, smoking cannabis since the age of 12 and engaging in self-harm behaviours and was under the care of the Department of Human Services from the age of 12 to 16 years.

Tyler was 18 years of age when he committed the offence in question. Heavily intoxicated, he went to his ex-girlfriend’s place to speak with her in the early hours of the morning. She, her friend and her father (the victim) had been drinking. When the victim heard loud voices outside the property, he came out and told Tyler to leave, at which Tyler smashed a bottle and brandished it at the older man. The victim grabbed Tyler by the shoulders. Tyler stabbed him in the neck with the bottle, causing a large laceration. The victim recovered but was left with a scar and heightened anxiety. Tyler pleaded guilty to recklessly causing serious injury.

The consultant psychologist’s report to the court noted that Tyler had complex needs and little insight into his offending behaviour. Although the pre-sentence report found him unsuitable for a youth justice centre order, the judge considered him to be ‘particularly immature and likely to be subjected to undesirable influences in an adult prison’ and further, his prospects of rehabilitation to be ‘reasonable’. He was sentenced to two years in youth detention.

897 Percentages displayed above each bar represent people aged 18 to 20 years inclusive who received a sentence of youth detention, as a percentage of all 18 to 20 year olds receiving a custodial sentence. Sentencing data for Magistrates’ Court cases were not available prior to 1 July 2004, so the graph covers only the 2005–09 period. People sent to an adult custodial facility include those given a combined custody and treatment order, custodial supervision order, hospital security order, imprisonment, partially suspended sentence and Commonwealth partially suspended sentence with recognisance release order.
Case study 2 – armed robbery, attempted armed robbery (held unsuitable for youth detention)

Tarni had a limited criminal history involving relatively minor offences. She had been a victim of sexual abuse in childhood, engaged in substance abuse from a young age, shown behavioural problems since primary school and left school at an early age. She had a significant psychiatric history, with possible attention deficit hyperactivity disorder and conduct disorder, as well as longstanding visual and auditory hallucinations.

Tarni was 20 years of age and ‘coming down off ice’ when she committed the offences in question. She entered a taxi and asked to be driven to the station. On the way, she pulled out a knife and held it to the driver’s neck, telling him she would stab him if he did not give her all his money. The driver parked the car, handed over his driving money and his personal belongings and got out of the car. While Tarni was trying to start the car to steal it, the driver managed to take the knife from her and throw it under some nearby cars. He then pressed the emergency button in the taxi and police arrived soon afterwards. While on bail, Tarni was admitted as an involuntary psychiatric patient, where she was treated for a psychotic episode.

Tarni pleaded guilty to armed robbery and attempted armed robbery. The psychologist’s report to the court stated that Tarni would need intensive psychological support in order to have any chance at rehabilitation. The judge concluded that a sentence of youth detention would be inappropriate and sentenced Tarni to a total effective period of imprisonment of 30 months, with an 18 month non-parole period. The judge deemed Tarni’s prospects of rehabilitation to be poor due to her psychological disorder (which would likely require inpatient treatment – not available in youth detention), her lack of remorse and her stated intention to continue using illegal drugs. The judge commented that she did not find Tarni to be particularly impressionable or more likely to be subjected to undesirable influences in adult prison than others of her age.

The need for general deterrence may influence a judge’s decision as to whether a young offender should be sentenced to youth detention or adult imprisonment. In *R v Speedie* 898 Justice Coldrey, in sentencing an 18 year old offender to four and a half years’ imprisonment, with a minimum of two years, said:

> The use of knives to inflict physical harm is abhorrent to this community. The courts, by the sanctions they impose, must seek to deter persons from carrying and using such weapons. 899

The offender in this case was convicted of two counts of intentionally causing serious injury (involving the stabblings of two other young males), two counts of intentionally damaging property and one count of common assault. Despite taking into account the offender’s relative youth (and the importance of rehabilitation as a sentencing objective), the fact that the offending was impulsive rather than premeditated and that the offender had been assessed as suitable for a youth detention order, the judge clearly felt compelled to impose a sentence of imprisonment due to the seriousness of the knife offences. 900

Although judges may think carefully about whether a young offender should be sentenced to adult imprisonment or detention in a youth facility, once sentenced, the offender falls within the jurisdiction of either the Adult Parole Board or the Youth Parole Board and may be transferred (in certain circumstances) in either direction.

