sentencing
ADVISORY
COUNCIL

SENTENCING YOUNG OFFENDERS

RESEARCH PAPER NO 6

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About this Research Paper

Previously, the Council's consideration of sentencing has only examined sentencing under the *Sentencing Act 1997* (Tas) and has not examined the operation of the sentencing principles, options and practices under the *Youth Justice Act 1997* (Tas). This Research Paper aims to fill this gap in information.

This Research Paper provides information on the operation of the Magistrates Court (Youth Justice Division) and the sentencing of young offenders by the Supreme Court. It also examines the use of pre-court diversion (cautions and community conferences) as this is integral to the Tasmanian approach to youth justice.

Information on the Sentencing Advisory Council

The Sentencing Advisory Council was established in June 2010 by the Attorney-General and Minister for Justice, the Hon Lara Giddings MP. The Council was established, in part, as an advisory body to the Attorney-General. Its other functions are to bridge the gap between the community, the courts and the government by informing, educating and advising on sentencing issues in Tasmania. At the time that this Research Paper was concluded, the Council members were Emeritus Professor Arie Freiberg AM (Chair), Mr Peter Dixon, Ms Kim Baumeler, Mr Vincenzo Caltabiano, Ms Jill Maxwell, Ms Kate Cuthbertson, Ms Rosalie Martin, Dr Isabelle Barthkowiak-Théron, Dr Caroline Spiranovic and Ms Linda Mason SC.

This paper was written by Dr Rebecca Bradfield.

Consultation

During the preparation of this Research Paper, the Council consulted with stakeholders to gain further insight about sentencing under the *Youth Justice Act 1997* (Tas). The Council held meetings with stakeholder representatives from the following organisations:

- Tasmania Legal Aid
- The Law Society
- Community Legal Service (Hobart)
- Tasmania Police (Youth Crime Intervention Unit)
- Communities Tasmania
- Education Department
- Health and Human Services
- The Commissioner for Children and Young People
- Office of Public Prosecutions.

The Council also met the Chief Magistrate, C Geason and the Chief Justice of the Supreme Court, the Hon A Blow AO.

Written feedback was received from the Link Youth Health Service and Distinguished Professor of Criminology, Rob White.

CONTENTS

List of abbreviations

ABS	Australian Bureau of Statistics
ACE	adverse childhood experiences
AIC	Australian Institute of Criminology
AIHW	Australian Institute of Health and Welfare
AOD	alcohol and other drug
AYDC	Ashley Youth Detention Centre
BOCSAR	New South Wales Bureau of Crime Statistics
CROC	Convention on the Rights of the Child
DORS	Drug Offence Reporting System
DPP	Director of Public Prosecutions
FASD	Fetal Alcohol Spectrum Disorder
FIND	Fines and Infringement Notices Database
IB	Information Bureau
PCYC	Police Citizens Youth Club
PROS	Prosecution System
RoGS	Report on Government Services
TLA	Tasmania Legal Aid
VSAC	Sentencing Advisory Council Victoria
YCIU	Youth Crime Intervention Unit

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EXECUTIVE SUMMARY

This Research Paper provides information about the operation of the Magistrates Court (Youth Justice Division) and examines the sentencing of young offenders by the Supreme Court. It also examines the use of pre-court diversion (cautions and community conferences) as this is integral to the Tasmanian approach to youth justice.

Previously, the Council's consideration of sentencing has only examined sentencing under the *Sentencing Act 1997* (Tas) and has not examined the operation of the sentencing principles, options and practices under the *Youth Justice Act 1997* (Tas). This Research Paper aims to fill this gap in information. However, it is important to note that this Research Paper is not a comprehensive review of the youth justice system in Tasmania. Instead, it is focused on providing information about the operation of sentencing in the youth justice system in Tasmania.

Most young people do not come into contact with the criminal justice system and the rate of youth crime is falling. Research has shown that most youth offenders do not progress to serious crime, and in fact appear to stop offending without intervention. However, a small number of youths have repeated contact with the criminal justice system, are responsible for a disproportionate amount of crime and continue to offend into adulthood. Factors that have been identified as being associated with youth offending include gender, family factors, disengagement from education, disadvantage and poverty, homelessness, drugs and alcohol use, mental health and intellectual disability. An examination of the circumstances of a young offender often reveals a complex picture of multiple vulnerabilities. An additional feature of youth offending is the continued over-representation of Indigenous young people in the criminal justice system. An understanding of these factors and their association with offending can inform the sentencing process and the development of effective and responsive programs. Recent literature also highlights the impact of trauma on youth offending. The significance of trauma in the lives of young offenders has led to an increased awareness of the need for trauma-informed responses in the delivery of programs and also the recognition of trauma as a sentencing factor.

Youth Justice Division

The *Youth Justice Act 1997* (Tas) creates the Magistrates Court (Youth Justice Division) ('Youth Division') which is a specialist criminal court for young people who are aged 10 to 17 years at the time of an alleged offence. The Youth Division can hear and determine both summary and indictable offences in relation to 'youth', except for 'prescribed offences'. Indictable offences are more serious offences and many of these offences are contained in the *Criminal Code* (Tas). Indictable offences are generally dealt with by the Supreme Court for adult offenders. Summary offences are less serious offences and, for adults, are determined and sentenced in the Magistrates Court.

The sentencing framework set out in the *Youth Justice Act 1997* (Tas) differs significantly from the approach under the *Sentencing Act 1997* (Tas). There are no express purposes for sentencing contained in *Sentencing Act 1997* (Tas), however, the general purpose of the Act is

expressed as promoting the protection of the community as a primary consideration in sentencing offenders as well as to help prevent crime and promote respect for the law by allowing courts to impose sentences aimed at deterrence, rehabilitation and denunciation. In contrast, the objectives of the *Youth Justice Act 1997* (Tas) are focused on treatment, rehabilitation and, if necessary, the imposition of an appropriate sanction. Rehabilitation is a dominant focus for youth offenders and the court is required to consider the impact of orders on a youth's chances of gaining employment. Also underpinning the approach to youth justice is the principle of restorative justice, which focuses on reconciliation, reparation and reintegration. This approach is based on young people being held responsible for their actions, together with the idea of diverting young people away from court in the first instance. In sentencing, the Court is also directed to have regard to the preservation of family relationships, the family environment and the continuation of education and employment as far as the circumstances of the individual case allow.

The *Youth Justice Act 1997* (Tas) states that youth offenders should not be treated more harshly than adult offenders. The Council has identified the requirement for mandatory disqualification for driving in cases where a person under the age of 17 is convicted of motor vehicle stealing or procuring the hire or use of a motor vehicle by fraud as offending against this principle as mandatory disqualification is not required for adult offenders.

Another key principle set out in the *Youth Justice Act 1997* (Tas) is that detention should only be imposed as a last resort and for the shortest possible time. In consultations, stakeholders have raised concerns about the lack of an appropriately funded and supported bail support program for young people and this appears to be inconsistent with this principle.

Youth offenders and diversion

Diversion is a key feature of the youth justice system in Tasmania. Under the *Youth Justice Act 1997* (Tas), the police have a significant gate-keeping function in relation to a youth's diversion by way of caution or community conference. The use of diversion provides a mechanism to give effect to the principle that detention should be a last resort option for young people. It also reflects the minor nature of much youth offending. Data provided by Tasmania Police show that since 2010–11 to 2018–19, there has been significant decrease in the number of youth offender cases This is consistent with data in relation to reported crime and court finalisations reported by the ABS, which both show a decrease in the level of reported crime involving youth offenders and a corresponding decrease in the number of matters finalised in the Youth Division. Diversion (informal and formal cautions and community conferences) account for nearly 50% of matters dealt with by police. In 2018–19, 47.4% of youth files were diverted and 52.6% of youth cases were sent to prosecution. However, there has been a decrease in the use of diversion, in particular informal cautions and community conferences.

Offence distribution in the Youth Division for youth offenders 2014–15 to 2019–20

A key finding was the significant decline in the matters finalised in the Youth Division since the late 2000s with a corresponding dramatic decline in the number of youth offenders proven guilty.

Proven principal offence data was obtained from the Department of Justice for the period 2014–15 to 2019–20. The offences were grouped into six broad categories: offences against the person, property offences, driving offences, drug offences, bail offences and 'other offences'. The largest category of youth offences were offences against property which accounted for 31% of principal proven offences. In this category, stealing offences (stealing, motor vehicle stealing) were the most common offences accounting for 42% of the property offences. Stealing accounted for 9.9% of all offences. Offences against the person made up 26% of total proven principal offences with assault being the most common offence in this category (68.2% of offences against the person). Assault was also the most common offence overall accounting for 14.2% of all cases with a guilty finalisation. Breach of bail accounted for 10% of guilty finalisations in the Youth Division.

Sentence distribution in the Youth Division for youth offenders 2014–15 to 2019–20

The sanctions contained in the *Youth Justice Act 1997* (Tas) are different from those in the *Sentencing Act 1997* (Tas) and range from dismissal to detention orders.

A key finding of the analysis of sentencing outcomes for the period 2014–15 to 2019–20 was that 90.8% of the orders made under the *Youth Justice Act 1997* (Tas) are non-custodial with fewer than 1 in 10 youth offenders receiving a custodial order. There were few detention orders, including partly suspended detention orders (5.8%) or fully suspended detention orders (3.5%), imposed by the Youth Division with low level sanctions imposed in a majority of cases (63.2%). The most frequently used sentencing orders for offences sentenced in the Youth Division were undertaking/released on conditions, which accounted for nearly 40% of sentencing orders made.

Other findings included:

- Common assault contrary to the *Police Offences Act 1935* (Tas) s 35(1), assault a police officer contrary to the *Police Offences Act 1935* (Tas) s 34B(1)(a)(i) and operate a vehicle in public place in an exhibition of speed, acceleration or loss of traction contrary to the *Police Offences Act 1935* Tas) s 37J(1) were the three most frequent offences against the person sentenced in the Youth Division, in decreasing order of frequency.[1] These three offences accounted for 79% of all offences against the person. The most frequent order was release on conditions (30.9%), followed by community service (23.7%) and probation (9.6%). There were 16.4% of youths who received a sentence of detention (including suspended detention) for offences against the person.
- Stealing contrary to the *Criminal Code* (Tas) s 234, burglary contrary to the *Criminal Code* (Tas) s 244 and aggravated burglary contrary to the *Criminal Code* s 245(a)(iii)) were the three most frequent property offences sentenced in the Youth Division, in decreasing order of frequency. These three offences accounted for 71.9% of all property offences sentenced in the Youth

[1] These offences were classified as offences against the person because of the risk posed by the conduct.

Division. The most frequent order was release on conditions (32.4%), followed by community service (21.1%) and dismissal (15.7%). There were 8.3% of youths who received a sentence of detention (including suspended detention) for property offences.

- Driving whilst not holding a licence, contrary to the *Vehicle and Traffic Act* (Tas) s 8(1), drive with prescribed illicit drug in blood contrary to the *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 6A(1) and drive without licence with alcohol in body contrary to the *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 6(2) were the three most common driving offences, in decreasing order of frequency. These three offences accounted for 70.4% of traffic offences sentenced in the Youth Division. The most frequent order was a monetary order (typically a fine) (79.9%), followed by release on conditions (7.4%) and dismissal (5%). There were no custodial orders made for driving offences and very few supervised sentences (2.5%).
- Sell or supply a controlled drug, contrary to the *Misuse of Drugs Act* (Tas) s 27, possess or use a controlled plant or its products, contrary to the *Misuse of Drugs Act* (Tas) s 25, and cultivate a controlled plant, contrary to the *Misuse of Drugs Act* (Tas) s 22 were the three most common drug offences, in decreasing order of frequency. These three offences accounted for 84% of drug offences sentenced in the Youth Division. The most frequent order was a dismissal (26.4%), followed by release on conditions (23.6%) and community service and monetary orders (both 11.3%). Custodial orders were rarely imposed for drug offences (8.5% combined detention and suspended detention).
- There were 116 youths sentenced to full-time detention, 54 youths sentenced to partly suspended detention and 103 sentenced to a fully suspended detention order by the Youth Division in the period 2014–15 to 2019–20.
- For the 116 youths sentenced to a full-time detention order, the minimum term was seven days' detention and the longest sentence was 15 months' detention. The median term was four months' detention. In relation to youths sentenced to full-time detention for offences against the person (n = 48), the minimum term was seven days' detention, and the longest sentence was 15 months' detention. The median term was five months' detention. In relation to youths sentenced to full-time detention for property offences (n = 37), the minimum term was 14 days' detention, and the longest sentence was 12 months' detention. The median term was two months' detention.