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899 Ibid [20].
900 However, Coldrey J did make a recommendation to the Adult Parole Board that the offender be transferred to a youth detention centre, where the offender would remain until eligible for parole: ibid [38].
Youth Parole Board and Youth Residential Board

Jurisdiction

The Youth Residential Board and Youth Parole Board have jurisdiction over all persons detained in either youth residential centres (10 to 14 years) or youth justice centres (15 years and older). The respective Boards are empowered torelease detainees on parole, amend or vary the terms and conditions of parole and cancel parole.

The Boards also decide matters concerning the transfer of young offenders between youth residential centres, youth justice centres and prison. Most jurisdictions transfer young offenders to an adult prison once they reach adult age; however, Victoria has traditionally allowed young offenders to serve their whole sentence in a youth detention facility. This adds to the already existing population of 18, 19 and 20 year olds in youth detention under the ‘dual track’ system. The Australian Institute of Health and Welfare estimates that there were 269 offenders over the age of 18 in youth detention in Victoria during 2009–10, which comprised 66.3% of the total sentenced population held in youth detention at this time. This was by far the highest proportion of over 18 year olds in youth detention across all states and territories.

Parole

Parole permits offenders to serve part of their sentence in the community, under the guidance and supervision of their parole officer. Offenders receive support and assistance via various programs and services, which aid transition from detention to the community.

A court sentencing an adult to a term of imprisonment of two years or more must set a non-parole period and it may set a non-parole period where the term of imprisonment is between one and two years. By contrast, when sentencing a child to a period of detention in a youth residential centre or youth justice centre, neither the Supreme Court, County Court nor Children’s Court has power to set a non-parole period, whatever the period of detention imposed. A decision to release a child or young person on parole is an administrative decision taken by either the Youth Residential Board or the Youth Parole Board.

Though every case depends on its individual circumstances, the Youth Parole Board and Youth Residential Board mainly consider eligibility for parole of young persons sentenced to youth detention for a period of six months or more.
Factors taken into account in assessing parole

The Boards base parole decisions on a variety of information sources, including comments from the sentencing court, reports from psychologists, medical practitioners and other professionals working with the offender as well as custodial officers, and requests or plans put forward by the offender. Factors taken into consideration when assessing a child offender for parole include the interests of and risks to the community, age and interests of the young person, capacity for parole to assist rehabilitation, the nature and circumstances of the offences, the young person’s criminal history, previous community-based dispositions and compliance, and family and community support networks.

Parole plan

A parole plan – prepared by a Department of Human Services parole officer in consultation with youth justice centre staff – must contain information about all arrangements in place for the parolee, including where the young person will live upon release, measures in place to limit the chance of reoffending, education and/or employment, professional support and supervision compliance with any special conditions.

Transfers

Pursuant to section 476(1) of the Children, Youth and Families Act 2005 (Vic) (‘CYF Act’), the Youth Parole Board has power to transfer a person aged 16 years or older from a youth justice centre to serve the remainder of their sentence in an adult prison (section 467). If the offender is aged 18 years or more, the Board may order the transfer if it ‘considers the direction appropriate, having regard to the antecedents and behaviour of the person’. If the person is aged between 16 and 18 years, there are strict conditions governing the transfer order. The Board may only make such a direction if it has taken into account the age, maturity, behaviour and antecedents of the person, the contents of a Department of Human Services report and be satisfied that the offender ‘has engaged in conduct that threatens the good order and safe operation of the youth justice centre’ and ‘cannot be properly controlled in a youth justice centre’.

If a person has been sentenced to detention in a youth justice centre and before the end of that sentence is sentenced to a period of imprisonment, the Youth Parole Board may direct that the person serve the unexpired portion of the youth detention sentence in prison (section 475). Further, a detainee aged 16 years or more may apply to the Youth Parole Board to be transferred to prison for the remainder of his or her sentence of detention (section 468).

In 2009–10, there were 39 transfers from a youth detention facility to adult prison, a large increase on the previous year. Table 10 does not distinguish between offenders under the age of 16 and those aged 18 or older. According to the Adult Parole Board’s 2009–10 annual report, 11 offenders were transferred to prison pursuant to section 467 of the CYF Act, one offender requested a transfer to prison and 27 were transferred under section 475 of the Act.

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909 Ibid 3.
910 Ibid 7.
911 Children, Youth and Families Act 2005 (Vic) s 467(4).
912 Children, Youth and Families Act 2005 (Vic) ss 467(2)–(3). See also sections 468 and 475 for further powers of transfer to prison.
913 Children, Youth and Families Act 2005 (Vic) s 475(1). Section 474 is a similar provision but directed at those in a youth residential centre.
914 Children, Youth and Families Act 2005 (Vic) s 468. The Youth Parole Board in such cases must take into account a Department of Human Services report and have regard to the antecedents and behaviour of the young person.
915 Children, Youth and Families Act 2005 (Vic) s 475 provides that if a person currently in youth detention receives a sentence of imprisonment during that detention, the Youth Parole Board may direct that the person serve the unexpired portion of the sentence in an adult prison.
Table 10: Transfers issued by the Youth Parole and Youth Residential Boards

<table>
<thead>
<tr>
<th>Provision</th>
<th>Number of transfers issued by the Boards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transfer from youth residential centre to youth justice centre (sections 464 and 465)</td>
<td>1</td>
</tr>
<tr>
<td>Transfer from youth justice centre to youth residential centre (section 470)</td>
<td>1</td>
</tr>
<tr>
<td>Transfer from youth justice centre to prison (section 467)</td>
<td>9</td>
</tr>
<tr>
<td>Young person’s request for transfer to prison (section 468)</td>
<td>1</td>
</tr>
<tr>
<td>Person in youth residential centre sentenced to detention in youth justice centre or imprisonment (section 474)</td>
<td>1</td>
</tr>
<tr>
<td>Person in youth justice centre sentenced to imprisonment (section 475)</td>
<td>4</td>
</tr>
<tr>
<td>Person in prison sentenced to detention in youth justice centre (section 477)</td>
<td>1</td>
</tr>
<tr>
<td>Transfer back to prison after transfer from prison to youth justice centre (section 473)</td>
<td>2</td>
</tr>
<tr>
<td><strong>Annual total</strong></td>
<td><strong>20</strong></td>
</tr>
</tbody>
</table>

Source: Youth Parole Board and Youth Residential Board Victoria (2010).

The Adult Parole Board may direct that a person under 21 years of age be transferred to a youth justice centre if the Board is satisfied that the person is suitable for detention in a youth justice centre and a place is available. In 2009–10 six offenders were transferred from prison to a youth detention facility, four the year before and two the year before that. This may occur in response to a court recommendation that a young person (under 21 years) be considered for a transfer for all or part of his or her sentence in a youth justice facility, despite the fact that the young person has been denied ‘dual track’ due to the length of the sentence.

For example, in the Supreme Court case of R v Speedie, the judge imposed a total effective sentence of four and a half years, which was outside the range of those available for youth detention. However, the judge recommended to the Adult Parole Board that the offender be transferred to youth detention and remain there until eligible for parole, and directed the Department of Human Services to prepare a report for the Board to consider.

In Director of Public Prosecutions v Sako the judge held:

I have concluded that a maximum of three years would be inadequate and therefore a youth justice centre sentence would not be appropriate. What is important about Mr Riordan’s report is that it reflects, both in its terms and by implication, that you had difficulty in the adult prison system. I will therefore recommend that the adult parole board, pursuant to s 471 of the Children, Youth and Families Act 2005, give consideration to your transfer to serve such portion of your sentence as they regard as appropriate in a youth justice centre. That will require the adult parole board obtaining from the Department of Human Services a report as to the appropriateness of that action.

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916 Children, Youth and Families Act 2005 (Vic) s 471(1).
919 Ibid [38]–[40].
920 Director of Public Prosecutions v Sako [2010] VSC 223 (11 February 2010). This was a manslaughter case.
921 Ibid [65].
Appendix 1: Data methodology

Data sources

The main source of data for this report is the Children’s Court ‘cubes database’ and its associated unit record data.922 The Children’s Court cubes database is based on Children’s Court records stored within the Courtlink case management system. The database contains information on cases brought before the Children’s Court, including charges, sentencing outcomes, and basic demographic details (age and gender of the accused).

The key results from analysing these data are presented in Chapters 8, 9 and 10.

Apart from the Children’s Court cubes database, data from other sources are occasionally referenced, such as the Australian Bureau of Statistics, the Australian Institute of Health and Welfare, the Australian Institute of Criminology and Victoria Police.