Sentencing youth offenders in the Supreme Court 2016–17 to 2019–20

The Youth Division does not have jurisdiction to hear 'prescribed offences' in relation to youths. Prescribed offences are generally serious offences, and the offences that are classified as prescribed offences change depending on the age of the young person.[2] Prescribed offences

[2] See further [6.1].

are dealt with in the Supreme Court or Magistrates Court (depending on the court that would deal with the matter if it involved an adult). In certain cases, a youth may elect to have the matter determined in the Supreme Court or the Supreme Court must deal with the matter because the youth is jointly charged with an adult.

In the period 2016–17 to 2019–20, the Council identified 38 'youths' who were sentenced in the Supreme Court. Offences against the person were the most common broad offence category for youths sentenced in the Supreme Court. This accounted for 37 out of 38 cases. This reflects the offences that are 'prescribed offences' that must be dealt with in the Supreme Court. In the Supreme Court, in the period 2016–17 to 2019–20, the most common offence category for which a youth was sentenced was robbery (44.7%) followed by sexual offences (31.6%). The most common robbery offence sentenced in the Supreme Court was aggravated armed robbery (14 out of 20 cases). There was more variation where a sexual offence was the principal offence category: in five of the 12 cases sentences were imposed for rape, and in four cases the sentences imposed were for maintaining a sexual relationship with a young person/persistent sexual abuse. Other offences included indecent assault, aggravated sexual assault, and attempted unlawful sexual intercourse with a young person.

Information about offender age was available in 37 out of the 38 cases, and these ranged from 10 to 17 at the time of offending (with two of these offenders being sentenced for offences committed while a youth and also for offences committed as an adult). Most offenders were sentenced when they were 18 years or older (28 out of 37 offenders) and generally these offenders were sentenced when they were aged 18 to 20. However, in relation to offenders sentenced for sexual offences, there were four out of the 12 offenders who were sentenced for many years after the offence with their age at sentencing ranging from 31 to 60 years.

If a youth is sentenced in the Supreme Court, the court has a discretion as to whether to sentence the young person under the *Sentencing Act 1997* (Tas) or *Youth Justice Act 1997* (Tas). In such cases, the predominant concerns of the court are the seriousness of the offence and the appropriateness of the sanctions available under the *Youth Justice Act 1997* (Tas) to provide a sufficient punishment.

In the period 2016–17 to 2019–20, 17 youths were sentenced under *Sentencing Act 1997* (Tas) and 21 were sentenced under the *Youth Justice Act 1997* (Tas). In cases where a sexual offence was the principal offence, nine out of 12 the cases were sentenced under the *Sentencing Act 1997* (Tas). In contrast, in cases where robbery was the principal offence, only three out of 17 cases were sentenced under the *Sentencing Act 1997* (Tas).

For youths sentenced under the *Sentencing Act 1997* (Tas):

- Eight received a sentence of full-time imprisonment. The longest sentence was 10 years (offending included six counts of rape and two counts of dangerous driving) and the lowest sentence was six weeks (aggravated burglary and assault). The median sentence was 48 months (four years).
- Five received a partly suspended sentence.
- Four received a fully suspended sentence.

For youths sentenced under the *Youth Justice Act 1997* (Tas):

- Four received a detention order. the highest sentence was 20 months' detention with an 18-month probation order on release (aggravated robbery and stealing). There were two youths sentenced to 12 months' detention (one case involving aggravated armed robbery and the other armed robbery). In both cases, the offender was also sentenced to a probation order on release (12 months and 18 months respectively).
- Seven received a partly suspended detention order.
- Three received a fully suspended detention order.
- Five received a probation order under the *Youth Justice Act 1997* (Tas).
- Two received an undertaking or adjournment with conviction.

1 Introduction

In Tasmania, a separate Children's Court, which dealt with both criminal and child protection cases, was established in 1918. This structure was changed in 1997 with the creation of a specialist division of the Magistrates Court to deal with criminal matters — the Magistrates Court (Youth Justice Division) ('Youth Division'), and child protection matters — the Children's Division of the Magistrates Court. The Youth Division has jurisdiction to hear and determine all offences against young people other than 'prescribed offences'. The legislation that provides the framework for the operation of the youth justice system is the *Youth Justice Act 1997* (Tas).

This Research Paper provides information on the operation of the Youth Division and examines the sentencing of young offenders by the Supreme Court. It also examines the use of pre-court diversion (cautions and community conferences) as this is integral to the Tasmanian approach to youth justice.

Previously, the Council's consideration of sentencing has only examined sentencing under the *Sentencing Act 1997* (Tas) and has not examined the operation of the sentencing principles, options and practices under the *Youth Justice Act 1997* (Tas). This Research Paper aims to fill this gap in information. However, it is important to note that this Research Paper is not a comprehensive review of the youth justice system in Tasmania. Instead, it is focussed on providing information about the operation of sentencing in the youth justice system in Tasmania. Despite its limited scope, it is clear from the literature, data and consultations that inform this Research Paper, that youth offending (and the response to it) exists within a wider social context and there remain significant service gaps in response to the complex trauma experienced by young Tasmanians who are vulnerable.[3] Although beyond the scope of this Research Pape, it should be acknowledged that there are significant challenges faced by vulnerable teenagers in accessing stable accommodation, appropriate mental health services, drug and alcohol recovery services and being supported to engage with schooling.[4] These concerns were raised in consultations with stakeholders where the unmet welfare needs of youth offenders were highlighted, as well as the limitations and gaps in services available to this vulnerable cohort. It was also observed that the youth justice system provided only a limited 'window' of opportunity within which to attempt to respond to these complex needs.

1.1 The Council's approach

In preparing this Research Paper, the Council has drawn on a range of resources to provide a detailed insight into the sentencing of youth offenders in Tasmania. In addition to a review of literature available from Tasmania, Australia and internationally, the Council has drawn together data obtained from a range of sources including the Tasmanian Justice Department, Tasmania Police, the Supreme Court library, the Australian Bureau of Statistics ('ABS'), the Report on Government Services ('RoGS') and the Australian Institute of Health and Welfare ('AIHW'). In interpreting the data contained in the reports of the AIHW and

[3] See for example, Catherine Robinson, *Too Hard? Highly Vulnerable Teens in Tasmania* (AnglicareTas: Social Action and Research Centre, 2017) Chapter 5.

[4] Ibid.

RoGS, it is noted that there are only a small number of young people under supervision in Tasmania. Accordingly, caution is required when examining and interpreting trends as random variation is more noticeable when numbers are small. The Council has also drawn on literature and research from other jurisdictions. While this is useful for understanding issues relating to youth justice more broadly, caution should again be used in regard to direct inferences due to differences in systems and youth populations. The Council notes that related to this, the 'law and order' debates in Tasmania are not like those in other Australian jurisdictions, where moral panics around young people are qualitatively different.[5]

The Council has also consulted with a range of stakeholders. Details of these meetings are set out in Appendix A.

1.2 Structure of the report

Chapter 2 provides an overview of offending by young people to provide context for the discussion about sentencing young offenders.

Chapter 3 outlines the development of youth justice policy and legislation in Tasmania, as well as the relevant international human rights framework.

Chapter 4 presents research examining public opinion in relation to sentencing young offenders.

Chapter 5 discusses pre-court diversionary framework in Tasmania and provides an overview of the use of these diversionary mechanisms.

Chapter 6 sets out the jurisdiction of the Youth Division and provides details about the operation of the court.

Chapter 7 provides an overview of sentencing under the *Youth Justice Act 1997* (Tas) including a discussion of the sentencing principles that apply to sentencing youths and the sentencing options available.

Chapter 8 provides data in relation to the guilty finalisations for youths in the Youth Division.

Chapter 9 examines sentencing for youths in the Youth Division for the period 2014–15 to 2019–20.

Chapter 10 examines sentencing for youths in the Supreme Court over the period 2016–17 to 2019–20.

Chapter 11 provides details about young people held in detention in Tasmania.

[5] See Chris Cunneen, Rob White and Kelly Richards, *Juvenile Justice: Youth Crime in Australia* (Oxford University Press, 5th ed, 2013) 78–81.

2 Overview of young people's offending

This chapter provides an overview of offending by young people to provide context for the discussion about sentencing young offenders. In this context, 'young people' refers to refers to offenders aged over 10 and under 18 at the time of the offence. It combines a literature review with a summary of relevant published data obtained from the ABS, RoGS, the AIHW) and the Department of Police, Fire and Emergency Management.

2.1 Statistical snapshot of young people's contact with criminal justice system

At the outset, it is important to bear in mind that 'the majority of young people never come into formal contact with the criminal justice system'.[6] The falling rate of youth crime is another important contemporary contextual feature in considering young people's offending both in relation to those having contact with police and those entering into the youth justice system.[7]

There are a number of ways in which the involvement of young people with the criminal justice can be measured: crime recorded by police, or court data relating to young people or by self-report studies.[8] And, as is well-recognised, there are a number of problems in relying on official sources of information to measure crime.[9] These include the underreporting of crime to the police (particularly for some offence categories) and changes in enforcement practices.[10] In addition, factors that relate to offending by young people also influence the reliability of official figures as a measure of the extent of offending. Cunneen, White and Richards have identified specific features of youth offending that increase youth representation in official statistics such as that young people are more likely to get caught by police, young people commit crimes in groups (and so several youths may be arrested for one offence) and young people are the most over-represented when compared with adults for offences that have high reporting rates due to insurance requirements.[11] It is also noted that the number of offences/offenders in Tasmania are relatively small compared to other jurisdictions, and so even when comparisons are made on a proportionate basis (as with Figure 2.1), these small numbers need to be considered.

Despite these limitations, recorded crime statistics provide one measure of the level of offending by young people. Recorded crime data provides information about alleged offenders who were proceeded against by police during the 12 months reference period. This includes court and non-court action such as informal or formal cautions/warnings,

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6 Kelly Richards, *What makes juvenile offenders different from adult offenders?* (Australian Institute of Criminology, Trends and Issues in Criminal Justice No 409, February 2011) 3. See Figure 2.2.

7 Garner Clancey, Sindy Wang and Brenda Lin, *Youth Justice in Australia: Themes from Recent Inquiries* (Australian Institute of Criminology, Trends and Issues in Criminal Justice No 605, October 2020) 2–3.

8 Cunneen, White and Richards (n 5) 56–60.

9 Ibid 53.

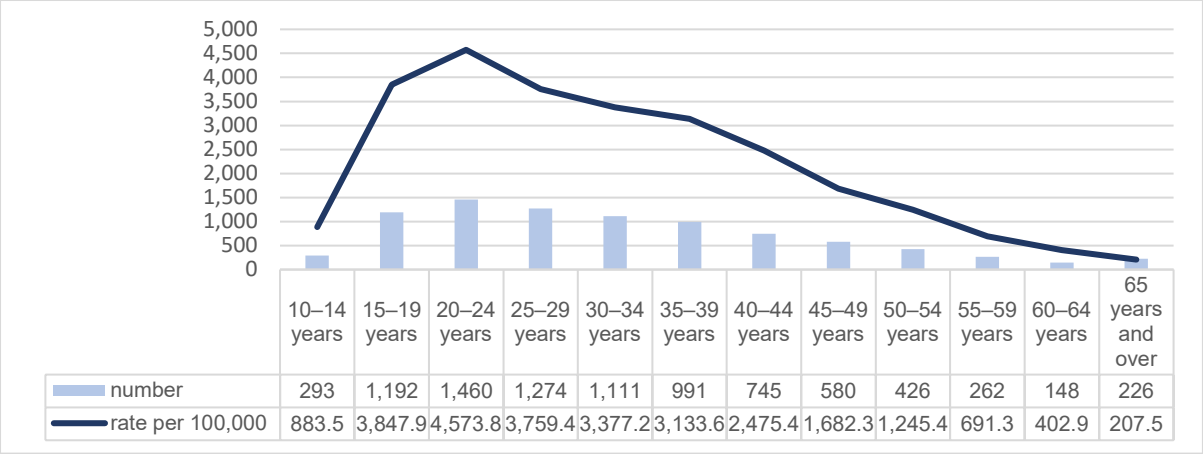
10 Ibid.