List of data sources

**Australian Bureau of Statistics data**


922 ‘Unit record data’ (provided by the Department of Justice, Victoria) refers to the individual, disaggregated records making up a database. Using unit record data allows more flexibility in answering various research questions.
Australian Bureau of Statistics, Population by Age and Sex, Australian States and Territories, cat. no. 3201.0 (2010):

- Table 1. Estimated resident population by single year of age, New South Wales;
- Table 2. Estimated resident population by single year of age, Victoria;
- Table 3. Estimated resident population by single year of age, Queensland;
- Table 4. Estimated resident population by single year of age, South Australia;
- Table 5. Estimated resident population by single year of age, Western Australia;
- Table 6. Estimated resident population by single year of age, Tasmania;
- Table 7. Estimated resident population by single year of age, Northern Territory;
- Table 8. Estimated resident population by single year of age, Australian Capital Territory;
- Table 9. Estimated resident population by single year of age, Australia.

Australian Institute of Health and Welfare data

Australian Institute of Criminology data


Youth Parole Board and Youth Residential Board Victoria (2010)
Youth Parole Board and Youth Residential Board Victoria, Annual Report 2009–10 (2010), 10 (Table 6).

Victoria Police data
Counting unit

The majority of the data analysis uses the principal proven offence as the main counting unit. The principal proven offence is the individual offence chosen in a case that attracted the most severe sentence within the sentencing hierarchy.\(^{923}\) It is a useful tool to pinpoint the main type of offending for which a person was sentenced, particularly if the case contains multiple charges.

While it would be possible to analyse every charge in a case, this risks skewing the results in favour of cases with a large number of charges. Analysing the sentences for every charge is also likely to result in double-counting due to some cases receiving an aggregate sentence.\(^ {924}\)

Using the principal proven offence as the main counting unit ensures that every case is given equal weight in the analysis, regardless of the number of charges within the case, and avoids the problem of double-counting an aggregate sentence.

Determining the principal proven offence

Principal proven offences for each case are selected using the following criteria, which are applied until only one charge remains:

- The principal proven offence is the charge that received the most severe sentence, according to the sentencing hierarchy.
- If two or more charges received an equally severe sentence, the principal proven offence is the charge that received the highest quantum of that sentence (for example, length of time in detention or dollar value of fines).
- If two or more charges resulted in sentences of equal quantum and severity, the principal proven offence is the one which receives the lowest ranking on the Australian Bureau of Statistics National Offence Index (NOI).\(^{925}\) Lower ranked offences within the NOI are regarded as more serious.
- If two or more charges resulted in sentences of equal quantum, severity and rank, the principal proven offence is the charge listed first in the database records.

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\(^{923}\) In the event that two or more charges attracted equally severe sentences, other criteria are used to determine the principal proven offence (discussed below).

\(^{924}\) Aggregate sentencing occurs when the court gives one sentence for all the charges in the case, rather than individual sentences for each charge. An aggregate sentence should only be counted once for each case, while an individual sentence can be counted once for each charge. Due to missing data, it was not possible to examine the extent to which aggregate sentencing is used in the Children’s Court.

Data scope and limitations

Reference period

The data analysis in this report includes all cases finalised during the 2000–09 calendar years. Calendar years were chosen in order to utilise as much of the available data as possible. As a result of this, the earliest case included in the analysis was finalised on 5 January 2000, while the latest case was finalised on 30 December 2009.

The Children’s Court database includes some cases finalised during September to December 1999; however, these were excluded as there were no records of cases finalised during the earlier periods of 1999.

Type of Children’s Court cases recorded

The database records cases finalised by the Criminal Division of the Children’s Court. It does not contain any data on cases brought before any other division of the Children’s Court (for example, the Family Division), or through the CAYPIN System. Cases sentenced in the Children’s Koori Court are included in the database, but cannot be reliably distinguished; as such they are included with the mainstream Children’s Court cases.

Cases are only recorded in the database once they are finalised. In the event that several separate cases are consolidated and finalised as one case, this appears as one case in the database. Similarly, cases that are ongoing would not appear in the database. Both these factors may lead to an undercount of the actual workload of the Children’s Court.

Demographic data

Basic demographic data (namely age at time of offending, age at sentencing and gender) are included.

The Council calculated age at offending and age at sentencing for each charge listed in the database, by comparing the date of offending and sentencing to the accused person’s date of birth. Where the resulting age appeared either too young or too old, the accused was classified as being ‘age unknown’ but still included in the data set, as checks revealed that all these cases had been finalised in the Children’s Court. However, these ‘age unknown’ cases were either excluded or placed in an ‘age unknown’ category in any tables or figures relying on age data.

Other important demographic information such as Indigenous status, culturally and linguistically diverse backgrounds, prior convictions, history of drug and/or alcohol use, and mental health status are not recorded in the database, and thus there is no analysis based on these factors in the report.

Type of prosecuting agency

Children’s Court data include cases brought to the court from a variety of prosecuting agencies such as Victoria Police, the Department of Transport (Vic) and the Department of Infrastructure (Vic), among others. Changes in the charging practices of various agencies may result in changes to the number and types of cases brought before the court.
Pre-sentencing programs

The data set does not contain data on pre-sentencing rehabilitative or other programs. Children's Court offenders frequently engage in programs prior to sentencing (for example, treatment programs or group conferencing) and their success or failure within these pre-sentencing programs can influence the magistrate’s sentencing decision. There were no data available to identify whether an offender had participated in a pre-sentencing program, or whether success or failure in these programs had affected sentencing.

Sentencing data

For each case in the Children's Court database, a list of charges is provided alongside the sentence for that charge. However, the data set only records the initial sentence that the offender received for each charge, and not whether they received another disposition due to subsequently breaching (or successfully complying with) the initial sentence.

In the event that a charge was not proven, the way in which it was finalised (for example, struck out, dismissed, sent to committal) is recorded in place of the sentencing disposition.

For the charges that received a good behaviour bond, accountable and non-accountable undertaking or probation, quantum data (that is, duration or dollar value of the sentence) were not available. Quantum data were available for all other sentences.

The data set contains very little information on the use of conviction and non-conviction in sentencing. In the Children's Court some sentences – including fines, probation and youth supervision orders – can be imposed either with or without a conviction. Unfortunately, the data set only differentiates convictions and non-convictions in regards to fines and the Council’s analysis was restricted accordingly.

Due to missing data, it was not possible to distinguish cases in which an aggregate sentence was imposed for all charges from those that received an individual sentence for each charge.

Offences receiving a dismissal or discharge

Some charges in the Children's Court database received a ‘dismissal’, ‘discharge’, or ‘convicted and discharged’926 sentencing disposition.

The Council received advice from the Department of Justice that dismissals and discharges are recorded in the database in instances where the charges were not proven or where they were proven but the court decided not to make a further order.927 Stakeholders with whom the Council spoke suggested that a large proportion of dismissals and discharges are issued for proven offences, although the exact percentage is unknown. Because it was not possible to distinguish the proven from the non-proven dismissals or discharges in the data set, all charges that received a dismissal, discharge, or ‘convicted and discharged’ disposition were excluded from the calculations.

As cases often have more than one charge, it is possible to have a combination of dismissals and discharges and other sentencing options for the set of charges in the case. In the event that this occurred, the case is included in the analysis, but only the charges that did not receive the dismissal or discharge. For example, if a child received a dismissal for a theft offence, but probation for a burglary offence, the burglary offence is included in the data for this report.

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926 There is no power under the Children and Young Persons Act 1989 (Vic) or CYF Act for a court to ‘convict and discharge’ an offender brought before the Children’s Court. A court can ‘convict and discharge’ an offender under section 73 of the Sentencing Act 1991 (Vic); however, the Sentencing Act 1991 (Vic) is not applicable in the Children’s Court: Sentencing Act 1991 (Vic) s 4.

927 Even if the court finds a child guilty of an offence, it may dismiss the charge, with no recording of a conviction: Children, Youth and Families Act 2005 (Vic) s 360(1)(a).
Offences receiving an ‘order to cancel driver’s licences’

Inspection of the data found that there were 1,000 charges in the Children’s Court database listed as having an ‘order to cancel driver’s licence’ as their sole sentence. An ‘order to cancel driver’s licence’ is not a sentence per se but can be given as an additional penalty to an offender who has been found guilty of committing offences relating to motor vehicles.\textsuperscript{928} This was due to the Children’s Court database failing to record the actual sentences for these charges.

For each of the charges with an ‘order to cancel driver’s licence’ recorded, an examination of Courtlink records resulted in 99.3% of the missing sentences (and quanta) being recovered and included in the data set. The remaining 0.7% of cases were also included towards the count of ‘proven’ cases in the Children’s Court, as the offender must be found guilty before an order to cancel driver’s licence can be given to them.\textsuperscript{929}

Breach offences

A small proportion of cases was excluded because their list of charges included breaches that the Children’s Court does not have the power to sentence as stand-alone offences. Additionally, it was not possible to determine whether the sentence handed down for charges in these cases was the initial sentence, or a revised sentence after a breach had been proven. Table A1 contains a list of breaches excluded from the analysis. There were 439 cases finalised in the Children’s Court database between 2000 and 2009 that were excluded due to this criterion.