11 Ibid 55–56.

conferencing, counselling, drug diversionary schemes or the issuing of penalty notices.[12] Tasmanian data collected by the ABS show:

- Most young people are not involved in the criminal justice system (see Figure 2.1).
- Young people account for only a small number of alleged offenders processed by police (856 out of 8,705 total offenders in 2019–20).[13]
- Assessed by offender rate, 20 to 24 year olds were more likely than any other age group to be processed by police for criminal acts followed by 15 to 19 year olds (see Figure 2.1). Alleged offenders aged 20 to 24 accounted for the largest proportion of offenders (17% or 1,460 offenders) and after this age there is a decline in the rate of recorded crime. This has been described as the 'age-crime curve' that shows that 'most people "grow out" of offending'.[14]
- There has been a reduction in the level of recorded crime for youths (see Figure 2.2) from 2009–10 to the lowest level in the time series contained in data for the period 2019–20. This reflects the experience of significantly declining rates of youth crime in other jurisdictions. For example, research conducted by Payne, Brown and Broadhurst in New South Wales shows that comparing two cohorts (those born in 1984 and those born in 1994), 'proportional to populations, the number of young people offending by age 21 had almost halved'.[15] However, those who did offend tended to offend at a higher rate.[16]
- A majority of individuals (including young people) had only one contact with police in the period 2017–18 to 2019–20 (see Figure 2.3).

Figure 2.1: Recorded crime, alleged offender by age, 2019–20, Tasmania



	10–14 years	15–19 years	20–24 years	25–29 years	30–34 years	35–39 years	40–44 years	45–49 years	50–54 years	55–59 years	60–64 years	65 years and over
number	293	1,192	1,460	1,274	1,111	991	745	580	426	262	148	226
rate per 100,000	883.5	3,847.9	4,573.8	3,759.4	3,377.2	3,133.6	2,475.4	1,682.3	1,245.4	691.3	402.9	207.5

Source: ABS, *Recorded Crimes 2019–20*, Table 15

[12] Australian Bureau of Statistics (ABS), *Recorded Crime – Offenders methodology, 2019–20 financial year* (11 February 2021) <https://www.abs.gov.au/methodologies/recorded-crime-offenders-methodology/2019-20>.

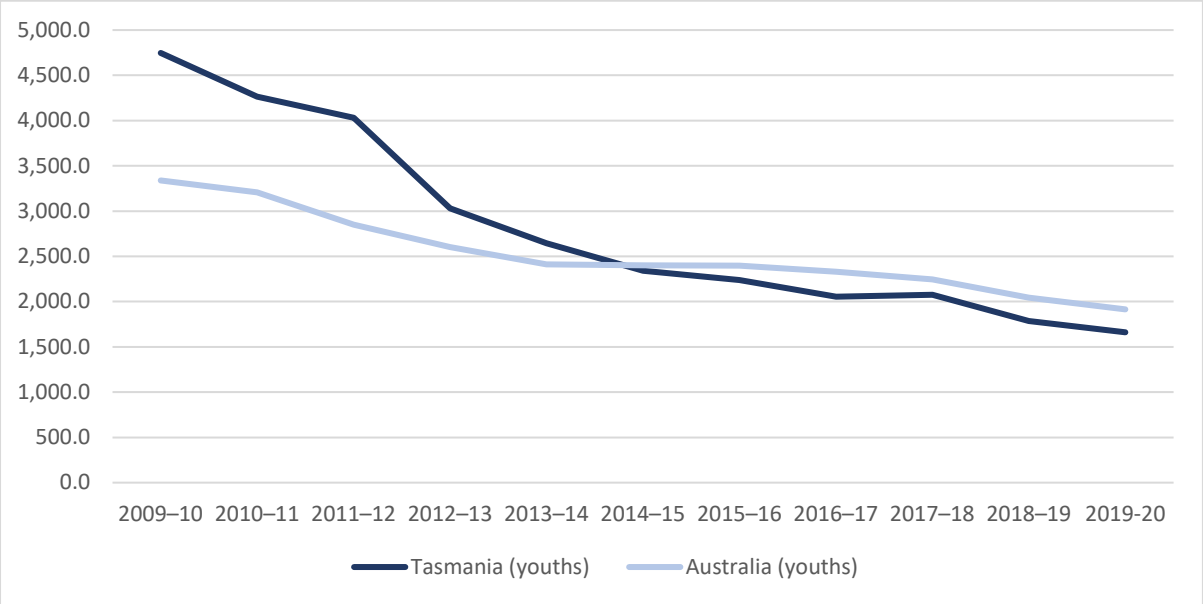
[13] ABS, *Recorded Crime – Offenders* (11 February 2021) Data Downloads, Youth Offenders, Table 20 <https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-offenders/2019-20#data-download>.

[14] Richards (n 6) 2.

[15] Jason Payne, Rick Brown and Roderic Broadhurst, *Where have all the young offenders gone? Examining changes in offending between two NSW birth cohorts* (Australian Institute of Criminology, Trends and Issues in Criminal Justice No 553, June 2018) 11.

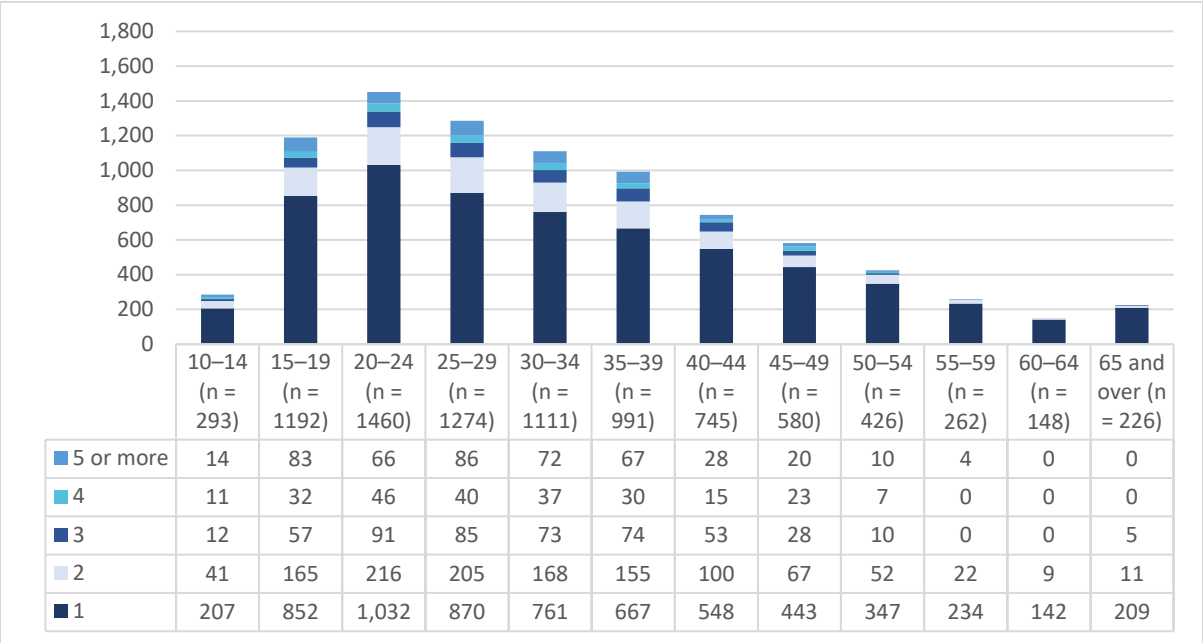
[16] Ibid 11. This finding was also supported by Victorian research. See Paul Sutherland and Melanie Millsteed, *Patterns of recorded offending behaviour amongst young Victorian offenders* (Crime Statistics Agency, In Brief No 6, 2016) which reported a decrease in juvenile offenders but an increase in the average number of incidents per juvenile offender.

Figure 2.2: Rate of recorded crime 2009–10 to 2019–20 per 100 000 of population, Australia and Tasmania



Source: ABS, *Recorded Crimes 2019–20*, tables 19, 20

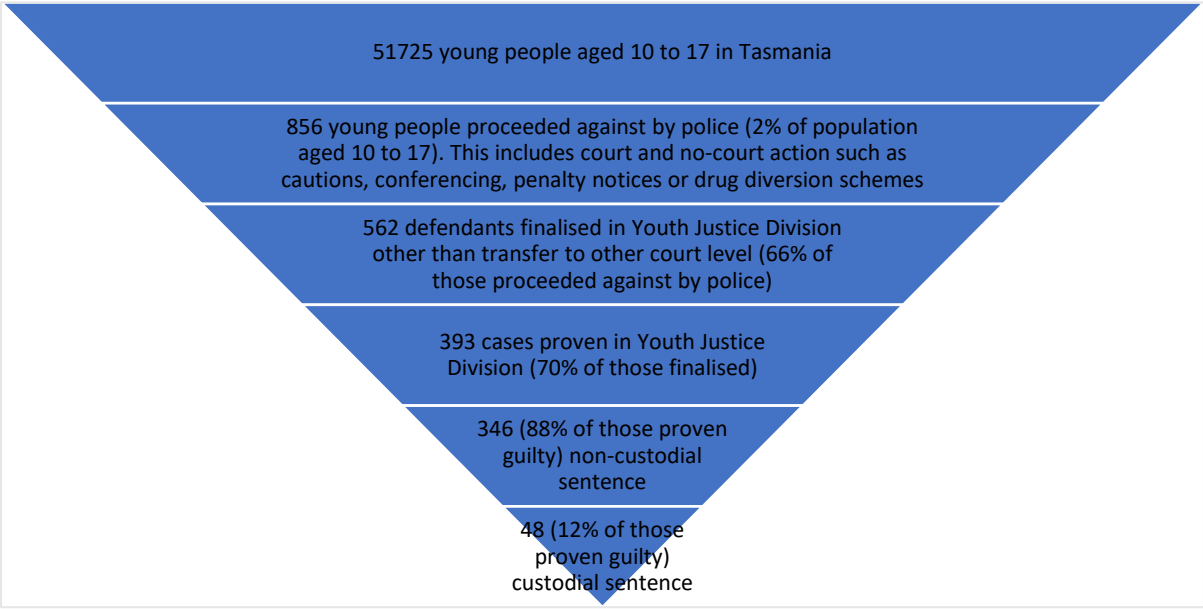
Figure 2.3: Recorded crime, number of contacts with police by age, 2019–20, Tasmania



	10–14 (n = 293)	15–19 (n = 1192)	20–24 (n = 1460)	25–29 (n = 1274)	30–34 (n = 1111)	35–39 (n = 991)	40–44 (n = 745)	45–49 (n = 580)	50–54 (n = 426)	55–59 (n = 262)	60–64 (n = 148)	65 and over (n = 226)
5 or more	14	83	66	86	72	67	28	20	10	4	0	0
4	11	32	46	40	37	30	15	23	7	0	0	0
3	12	57	91	85	73	74	53	28	10	0	0	5
2	41	165	216	205	168	155	100	67	52	22	9	11
1	207	852	1,032	870	761	667	548	443	347	234	142	209

Source: ABS, *Recorded Crimes 2019–20*, Table 17

Figure 2.4: Snapshot of involvement of young people in Tasmanian Criminal Justice System 2019–20



Source: National, State and Territory Population, ABS Estimated Resident Population by single year, Tasmania, 2020; ABS, *Recorded Crime 2019–20*, Table 20; *Criminal Courts 2019–20*, Table 41

Information on the extent of young people's contact with the justice system is also available from RoGS data.[17] These show that the rate of young people aged 10–17 under supervision on an average day in Tasmania in 2019–20 was 22.3 per 10,000 young people.[18] This is higher than the Australian rate of 17.4 per 10,000.[19] For this period, in Tasmania, the rate of young people under community-based supervision was 19.5 per 10,000 (compared to the national rate of 14 per 10,000) and the rate of young people in detention was 2.8 per 10,000 (compared to a national rate of 2.7 per 10,000).[20]

Further information is available from the AIHW. These data indicate that on an average day in 2019–20, there were 146 young people under youth justice supervision.[21]

Overall, these data show that most young people do not have involvement with the youth justice system. The data also reflect the 'dogma' of the youth justice system that 'left to their own devices, most juveniles grow out of crime. In other words, juvenile involvement in crime is for the most part transient and self-limiting.'[22] As noted by Tasmania Legal Aid ('TLA'), those young people who do have contact with the youth justice system 'generally have

[17] This is an annual report series published by the Productivity Commission which provides information on the equity, effectiveness and efficiency of government services in Australia. These data are taken from the 2021 Report on Government Services (RoGS), see Productivity Commission, 'Report on Government Services' (Web Page, 20 January 2021) <https://www.pc.gov.au/research/ongoing/report-on-government-services>.

[18] Ibid. See Part F – Community Services, Chapter 17 – Youth Justice Services, Table 17A.1.

[19] Ibid.

[20] Ibid. It is noted that as Tasmanian data is subject to small numbers of young people in detention, trend information should be interpreted with caution.

[21] Australian Institute of Health and Welfare ('AIHW'), 'Tasmania Fact Sheet' *Youth justice in Australia 2019–20* (Web Page, 2021) <https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2019-20/contents/state-and-territory-fact-sheets/tasmania>. It is noted that numbers refer to young people of any age under youth justice supervision. It is also noted that numbers of young people on an average day might not sum to the total due to rounding.

[22] Don Weatherburn, Andrew McGrath and Lorana Bartels, 'Three Dogmas of Juvenile Justice' (2012) 35 *University of New South Wales Law Journal* 779,779.

limited involvement'.[23] Research has shown that most 'delinquent youth do not progress to serious crime, and in fact appear to desist spontaneously without intervention'.[24] Nevertheless, it is noted that 'a small proportion of juveniles continue offending well into adulthood. A small "core" of juveniles have repeated contact with the criminal justice system and are responsible for a disproportionate amount of crime'.[25] This group of offenders also 'tend to be young people who started offending at an early age'.[26] As Cunneen, White and Richards write, 'considerable research … lend[s] weight to [the] idea' that 'the younger the child is when first having contact with the juvenile justice, then the more likely it is the child will become entrenched in the justice system'.[27] Research conducted by the Victorian Sentencing Advisory Council ('VSAC') also confirms that 'there was a clear relationship between age at first sentence and the likelihood of being sentenced in an adult court before the age of 22' with those who first entered the criminal courts at age 10–12 being almost three times more likely to progress to immediate imprisonment than those aged 18 or older at entry.[28]

Other key social factors relevant to the consideration of young offenders include gender, social class, family structure (including involvement of child protection and out-of-home care services), substance use, mental illness and intellectual disability, and trauma.[29] An additional feature of youth offending is the continued over-representation of Indigenous young people in the criminal justice system.[30] A key theme of recent inquiries into youth justice in Australia has been that '[y]oung people who enter youth justice systems, especially those who serve some period in detention (either on remand while they await a court appearance or once sentenced), frequently present with an array of vulnerabilities and complex needs'.[31] An understanding of these factors and their association with offending can inform the sentencing process and the development of effective and responsive programs. These factors are discussed further at [2.3].

2.2 Types of offending

Research into offending by young offenders shows that young people typically commit particular types of offences. For example, Richards has observed that:

> certain types of offences (graffiti, vandalism, shop stealing and fare evasion) are committed disproportionately by young people. Conversely, very serious offences (such as homicide and sexual offences) are rarely perpetrated by juveniles. … On the whole, juveniles are more frequently apprehended by police in relation to offences against property than offences against the person.[32]

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23 Tasmania Legal Aid ('TLA'), *Children First: Children in the Child Safety and Youth Justice System* (Report, 2021) 3.

24 Stefan Luebbers et al, 'Appendix 3: Understanding and Intervening with Young Offenders: Literature Review' in Armytage and Ogloff, *Youth Justice Review and Strategy: Meeting Needs and Reducing Offending – Appendices* (July 2017) 29.

25 Richards (n 6). See discussion of reoffending at [2.4].

26 Cunneen, White and Richards (n 5) 65 referring to Weatherburn, McGrath and Bartels (n 22).

27 Cunneen, White and Richards (n 5) 65.

28 Sentencing Advisory Council, Victoria (VSAC), *Reoffending by Children and Young People in Victoria* (Report, 2016) 31.

29 See discussion in Cunneen, White and Richards (n 5) 67–77. This is considered further at [2.2].

30 Cunneen, White and Richards (n 5) 67–68.

31 Clancey, Wang and Lin (n 7) 5.

32 Richards (n 6) 3.

More recently, literature in Australia and internationally has highlighted the rate of involvement of young offenders in types of crimes not typically associated with young offenders such as sexual offending[33] and family violence.[34] Tasmanian data reflect research elsewhere. The involvement of young people as perpetrators of family violence was also noted in stakeholder consultations.

The Department of Police, Fire and Emergency Management collects data for internal use (and not official statistics) that sets out information from the Offence Reporting System in relation to offences committed by category of offence and offences allegedly committed by juveniles as recorded by police.[35] Figure 2.5 shows the number of youth offenders and the proportion of the different offence categories that are recorded as being committed by juveniles (as opposed to an adult offender). While youths are recorded as having committed fewer offences than adults for all offence categories, they account for a larger proportion of burglary offences than serious crimes or crimes against the person.

Figure 2.5: Offences recorded as being committed by juveniles by offence category, Tasmania 2019–20

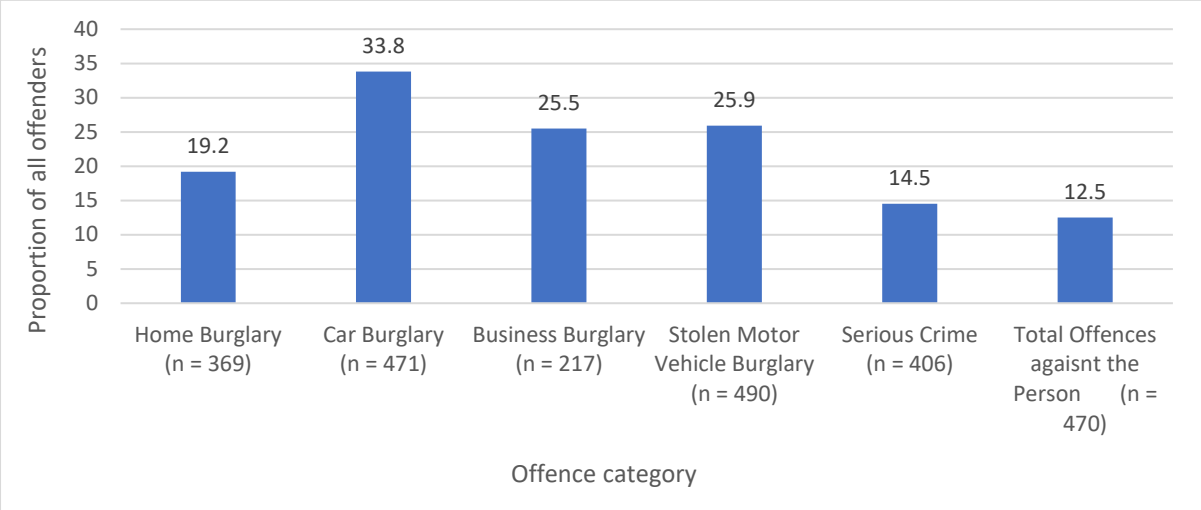


Figure 2.6 presents ABS data on offence types where the offender was proceeded against by police. As noted, this includes court and non-court action such as informal or formal cautions/warnings, conferencing, counselling, drug diversionary schemes or the issuing of penalty notices.[36] Figure 2.6 shows that in Tasmania, in 2019–20, acts intended to cause injury were the most common principal offence proceeded against by police in relation to young offenders (21.6%), followed by theft (14.4%), public order offences (13.8%) and illicit drug offences (12.6%).[37] Acts intended to cause injury and theft were the two most common

[33] See Kate Warner and Lorana Bartels, 'Juvenile Sex Offending: Its Prevalence and the Criminal Justice Response' (2015) 38(1) *University of New South Wales Law Journal* 48; Riddhi Blackley and Lorana Bartels, *Sentencing and Treatment of Juvenile Sex Offenders in Australia* (Australian Institute of Criminology, Trends and Issues in Criminal Justice No 555, July 2018); Nadine McKillop et al, *Understanding and Preventing the Onset of Child Sexual Abuse in Adolescence and Adulthood* (Australian Institute of Criminology, Trends and Issues in Criminal Justice No 554, July 2018); Kathomi Gatwiri et al, *What is Known About Child Sexual Exploitation in Residential Care?:* (Research Briefing, Australian Childhood Foundation and Southern Cross University, January 2020).

[34] Hayley Boxall and Anthony Morgan, *Repeat Domestic and Family Violence Among Young People* (Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice No 591, 2020).

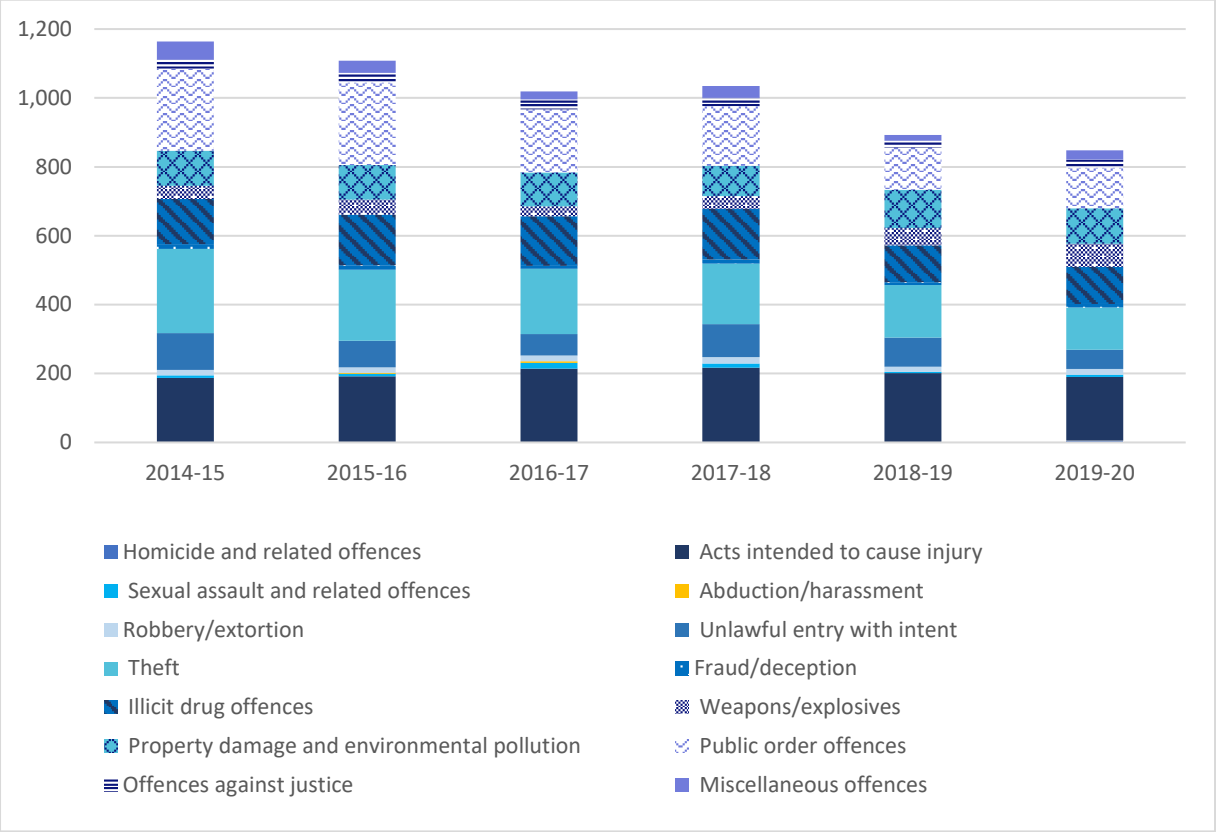
[35] Department of Police, Fire and Emergency Management, *Corporate Performance Report, Annual 2019–20* (June 2020) 44 <https://www.police.tas.gov.au/uploads/Corporate-Performance-Report-June-2020-1.pdf>.