Breach offences that can be sentenced as stand-alone offences in the court (for example, breaching family violence intervention orders) are included in the analysis. These breaches are briefly discussed in Chapter 9 and listed in Table A2 below. There were 3,069\textsuperscript{930} cases finalised in the Children’s Court database during 2000–09 that contained these offences.

\textsuperscript{928} \textit{Road Safety Act 1986 (Vic)} s 28.

\textsuperscript{929} For these cases, the principal proven offence was selected based on the other charges that received a proper sentence, and the charge receiving the ‘order to cancel driver’s licence’ as the principal proven offence was only selected if there were no other proven charges. Inspection of the data revealed that all of the ‘proven’ cases in 2000–09 had at least one charge that was given a proper sentence.

\textsuperscript{930} The figure of 3,069 cases includes cases excluded from the main body of the report due to other problems in the data (for example, given a dismissal or discharge as the sentence). This is different from the figures used in Chapter 9, which only deals with proven offences.
<table>
<thead>
<tr>
<th>Breach name</th>
<th>Section</th>
<th>Legislation</th>
<th>Reason for exclusion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Breach good behaviour bond</td>
<td>s 371(1)</td>
<td><em>Children, Youth and Families Act 2005</em> (Vic)</td>
<td>Children’s Court does not have the power to sentence as a stand-alone offence. Can only be sentenced after offender has breached initial sentence.</td>
</tr>
<tr>
<td>Breach supervision order</td>
<td>s 392(1)</td>
<td><em>Children, Youth and Families Act 2005</em> (Vic)</td>
<td>Children’s Court does not have the power to sentence as a stand-alone offence. Can only be sentenced after offender has breached initial sentence.</td>
</tr>
<tr>
<td>Breach of good behaviour bond</td>
<td>s 42(1)</td>
<td><em>Children’s Court Act 1973</em> (Vic)</td>
<td>Children’s Court does not have the power to sentence as a stand-alone offence. Can only be sentenced after offender has breached initial sentence.</td>
</tr>
<tr>
<td>Breach of undertaking</td>
<td>s 143(1)</td>
<td><em>Children and Young Persons Act 1989</em> (Vic)</td>
<td>Children’s Court does not have the power to sentence as a stand-alone offence. Can only be sentenced after offender has breached initial sentence.</td>
</tr>
<tr>
<td>Breach good behaviour bond</td>
<td>s 148(1)</td>
<td><em>Children and Young Persons Act 1989</em> (Vic)</td>
<td>Children’s Court does not have the power to sentence as a stand-alone offence. Can only be sentenced after offender has breached initial sentence.</td>
</tr>
<tr>
<td>Breach of probation</td>
<td>s 160(1)</td>
<td><em>Children and Young Persons Act 1989</em> (Vic)</td>
<td>Children’s Court does not have the power to sentence as a stand-alone offence. Can only be sentenced after offender has breached initial sentence.</td>
</tr>
<tr>
<td>Breach of youth supervision order</td>
<td>s 165(1)</td>
<td><em>Children and Young Persons Act 1989</em> (Vic)</td>
<td>Children’s Court does not have the power to sentence as a stand-alone offence. Can only be sentenced after offender has breached initial sentence.</td>
</tr>
<tr>
<td>Breach of youth attendance order</td>
<td>s 184(1)</td>
<td><em>Children and Young Persons Act 1989</em> (Vic)</td>
<td>Children’s Court does not have the power to sentence as a stand-alone offence. Can only be sentenced after offender has breached initial sentence.</td>
</tr>
<tr>
<td>Breach of bail</td>
<td>s 24(1)(a)</td>
<td><em>Bail Act 1977</em> (Vic)</td>
<td>Not an actual offence</td>
</tr>
<tr>
<td>Breach suspended sentence order</td>
<td>s 31(1)</td>
<td><em>Sentencing Act 1991</em> (Vic)</td>
<td>Legislation does not apply to Children’s Court</td>
</tr>
<tr>
<td>Fail to comply with community-based order</td>
<td>s 47(1)</td>
<td><em>Sentencing Act 1991</em> (Vic)</td>
<td>Legislation does not apply to Children’s Court</td>
</tr>
<tr>
<td>Fail to comply with undertaking order</td>
<td>s 79(1)</td>
<td><em>Sentencing Act 1991</em> (Vic)</td>
<td>Legislation does not apply to Children’s Court</td>
</tr>
<tr>
<td>Contravene family law act order</td>
<td>s 112(ad)</td>
<td><em>Family Law Act 1975</em> (Cth)</td>
<td>Not an actual offence</td>
</tr>
</tbody>
</table>
Table A2: List of breaches included in Children’s Court data analysis