[36] ABS (n 12).

[37] ABS (n 13). The offence category of dangerous/negligent acts was excluded because there were no offenders in the period 2014–15 to 2018–19.

principal offences over the period 2014–15 to 2019–20, with very few youth offenders being proceeded against by police for a sexual assault, robbery or extortion, abduction or harassment, offences against justice, or fraud and deception offences.[38]

Figure 2.6: Offence types where matter proceeded against by police, Tasmania 2014–15 to 2019–20



ABS, *Recorded Crime 2019–20*, Table 20

2.3 Characteristics of young offenders

Informed by knowledge of human brain development, the youth justice system recognises the need to distinguish young offenders from adult offenders.[39] In summarising the research, VSAC has written, 'children make decisions differently from adults due to "psychosocial immaturity"'[40] and that 'the part of our brain responsible for impulse control, planning and decision-making (the prefrontal cortex) is not fully developed until we are about 25 years of age'.[41] Traditionally, this has been reflected in the age of criminal responsibility and the

[38] It is noted that breach of bail offences are excluded from this ABS data: ABS (n 12).

[39] See Richards (n 6); Cunneen, White and Richards (n 5); VSAC, *Sentencing Children and Young People in Victoria* (Report, 2012) 40–41.

[40] VSAC, *'Crossover Kids': Vulnerable Children in the Youth Justice System – Report 1: Children Who Are Known to Child Protection among Sentenced and Diverted Children in the Victorian Children's Court* (Report, 2019) 34 [4.12] citing Gene Griffin and Sarah Sallen, 'Considering Child Trauma Issues in Juvenile Court Sentencing' (2013) 34(1) *Children's Legal Rights Journal* 1, 2; Laurence Steinberg and Elizabeth Scott, 'Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty' (2003) 58(12) *American Psychologist* 1009, 1014.

[41] VSAC (n 40) 34 quoting Mark Marien, '"Cross-Over Kids": Childhood and Adolescent Abuse and Neglect and Juvenile Offending' (Paper presented at the National Juvenile Justice Summit, Melbourne, 26–27 March 2012) 2.

doctrine of *doli incapax* (which is a rebuttable presumption that children aged 10–13 are presumed to be 'incapable of crime'),[42] as well as the different sentencing considerations that apply to young offenders.[43]

Advances in neuroscience have allowed prior understandings of the nature of adolescence to be better understood, in particular the recognition of the considerable brain developments that take place in this period and that 'certain regions of the brain continue to develop through adolescence'.[44] A 2020 literature review on adolescent brain development prepared by the University of Edinburgh and commissioned by the Scottish Sentencing Council set out 'a synthesis and evaluation of the current neurobiological, neuropsychological and psychological literature on adolescent cognitive maturation'.[45] It states:

> During adolescence, the brain undergoes structural and functional changes that translate into a number of 'stereotypical behaviours' for which adolescents are known. Advances in research have evidenced that, for example, adolescent risk-taking behaviours and poor decision making may not be intrinsically motivated, but instead may be due to the increased activation or underdevelopment of specific brain regions. Specifically, that those regions associated with emotions and rewards become increasingly active at a time when the brain's control centre, the prefrontal cortex, remains unable to deploy the skills required for weighing complex decisions and regulating behavioural and emotional responses … Models therefore suggest that risk-taking behaviour during adolescence is the result of the incongruent growth of two essential brain systems, one that matures earlier and acts as a driver for these behaviours, and one that matures later and acts to inhibit them … Thus, during adolescence emotions and the motivation to achieve rewards increase but the skills that allow young people to exercise impulse control and evaluate risks and rewards are not yet fully developed, potentially resulting in illegal or dangerous behaviours.[46]

There is marked individual variability in normal brain maturation and factors such as traumatic brain injury (even mild concussion), alcohol and substance use, adverse childhood experiences or trauma, as well as neurodevelopment disorders may interfere with normal brain development.[47] Another feature of youth offenders, identified by Haines et al, is that while 'there are many different profiles of children that offend, but most common to children is that they are neurologically prone to act in the moment'.[48]

This section provides a brief overview of the key social factors that have been identified as characteristics of youth offenders. These factors include gender, family factors, disengagement from education, disadvantage and poverty, homelessness, drugs and

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42 In Tasmania, the age of criminal responsibility is 10 (*Criminal Code* (Tas) s 18(1)) and children aged between 10 and 14 are presumed not to have criminal responsibility 'unless it be proved that he had sufficient capacity to know that the act or omission was one which he ought not to do or make' (*Criminal Code* (Tas) s 18(2)). See further discussion in VSAC (n 40) 24–25; Kate Fitz-Gibbon and Wendy O'Brien, 'A Child's Capacity to Commit Crime: Examining the Operation of *Doli Incapax* in Victoria (Australia)' (2019) 8(1) *International Journal for Crime, Justice and Social Democracy* 18. It is noted that there are significant concerns about the age of criminal responsibility and there are proposals for law reform across Australian jurisdictions to address these concerns, see Commissioner for Children and Young People Tasmania, *Age of Innocence: Children and Criminal Responsibility* (2021) <https://www.childcomm.tas.gov.au/wp-content/uploads/Age-of-Innocence-Children-and-criminal-responsibility-Background-Paper-FINAL.pdf>. This is also the recommendation of TLA. See TLA (n 23) 13–14.

43 See discussion in Chapter 7 below.

44 Kevin Haines et al, 'Children and Crime: In the Moment' (2020) *Youth Justice* 1, 6–7.

45 Suzanne O'Rourke et al, *The Development of Cognitive and Emotional Maturity in Adolescents and its Relevance in Judicial Contexts: Literature Review* (University of Edinburgh, 2020) 1.

46 Ibid 3.

47 Ibid 16.

48 Haines et al (n 44) 11.

alcohol use, mental health and intellectual disability.[49] Data has consistently shown that these are the [psychological and] social characteristics that tend to be exhibited by young people entering the criminal justice system.[50] They are not, however, presented as causes of youth offending. Instead, 'an understanding of these social factors allow us to contextualise and understand both the nature of offending by young people and the response to offending by state agencies'.[51] In addition, while these social factors are considered separately, it is important to acknowledge that an examination of the circumstances of a young offender often reveals a complex picture of multiple vulnerabilities. An additional feature of youth offending is the continued over-representation of Indigenous young people in the criminal justice system.

This section also considers emerging literature that has examined the impact of trauma on youth offending. The significance of trauma in the lives of young offenders has led to an increased awareness of the 'need for trauma-informed responses to young people who offend in recognition that they may be a highly victimised and traumatised group'.[52] As well as informing the delivery of programs to young offenders, an understanding of trauma and its impact on the cognitive development of young people is also highly relevant to the sentencing process.[53] In recognising the relevance of trauma as a sentencing factor, VSAC observed that trauma 'affects children's culpability, their ability to comply with court-ordered conditions and their capacity to be rehabilitated, thus protecting the community in the long term'.[54] However, VSAC further noted that there is 'currently limited guidance on how courts should take childhood trauma into account in sentencing children'.[55]

2.3.1 Gender

As stated by Cunneen et al, 'the overwhelming feature of the data is that boys are about five to six times more likely than girls to be charged with a criminal offence and appear in court.'[56] In Tasmania, recorded crime data show that there were 192 males aged 10–14 (65.5% of alleged offenders in that age category) proceeded against by police in 2019–20 compared to 99 females (33.8%) and 869 males aged 15–19 (72.9% of alleged offender in that age category) compared to 324 females (27.2%).[57] As shown in Figure 2.7, males accounted for three quarters (n = 441) of the defendants finalised in the Youth Division in 2019–20.

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49 This list is based on Cunneen, White and Richards's (n 5) summary of key social characteristics associated with young people who enter the juvenile justice system, see at 63–77.

50 Ibid 63.

51 Ibid 64.

52 C Malvaso et al, 'Adverse Childhood Experiences in a South Australian Sample of Young People in Detention' (2019) 52(3) *Australian and New Zealand Journal of Criminology* 411, 414. The study uses the ACE framework that identifies 10 distinct life events: physical abuse; sexual abuse; emotional abuse; physical neglect; emotional neglect; witnessing domestic violence; parental separation or divorce; household mental illness; household substance abuse; and, living with a household member who has been incarcerated: at 412. The study found that 84% of young people in detention had more than one ACE: at 423.

53 See [7.1.4].

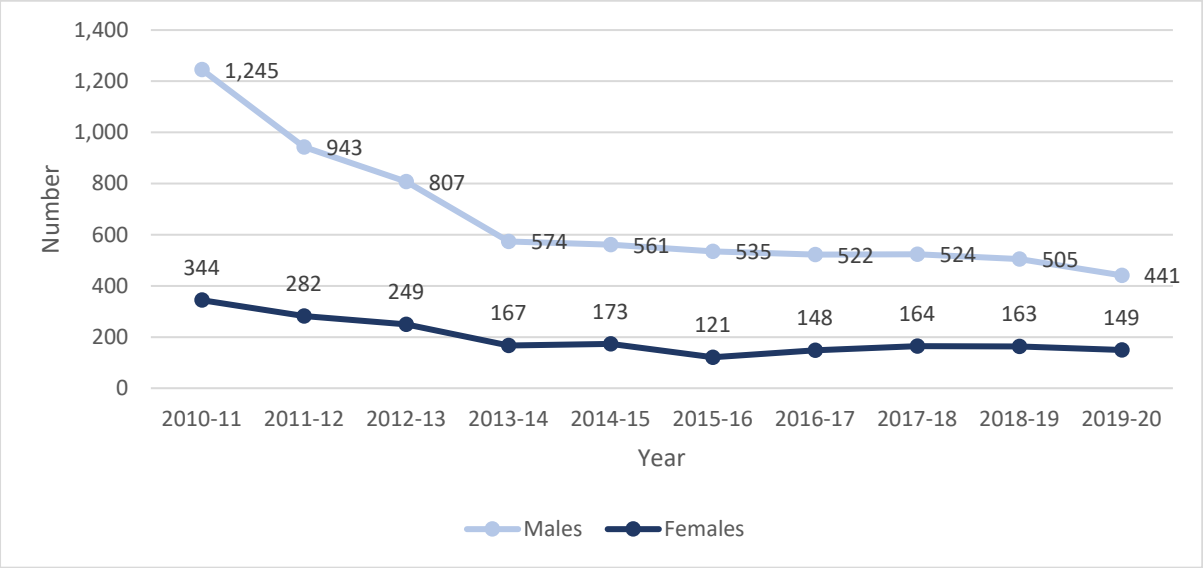
54 VSAC, *'Crossover Kids': Vulnerable Children in the Youth Justice System – Report 3: Sentencing Children Who Have Experienced Trauma* (Report, 2020) xii.