<table>
<thead>
<tr>
<th>Offence name</th>
<th>Section</th>
<th>Legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Contravene family violence final intervention order</td>
<td>s 123(2)</td>
<td>Family Violence Protection Act 2008 (Vic)</td>
</tr>
<tr>
<td>Contravene family violence-interim intervention order</td>
<td>s 123(2)</td>
<td>Family Violence Protection Act 2008 (Vic)</td>
</tr>
<tr>
<td>Contravene family violence order</td>
<td>s 123(2)</td>
<td>Family Violence Protection Act 2008 (Vic)</td>
</tr>
<tr>
<td>Contravene final stalking intervention order</td>
<td>s 32</td>
<td>Stalking Intervention orders Act 2008 (Vic)</td>
</tr>
<tr>
<td>Breach interim intervention order</td>
<td>s 22</td>
<td>Crimes (Family Violence) Act 1987 (Vic)</td>
</tr>
<tr>
<td>Breach intervention order</td>
<td>s 22</td>
<td>Crimes (Family Violence) Act 1987 (Vic)</td>
</tr>
<tr>
<td>Fail to attend counselling-family violence</td>
<td>s 8d(4)</td>
<td>Crimes (Family Violence) Act 1987 (Vic)</td>
</tr>
<tr>
<td>Fail to answer bail</td>
<td>s 30(1)</td>
<td>Bail Act 1977 (Vic)</td>
</tr>
</tbody>
</table>

Prior offending or recidivism

Records within the Children’s Court database are de-identified so it was not possible to determine how many times a particular young offender appeared in the Children’s Court over the 10 year data period. Similarly, no data were available to indicate whether an offender had a record of prior offending.

Linkages to other databases

Given the de-identified nature of the data, it was not possible to track whether an offender brought before the Children’s Court had a history of contact with other relevant organisations such as the police, Department of Housing or Child Protection.

It was possible, to a limited extent, to link cases in the Children’s Court to cases in the County and Supreme Courts for the purposes of the discussion in Chapter 11. This is discussed further in the section ‘Identifying children sentenced in the higher courts’.
Population rates

In some portions of the report, data are presented in the form of population rates per 100,000 people. Unless stated otherwise, the population data were obtained from the Australian Bureau of Statistics’ Population by Age and Sex, Australian States and Territories datacubes (refer to ‘List of data sources’), corresponding to the relevant state/territory discussed in the report.

The Children’s Court data are presented in calendar year format, ending in December, while Australian Bureau of Statistics population estimates are taken at June each year. To make these two formats compatible, the Australian Bureau of Statistics population estimates for December were imputed by averaging the June population estimate immediately before and after the required period (for example, by averaging the population estimates in June 2000 and June 2001 to impute the population during December 2000).

For all states and territories, the population of 10 to 17 year olds was used to calculate the number and rate of young people or young offenders interacting with the juvenile justice system, while the population aged 18 and above was used to calculate the number and rate of people interacting with the adult justice system. The main exception to this rule occurred in regard to Queensland (for all periods) and Victoria (prior to 1 July 2005), where the population aged 10 to 16 years was used for young people or young offenders, and correspondingly, the population aged 17 years or older was used for adults. This was done so that the population numbers and rates for Queensland and Victoria (prior to 1 July 2005) would align with the age jurisdictions for young persons and adult offending in these two states. The different age jurisdictions in Queensland and Victoria (prior to 1 July 2005) were also taken into account when calculating either the population of young persons, or adults at a national level.

Identifying children sentenced in the higher courts

Chapter 11 of the report includes data on young offenders who were sentenced in the County and Supreme Courts of Victoria during 2000–09. In order to obtain data on County and Supreme Court cases involving young offenders, three separate data sources were used:

- The Children’s Court cubes database, which contains a record of Children’s Court cases sent for committal to another court. Unfortunately, it does not record information on the name of the accused, or the date and type of higher court (for example, County or Supreme) they were sent to.
- Courtlink case records, which contain the name of the accused and the date and court that the Children’s Court case was transferred to, but do not contain any details on what happened after the case arrived at the higher court.
- The higher courts conviction returns database, provided by the Victorian Department of Justice, which contains name, offence and sentencing information for proven cases in the County and Supreme Courts of Victoria. This database could not be used in isolation, as it does not record any information to identify whether the case originated in the Children’s Court, or involved child offenders. It was also not possible to match the case numbers between the Children’s Court and higher courts databases, as the case numbering system is different in each database.
The procedure used to identify young offenders sentenced in the County and Supreme Courts was as follows:

- The Children’s Court cubes database was used to identify the cases sent for committal to another court. A case can be sent for committal if the Children’s Court does not have the jurisdiction to hear the case (for example, if the charges include any excluded offence such as murder or manslaughter), or if there are ‘exceptional circumstances’ which result in a transfer to another court. There were 50 cases identified in this manner.

- The case numbers of each of the cases sent for committal were examined within the Courtlink case records to obtain the names of the accused, and the dates at which they would receive their first hearing in the County or Supreme Court.

- The name (obtained from Courtlink) and date of birth (obtained from the Children’s Court cubes) of the accused were matched against the relevant variables in the higher courts conviction returns database. If a case matched on both variables, its date of sentencing was compared with the date of first hearing recorded in Courtlink to ensure they occurred within a similar time frame.

- Finally, if possible, sentencing remarks for each of the identified County and Supreme Court cases were obtained, to ensure that they involved young offenders who were otherwise of the appropriate age to be in the Children’s Court.

At the end of this process, 39 of the 50 cases were successfully identified and matched within the higher courts database, although only 38 were sentenced during 2000–09. As the higher courts database only records sentenced cases, the remaining cases that were not successfully matched may be cases that were subsequently found ‘not guilty’, were withdrawn by the prosecution, or had yet to be finalised.

A limitation of this process is that it is reliant on Children’s Court database records marked as being sent for committal. It is possible that Children’s Court cases could be sent for committal prior to September 1999 (the earliest period of time recorded in the database) and sentenced in a higher court during 2000–09. Unfortunately, there would be no easy way to identify these cases as involving young offenders. This problem is more likely to result in an undercount during the earlier years. However, given that this process was still able to identify two cases sentenced during the 2000 calendar year, it is likely that the impact of such an undercount would be minimal on the overall data.

931 The remaining case was sentenced in 2010 and was not included in the data analysis in Chapter 11.
Appendix 2: Meetings list

Roundtable meeting

24 March 2011

Attended by representatives from: Children’s Court of Victoria; Youth Law; Victoria Legal Aid (Youth Legal Service); Youth Referral and Independent Persons Program; Office of Child Safety Commissioner; Victorian Aboriginal Legal Service; Dowling McGregor; Department of Human Services; Youth Substance Abuse Service; Brosnan Youth Services.

Individual meetings

<table>
<thead>
<tr>
<th>Organisation</th>
<th>Date</th>
<th>Attendees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Children’s Court of Victoria</td>
<td>18 November 2010</td>
<td>Maxine Catton, Leah Hickey, Janet Matthew</td>
</tr>
<tr>
<td></td>
<td>23 February 2011</td>
<td>His Honour Judge Grant, Leah Hickey</td>
</tr>
<tr>
<td></td>
<td>15 April 2011</td>
<td>Magistrate Leslie Fleming</td>
</tr>
<tr>
<td></td>
<td>27 April 2011</td>
<td>His Honour Judge Grant</td>
</tr>
<tr>
<td>Department of Human Services</td>
<td>2 December 2010</td>
<td>John Sutcliffe, Eddie Wilson</td>
</tr>
<tr>
<td></td>
<td>13 April 2011</td>
<td>Kathryn Anderson, Rebecca Fitzsimons, Catherine Lane</td>
</tr>
<tr>
<td>Victoria Police</td>
<td>16 February 2011</td>
<td>Carolyn Budd, Acting Inspector Tim Hardiman, Senior Sergeant Steve Lefebvre</td>
</tr>
<tr>
<td></td>
<td>15 April 2011</td>
<td>Acting Senior Sergeant Mick Lynch, Leading Senior Sergeant Monica Smith (Dandenong Police)</td>
</tr>
<tr>
<td>Courts and Tribunals unit, Department of Justice</td>
<td>31 March 2011</td>
<td>Carmel Benham, Sarah Roberts</td>
</tr>
<tr>
<td>Youth Affairs Council of Victoria and Youth Referral and Independent Persons Program</td>
<td>7 April 2011</td>
<td>Vivian Dias, Georgie Ferrari, Sally Reid</td>
</tr>
<tr>
<td>Youth Parole Board</td>
<td>21 June 2011</td>
<td>His Honour Judge Bourke</td>
</tr>
</tbody>
</table>
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