55 Ibid.

56 Cunneen, White and Richards (n 5) 66.

57 ABS (n 13) Table 15. As noted, recorded crime data relates to matters proceeded against by police. This includes court and non-court action.

Figure 2.7: Defendants finalised, Youth Division Tasmania 2010–11 to 2019–20, gender



Source ABS, *Criminal Courts 2019–20*, Table 41

The Report on Government Services shows that for young people under supervision on an average day in Tasmania, there were 85 males (75%) and 29 (25%) females in 2019–20.[58]

2.3.2 Indigenous status

In Australia, Indigenous youth are over-represented in the youth justice system dominating arrest, court and detention figures.[59] This over-representation is even more pronounced in youth justice than in the adult criminal justice system 'with Indigenous juveniles comprising about half of all juvenile detainees compared with about one-quarter of adult prisoners'.[60] Data presented by the Australian Institute of Health and Welfare indicates that Indigenous young people are over-represented in all states and territories in Australia based on data on youths under supervision (both in detention and in the community). While the level of Indigenous over-representation was the lowest in Tasmania compared to other jurisdictions,[61] Indigenous young people were still almost five time as likely as non-Indigenous young people to be under supervision.[62]

In Tasmania, the level of Indigenous over-representation can be seen in comparing the rate of detention and community supervision for Indigenous and non-Indigenous youths. In 2019–20, the rate of detention based on the average daily number in detention for Indigenous youth was 10.8 per 10,000 young people aged 10–17 compared to 1.9 for non-Indigenous young people. The rate of community supervision for Indigenous youth was 63.4 per 10,000 young people aged 10–17 compared to 13.7 for non-Indigenous young people.[63] Of those under youth justice supervision, 34% were Aboriginal or Torres Strait Islander.[64]

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58 Productivity Commission (n 17) Tables 17A.3, 17A.4.

59 Cunneen, White and Richards (n 5) 67; AIHW, *Youth Justice in Australia 2019–20* (Report, 28 May 2021) <https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2019-20> 10.

60 Cunneen, White and Richards (n 5) 67–68.

61 Productivity Commission (n 17), see Chapter 17 Youth Justice Services Table 17A.6, 17A.7.

62 AIHW (n 21).

63 AIHW (n 59) Table 3.1. It is noted that Indigenous rates should be interpreted with caution due to Indigenous population denominators that are less than 10,000, Table 3.1 note 3.

64 AIHW (n 21).

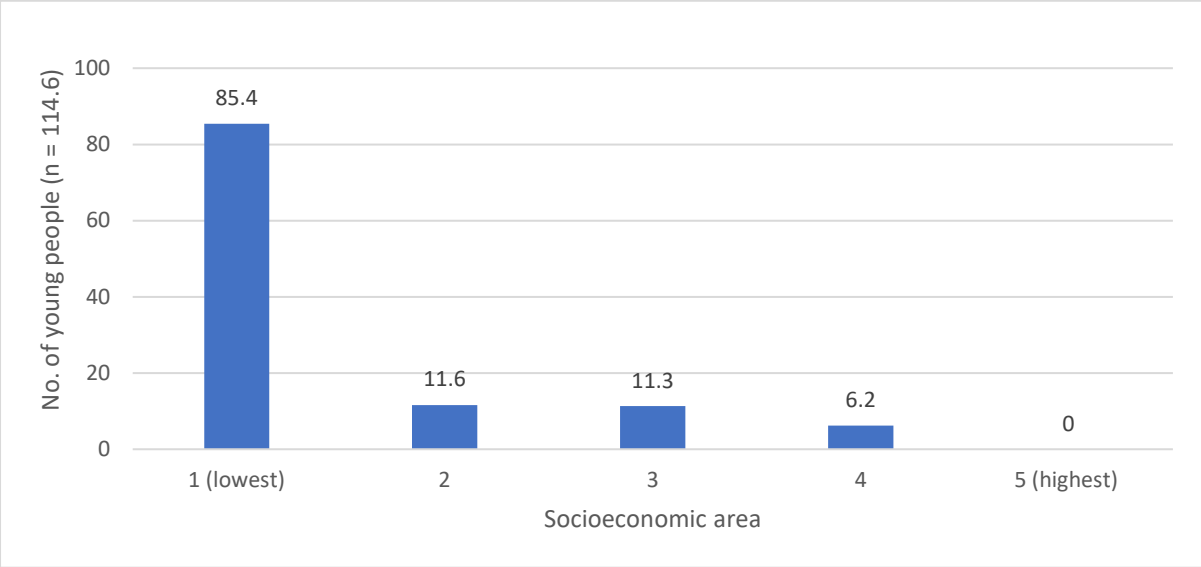
2.3.3 Disadvantage and poverty

Research indicates that '[y]oung people in youth justice may experience persistent poverty and socioeconomic disadvantage.'[65] The AIHW reported that for Australia as a whole:

> On an average day in 2019–20, 28 per 10,000 young people aged 10–17 from the lowest socioeconomic areas were under supervision, compared with 5.4 per 10,000 from the highest socioeconomic areas. …
>
> This means that young people from the lowest socioeconomic areas were 5 times as likely to be under supervision as those from the highest socioeconomic areas. The results were the same across supervision types (community-based supervision and detention).[66]

In Tasmania, the rate for young people from the lowest socioeconomic areas was 30.8 per 10,000 under supervision on an average day in 2019–20.[67] The rate for young people from the lowest socioeconomic area during the year was 54.4.[68] As shown by Figure 2.8, 77.1% of young people under supervision are from the lowest socioeconomic areas in Tasmania in contrast to 0.8% from the highest socioeconomic areas.

Figure 2.8: Young people aged 10–17 under supervision on an average day by socioeconomic areas, Tasmania 2019–20[69]



[65] Penny Armytage and James Ogloff, *Youth Justice Review and Strategy: Meeting Needs and Reducing Offending – Part 1* (Report, July 2017) 164.

[66] AIHW (n 59) 14.

[67] AIHW, 'Data tables: Youth Justice in Australia 2019–20 supplementary tables—Characteristics of young people under supervision: S1 to S35' *Youth justice in Australia 2019-20* (2021) Table S24c <https://www.aihw.gov.au/reports-data/health-welfare-services/youth-justice/data>. Rates are number of young people per 100,000 relevant population.

[68] Ibid Table S24d. Rates are number of young people per 100,000 relevant population.

[69] Ibid Table S24a. It is noted that zero either represents zero or rounded to zero.

2.3.4 Substance misuse

D pleaded guilty to aggravated burglary and aggravated armed robbery. One of D's parents was loving and supportive but as a teenager D became addicted to illicit drugs. Driven by addiction to illicit drugs, D has committed offences since then, including many offences of dishonesty and violence.[70]

D was found guilty of aggravated armed robbery. D had a supportive family but still developed a very serious problem with the use of illicit drugs.

Substance misuse has been identified as a major issue for young offenders.[71] In Victoria, in '2015–16 at least 46 per cent of the 1,548 young people receiving youth justice orders (across community and custody) had received alcohol and drug services (based on DHHS data)'.[72] Self-reports of youth in detention also report high levels of substance use, including illicit drugs and alcohol.[73] Research conducted by the AIHW examined young people aged 10–17 who were under youth justice supervision (in the community and in detention) and/or received alcohol and other drug (AOD) treatment services between 1 July 2012 and 30 June 2016. This research found that '[y]oung people under youth justice supervision were 30 times as likely as the young Australian population to receive an alcohol and other drug treatment service'.[74]

2.3.5 Mental health and intellectual disability

D pleaded guilty to aggravated burglary, wounding, burglary and stealing. D's father died when D was young and behavioural problems emerged not long after this. D was first sentenced by a court at age 10. D was diagnosed with attention deficit hyperactivity disorder. D's full-scale IQ is assessed in the extremely low range which was consistent with intellectual disability. D had limited education. Throughout the relevant period D's difficulties have been compounded by a drug addiction.

D pleaded guilty to armed robbery. The background capacities and circumstances of D are desperate. D was made the subject of a care and protection order when a toddler, and had been diagnosed with attention deficit hyperactivity disorder, reactive attachment disorder, and mental intellectual disabilities. His pervasive psychological and behavioural difficulties are complex and multifaceted.

Research has shown that 'young people with mental health needs are significantly over-represented in justice systems'.[75] In addition, higher levels of young people in youth justice have disabilities than the general population.[76] More recently, there has been recognition of the large numbers of young people with Fetal Alcohol Spectrum Disorder ('FASD') who come into contact with the juvenile justice system.[77] FASD 'can be understood as a range of

[70] It is noted that the case studies are taken from Supreme Court sentencing comments with identifying details (including the case reference) removed.

[71] Cunneen, White and Richards (n 5) 70–71.

[72] Armytage and Ogloff (n 65) 160.

[73] Cunneen, White and Richards (n 5) 70.

[74] AIHW, *Overlap between youth justice supervision and alcohol and other drug treatment services – 1 July 2012 to 30 June 2016* (Report, 2018) <https://www.aihw.gov.au/getmedia/f3906ed5-3035-4294-98ef-7a37c3a10cbb/aihw-juv-126.pdf.aspx?inline=true> vii.

[75] Armytage and Ogloff (n 65) 156. See also Cunneen, White and Richards (n 5) 71–72.

[76] Armytage and Ogloff (n 65) 157. See also Cunneen, White and Richards (n 5) 71–72.

[77] Cunneen, White and Richards (n 5) 72–73.

outcomes that can occur in an individual who has been to exposed alcohol in the womb'.[78] Characteristics of FASD are '[i]mpairment in executive function, memory, language, learning and attention … [which] can result in a range of difficulties including understanding cause and effect, learning from past experiences and decision making'.[79] International research has shown that 'those with FASD have extremely high rates of contact with the justice system'.[80] Australian research conducted in 2018 using a representative sample of young people in detention in Western Australia found that 89% of young people 'had at least one domain of severe neurodevelopment impairment' and 36% were diagnosed with FASD.[81] Accordingly, it concluded that the research 'documented a high prevalence of FASD and severe neurodevelopmental impairment, the majority of which had not been previously identified'.[82]

2.3.6 Family environment

D was found guilty of two counts of rape. D's childhood was described as 'dysfunctional in the extreme'. After D's parents separated, he lived with a grandparent and parent for a short time before his parent formed a relationship with a man who was violent. This man used violence towards D and D was put in foster care.

D pleaded guilty to one count of persistent sexual abuse of a child. There are contextual factors that contributed to his crime. These facts arise from the unstable and dysfunction family environment in which D grew up, lack of parental supervision, lack of sexual boundaries between siblings and early sexualisation of the children in their home environment.

D pleaded guilty to armed robbery. D has a complex family background. D is Indigenous. D lived with one parent but has no contact with the other. Over the years D has been subject to neglect and abuse. Others in D's immediate and extended family have engaged in criminal behaviour, which is generational. D is disengaged from education. There have been concerns about D's mental health. D has used illicit drugs and there is a strong association between D's use of illicit drug and offending.

Family circumstance is a factor that has been consistently recognised in research in the context of youth offending. Cunneen, White and Richards have stated that 'many young people who appear before the children's court do not live in nuclear families. These include young people who live with one parent, with relatives, with other young people, or in a de facto relationship; and those who are homeless, in unstable housing or in out-of-home care'.[83]

Another feature of family dynamics that is evident in young people in the juvenile justice system is that '[i]n many instances, young people in custody have a parent or family member who has also been part of the criminal justice system.'[84] Research has shown than 'crime

78 Ibid 72.

79 Bower et al, 'Fetal Alcohol Spectrum Disorder and Youth Justice: A Prevalence Study among Young People Sentenced to Detention in Western Australia' (2018) *BMJ Open Access* <https://bmjopen.bmj.com/content/8/2/e019605>.

80 Cunneen, White and Richards (n 5) 73.

81 Bower et al (n 79) 1.

82 Ibid 8.

83 Cunneen, White and Richards (n 5) 69.

84 Armytage and Ogloff (n 65) 164.

tends to run in families'.[85] A study conducted by Goodwin developed a profile of six extended families in Tasmania with a pattern of intergenerational offending. The results suggested that 'the children of parents with a criminal record have a much greater likelihood of becoming involved themselves than the children of parents who do not have criminal record'.[86] In research conducted in NSW, it was found that familial involvement in the justice system was a part of a child's background in 20% of children's court files.[87]

2.3.7 Homelessness

D pleaded guilty to stealing and aggravated robbery. D comes from a background of severe disadvantage. D has been in State care since D was a young teenager as a result of exposure to family violence, abuse, neglect and homelessness. D has had no meaningful engagement in education since early high school. D became a heavy user of illicit drugs.

Research literature has established that homelessness or unstable housing are factors leading to greater contact for children with the criminal justice system.[88] Research conducted in New South Wales found that approximately 35% of children with children's court files had experienced insecure accommodation or homelessness.[89] Further, there were 11% of children who were homeless at the time of the current offence.[90] The need for stable accommodation has been identified as a crucial issue because:

> Homelessness or a lack of appropriate housing can drive offending and can be a significant contribution to reoffending by exacerbating criminogenic risk factors through poor-quality care, substance use, antisocial peers and offending exposure.[91]

Suitable accommodation is also a factor relevant to decisions made about bail and is also relevant to whether a young person has the capacity to successfully complete a community-based order.[92] In the Tasmanian context, in 2014, it was observed that:

> There are currently few bail options for young people, which means that those who are homeless are either placed in shelters with little support to avoid breaching bail or are remanded in juvenile detention, sometimes for long periods of time. There needs to be better exit planning that includes stable accommodation, opportunities for education, training, work experience, rehabilitation and treatment, and greater support for young people to meet bail conditions.[93]

In 2021, the continued need to respond to homelessness of children, including the provision of transitional accommodation for young people leaving detention and for those on bail was

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85 Vanessa Goodwin, *The Concentration of Offending and Related Social Problems in Tasmanian Families* (Tasmanian Institute of Law Enforcement Studies Briefing Paper No 8, 2008) 1; Vanessa Goodwin and Brent Davis, *Crime Families: Gender and the Intergenerational Transfer of Criminal Tendencies* (Trends and Issues in Crime and Criminal Justice No 414, 2011) 1–3.

86 Goodwin and Davis (n 85) 5.

87 Kath McFarlane, 'Care-criminalisation: The Involvement of Children in Out-of-home Care in the New South Wales Criminal Justice System' (2018) 51(3) *Australian and New Zealand Journal of Criminology* 412, 419.

88 Jamie Yoder et al, 'Explaining Homeless Youths' Criminal Justice Interactions: Childhood Trauma or Surviving Life on the Streets?' (2014) 50(2) *Community Mental Health Journal* 135, 135.

89 McFarlane (n 87) 419.

90 Ibid 420.

91 Armytage and Ogloff (n 65) 163. See also Anna Stewart and Emily Hurren, *Child Maltreatment, Homelessness and Youth Offending* (Australian Institute of Family Studies, 2017).

92 Armytage and Ogloff (n 65) 163.

93 Anita Pryor, *Reducing Youth Homelessness: Advice from Young People on How to Reduce Homelessness in Tasmania* (Anglicare, 2014) 8.

highlighted by the Commissioner for Children and Young People in Tasmania.[94] The need for stable accommodation for young people was also observed by many of the participants in the stakeholder consultations.

2.3.8 Disengagement with education

D pleaded guilty to attempted aggravated armed robbery and aggravated armed robbery. D's record commenced at age 10. D had had a difficult childhood. D was raised at first in a violent home and effectively abandoned and placed in State care. D has not had regular school since early primary school. D uses alcohol and illicit drugs regularly. D associated with much older offenders. D's life has had no stability.

Research has also highlighted that '[y]oung people involved with the youth justice system often have fragmented and persistently problematic contact with education services'.[95] Disconnection with schooling has been identified as a factor associated with youth offending: 'Many young offenders have experienced significant disruption to their education, and many experience difficulties with literacy and numeracy, disabilities such as cognitive impairment, intellectual disability or language and communication disorders'.[96] In a New South Wales study undertaken by McFarlane, which examined the Children's Court files of 160 children from the period 2008 and 2010, it found that there was:

> [a]n initial impression of strikingly high rates of loss, grief and social disadvantage experienced by many children who appeared before the NSW Children's Court, whether they were in care or not. For example, 39% had experienced neglect or abuse. … Children had high truancy (44%), suspension (22%) and expulsion (13%) rates and just 27% had remained engaged in education.[97]

In this study, there were 73% of children who were found not to be in education.[98] Similarly, Victorian research found that '[a]cross the sample, 80.1% of young people in custody were rated as having a risk of not participating in education, and 77.8% were truant in the past year'.[99]

Further, related to the connection between disengagement with education and conflict with the law, successfully engaging (or re-engaging) with education has been identified as a factor that can assist in shifting the offending trajectory for a young person.[100] The critical importance of engagement with education for young people was also highlighted in the stakeholder consultations.

2.3.9 Child protection involvement

D pleaded guilty to stealing and aggravated robbery. D comes from an extremely disadvantaged background. D was placed into foster care as a toddler. D left foster care as a young teenager and since then has had little stable accommodation. D has no relationship with one parent and the other parent uses drugs. D's family all have involvement with the

94 Commissioner for Children and Young People Tasmania, 'Re: Comment on Tasmania's Child and Youth Wellbeing Strategy Discussion Paper – January 2021' (Web Page, 1 April 2021 <https://www.childcomm.tas.gov.au/wp-content/uploads/CCYP-Submission-to-Tasmanias-Child-and-Youth-Wellbeing-Strategy-Discussion-Paper.pdf>.

95 Armytage and Ogloff (n 65) 162.

96 Ibid.

97 McFarlane (n 87) 419.

98 Ibid 420.

99 Armytage and Ogloff (n 65) 162.

100 Ibid.

criminal justice system. D has little formal education. D has used illicit drugs since he was young teenager.

Australian research has highlighted the over-representation in youth justice of children living in out-of-home-care and young people involved with child protection.[101] VSAC has released three reports examining the association between child protection backgrounds and criminal offending — so called 'crossover kids'.[102] These reports provide information about the child protection history of children who were sentenced or diverted in the Victorian Children's Court in 2016 or 2017. In summary, VSAC found that:

- 1,538 of 5,063 of children (30%) sentenced or diverted in the Children's Court had at least one investigated report and 892 (18%) had at least one child protection order.[103]
- 767 (15%) of the children had at least one recorded out-of-home care placement.[104]
- 49% of children sentenced to detention had at least one child protection report.[105]
- The younger children were at their first sentence, the more likely they were to be known to child protection.[106]
- Of the children known to child protection, 94% were the subject of at least one child protection report before their first sentenced or diverted offence.[107]
- Of the children subject to a child protection order, 98% were known to child protection before their first sentence or diverted offence.[108]

Other studies have also examined the relationship between child protection and youth offending. The AIHW used linked child protection and youth justice supervision data collections to examine young people aged 10–17 in child protection and who were under youth justice supervision between 1 July 2013 and 30 June 2017 from several jurisdictions.[109] Australian data showed that 'young people who had received child protection services were 9 times as likely as the general population to have also been under youth justice supervision'.[110] Further, 'nearly half of those under youth justice supervision had also received child protection services'.[111] In relation to those who received both child protection services and youth justice services, most (81.7%) received child protection services as their

[101] Ibid 165.

[102] VSAC (n 40); VSAC, *'Crossover Kids': Vulnerable Children in the Youth Justice System – Report 2: Children at the Intersection of Child Protection and Youth Justice Across Victoria* (Report, 2020); VSAC (n 54).

[103] VSAC (n 40) xx.

[104] Ibid xxi.

[105] Ibid 79.

[106] Ibid 86.

[107] VSAC, Report 2 (n 102) xvi.

[108] Ibid.

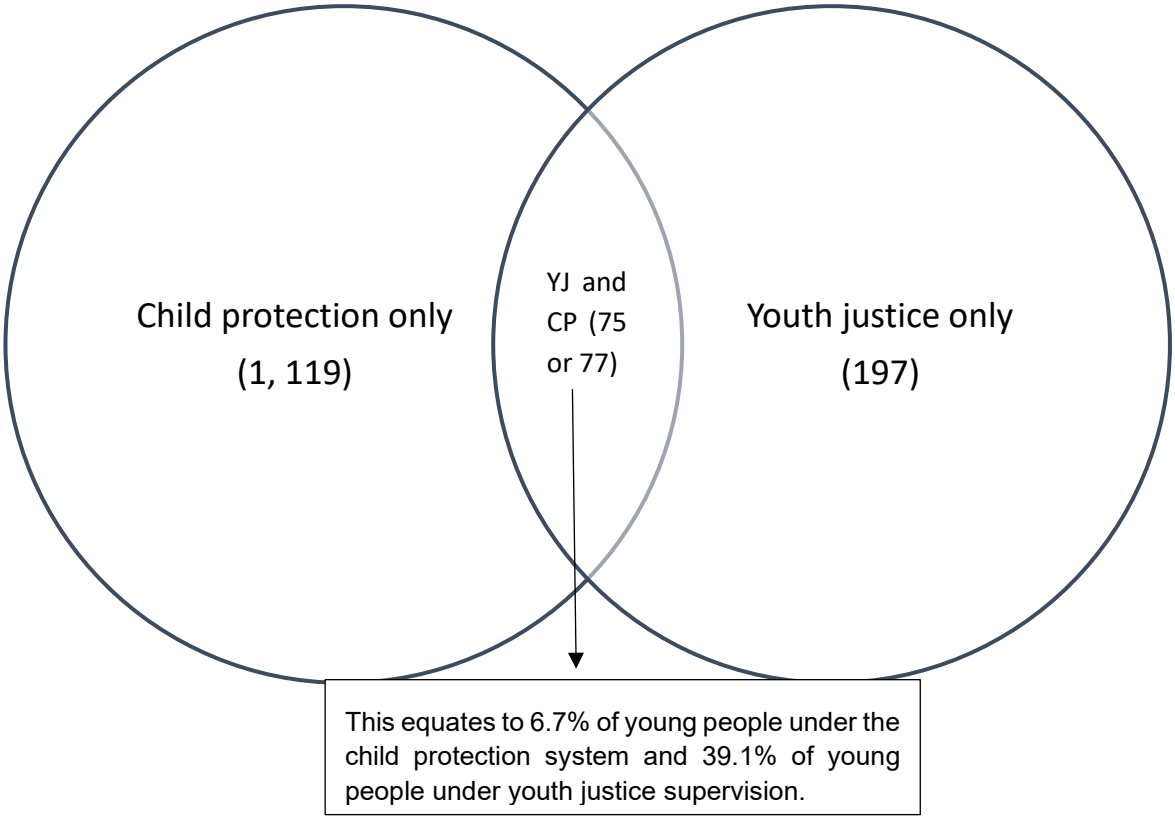
[109] See AIHW, *Young People Aged 10–17 in Child Protection and Who Were Under Youth Justice Supervision Between 1 July 2013 and 30 June 2017* (Report, 2018) <https://www.aihw.gov.au/getmedia/bdcab5ea-2009-4c44-95ff-8225f5171c4a/aihw-csi-26.pdf.aspx?inline=true>. This reports on information from Victoria, Queensland, Western Australia, South Australia, Tasmania and the Australian Capital Territory. In the report, child protection services refers to investigated notifications, care and protection orders and out of home care: at 3.

[110] Ibid v.

[111] Ibid.

first contact.[112] This report also provided some Tasmanian specific information. In Tasmania in this period, there were 75 (6.7%) young people who received child protection services who had also been under youth justice supervision at some point during the same four-year period.[113] In relation to young people who had been under youth justice supervision, nearly 40% had also received child protection services (77 young people).[114] It is noted that these data only relate to young people who have been under supervision by youth justice and so do not provide the full picture of 'crossover kids' given the use of diversion by police and also the use of sentencing options other than supervision by the Youth Division.

Figure 2.9: Young people in the child protection system who had youth justice supervision, Tasmania 1 July 2013 to 30 June 2017



Source: AIHW, *Young People Aged 10–17 in Child Protection and Who Were Under Youth Justice Supervision Between 1 July 2013 and 30 June 2017*, data tables S3b,c and S4b, c. Includes only children who were aged 10–14 at 1 July 2013

The information provided in the AIHW data reflects findings of other studies that 'a large proportion of young people who had convictions also had child protection histories' but that 'the majority of child protection involved youths did not go on to offend'.[115] As noted by VSAC, on any given day, children's courts are 'likely to sentence children who are known to

[112] Ibid vi.

[113] AIHW, 'Data tables: Young People Aged 10–17 in Child Protection and Who Were Under Youth Justice Supervision Between 1 July 2013 and 30 June 2017' (2018) Table S3a and S3b <https://www.aihw.gov.au/getmedia/4d28d6e0-be9b-42a3-b880-2275f8d1d4b4/aihw-csi-26-data-tables.xlsx.aspx>.

[114] Ibid Tables S4a and S4b.

[115] Catio Malvaso, Paul Delfabbroa and Andrew Day, 'The Child Protection and Juvenile Justice Nexus in Australia: A Longitudinal Examination of the Relationship Between Maltreatment and Offending' (2017) 64 *Child Abuse and Neglect* 32, 41; VSAC (n 40) 35; Susan Baidawi and Rosemary Sheehan, 'Crossover Kids': Offending by Child Protection-Involved Youth' (Australian Institute of Criminology, Trends and Issues In Crime and Criminal Justice No 582, 2019).

the … child protection service due to those children's experience of abuse, harm, neglect, trauma, parental death or incapacitation, or risk of harm'.[116]

Recent research released by TLA also confirms the disproportionate representation of 'crossover children' in the Tasmanian youth justice system. A review of TLA files from July 2007 to June 2020 identified children who had a child safety file (which resulted in application to court) and/or youth justice files with TLA.[117] This research found that:

- 10% of children with a child safety file also had a youth justice file.
- 15% of youth justice clients had a child safety file. These children accounted for 24% of all youth justice files.
- 41% of children first charged with a crime before turning 14 years were 'crossover kids' and accounted for 46% of files.
- 15% of crossover children identified as Aboriginal and/or Torres Strait Islander.
- 37% of crossover children were female compared to 25% of all TLA youth justice clients.[118]

2.3.10 Trauma

D pleaded guilty to aggravated armed robbery. There was a background of trauma and grief and clear need for continuing support at an intensive level.

D pleaded guilty to four counts of indecent assault and two counts of penetrative sexual abuse of a child. D grew up with his mother and stepfather for most of his early childhood. His stepfather was violent to D's mother and to D. Expert opinion was that it was likely that at the time of offending, D was still suffering from symptoms relating to trauma reflective of being raised in a dysfunctional family.

Related to child protection involvement is research that has demonstrated the exposure of many young offenders to chronic trauma. For example, research by the Australian Institute of Criminology ('AIC') found that 'crossover children were exposed to a range of adverse experiences. Almost three-quarters had been exposed to family violence (73%) typically moderate to severe, and at least 50 percent had a household member with mental health concerns.'[119] Many children had experienced neglect (67%) and physical abuse (60%).[120] Other research has found 'that 50–80 per cent of young offenders were exposed to chronic trauma (eg living with ongoing exposure to family violence or parental neglect)'.[121] Studies have 'found evidence of elevated offending risk among children exposed to neglect and physical abuse in particular'.[122] For example, a South Australian study has found a high prevalence and interrelatedness of adverse childhood experiences (ACE) among young offenders, with a greater prevalence of ACE for young people who had convictions for violent offences.[123] The researchers found that '[p]ersistent maltreatment was one of the strongest predictors of youth convictions' in their longitudinal examination of the relationship

[116] VSAC (n 40) 93.

[117] TLA (n 23) 9.

[118] Ibid 9–10.

[119] Baidawi and Sheehan (n 115) 16.

[120] Ibid.

[121] Armytage and Ogloff (n 65) 165.

[122] Baidawi and Sheehan (n 115) 2.

[123] Malvaso et al (n 52) 411.

between maltreatment and offending.[124] The strongest predictors 'for receiving a conviction among maltreated youth were: male gender, Aboriginal and Torres Strait Islander ethnicity, experiences of physical abuse and emotional abuse, a greater number of substantiations (recurrence), experiencing maltreatment that commenced in childhood and continued into adolescence, and placement in out-of-home care'.[125]

The prevalence of people who had experienced trauma within the justice system has been explained on the basis of sociological theories of crime (social learning/social control theory):[126] 'highly conflictual, violent or abusive environments or family environments involving intergenerational criminal behaviour ... may affect a child's understanding of behavioural and moral norms'.[127] However, evidence also suggests that trauma can actually result in a delay of brain development in young people. Although the precise mechanisms are not fully understood, there is growing acknowledgement of the consequences of childhood trauma for brain development with 'compelling evidence that maltreatment results in long-term alternations in neurobiological and neurocognitive functioning'.[128] In a summary of the current understanding of the implications of trauma on typical development, O'Rouke et al write:

> evidence confirms that the effects of childhood maltreatment extend across the entire brain, which helps explain the profound neurocognitive and psychosocial deficits observed in maltreated individuals. Childhood maltreatment further significantly affects core aspects of psychological maturation, individual resilience and core capacities of mentalisation, emotion regulation and social and interpersonal skills, as well as increased vulnerability to mental health difficulties which can compound the outlined impairments significantly.[129]

Features of childhood trauma associated with offending behaviour have been explored by VSAC, who identified:

- Effects on emotional responses and behaviour (emotional dysregulation: difficulty recognising and responding to emotions; increased threat response: hypervigilance and reacting with panic; altered reward sensitivity and attachment issues: isolation and damaged trust in others; executive function difficulties: limitations in self-regulation and impulse control).[130]
- Links to and effects on mental health.[131]
- Links to a range of neurodisabilities such as FASD, intellectual disability, traumatic brain injury and communication deficits.[132]

[124] Malvaso, Delfabbroa and Day (n 115) 43.

[125] Ibid 32.

[126] See Mirko Bagaric et al, 'Trauma and Sentencing: The Case for Mitigating Penalty for Childhood Physical and Sexual Abuse' (2019) 30(1) *Stanford Law and Policy Review* 1, 33–34; Nina Papalia et al, 'Child Sexual Abuse and Criminal Offending: Gender-Specific Effects and the Role of Abuse Characteristics and Other Adverse Outcomes' (2018) 23(4) *Child Maltreatment* 399, 401.

[127] VSAC (n 54) 11.

[128] O'Rourke et al (n 45) 30.

[129] Ibid 32.

[130] See VSAC (n 54) 13–17.

[131] See ibid 18–19.

[132] Ibid 20–24.

- Removal from family and community compounding the effects of trauma so that child protection involvement can itself be a source of trauma.[133]

Accordingly, '[t]here is growing recognition that young offenders are not just the preparators of crime, inflicting trauma on members of the community; they also represent a highly traumatised population'.[134] This was clearly recognised in many of the consultations, with stakeholders highlighting the complex needs of many young people in contact with the youth justice system and the importance of responding with a trauma-informed approach.

In consultations with stakeholders, the high level of unmet welfare needs of youth offenders (including an absence of family support and stable housing, issues with access to food and transport and a disengagement from education) were highlighted, as well as the large number of youth offenders with a trauma background. In written feedback to the Council, the Link Youth Health Service commented that the majority of young people referred to the Link AOD Program by Youth Justice Workers had:

> evidence of previous and/or current trauma. Recurrent themes for young people include being exposed to family, domestic, community, and sexual violence, poverty, addictions and dependencies including alcohol. Tobacco, other drugs, and gambling, low literacy, and identification with a minority group.

In this context, stakeholders identified the need for an integrated therapeutic approach to supporting families and young people across the continuum as a matter of priority. This reflects the findings of research that:

> has demonstrated that intensive family and community-based treatment programmes designed to make positive changes in aspects of the various social systems (home, school, community, peer relationships) that contribute to the serious behavioural difficulties of children reduce the risk of children coming into child justice systems. Prevention and early intervention programmes should be focused on support for families, in particular those in vulnerable situations or where violence occurs.[135]

It is important to emphasise that issues such as family violence and access to suitable housing have subsequent links to trauma and the commission of offences.[136]

2.4 Reoffending

This section provides a brief overview of prior research that has sought to identify rates of youth reoffending, as well as identify and account for factors associated with higher or lower rates of reoffending. As noted above, young offenders tend to desist from offending after one or two police contacts — a small cohort of youth offenders continue to offend and account for a disproportionate amount of crime.[137] Research has shown that children are less likely than adults to offend but, as might be expected (given data that show that offending peaks

[133] Ibid 24–25.

[134] Penny Armytage and James Ogloff, *Youth Justice Review and Strategy: Meeting Needs and Reducing Offending – Part 2* (Report, July 2017) 49.

[135] Committee on the Rights of the Child, *General Comment No 24 (2019) on Children's Rights in the Child Justice System*, Un Doc CRC/C/GC/24 (18 September 2019) [9].

[136] Email from Rob White, Distinguished Professor, Criminology, to Rebecca Bradfield, 18 July 2021.

[137] See also Kimberley Shirley, *The Cautious Approach: Police Cautions and the Impacts on Youth Offending* (Crime Statistic Agency (Vic), In Brief No. 9, September 2017) 1.

during adolescence and the offending profile of young people),[138] are more likely than adults to reoffend.[139]

2.4.1 Reoffending rates

As with the inherent difficulties in determining levels of youth offending,[140] calculations of young people's reoffending are also problematic.[141] The use of recidivism (reoffending or repeat offending) as a measure of the effectiveness of juvenile justice interventions is problematic for a number of reasons:

- It may be misleading and/or inaccurate due to reliance on administrative data which may be inaccurate and also an underestimate as only a small proportion of incidents are reported to police and/or result in charges being laid.[142] Variations in recidivism may reflect a change in policy or procedure — the time over which recidivism is measured and using the commission of a new offence is a blunt instrument that 'does not provide information about the reasons why a young person has reoffended'.[143] It has been argued that it is crucial to track young offenders into the adult criminal justice system 'to produce accurate and meaningful measure of recidivism'.[144]
- Determining the 'event' that should count as reoffending is problematic in terms of whether 'return to crime [should be] self-reported offender data, arrest, reconviction or reimprisonment'[145] and, further, each of these methods has limitations. For example, rearrests are likely to be an overestimation of levels of reoffending and may be dependent on changes in policing strategies.[146] Reconvictions are also a limited measure because a young person may be reconvicted of a very minor offence (so technically recidivism but not reflecting genuine recidivism).[147] Rates of incarceration are also problematic because this may be the result of a breach of parole (for example) rather than new offending. Similarly, police cautions may be given for very minor offences and are 'easily influenced by the political climate and changes to policing practices'.[148]
- Focusing on recidivism as measure of success tends to render other outcomes redundant.[149] A focus on recidivism ignores changes in the frequency or type of offending as well as other achievements of a young person such as significant improvement in attendance at school, mental well-being and engagements with

[138] Kelly Richards, *Technical and Background Paper: Measuring Juvenile Recidivism in Australia* (AIC Reports, Technical and Background Paper 44, 2011) 10. See [2.1].

[139] VSAC (n 40) 32.

[140] See [2.1].

[141] See Richards (n 138).

[142] Ibid 5.

[143] Ibid 6.

[144] Ibid 19.

[145] Simon Little, 'Impact of Police Diversion on Re-offending by Young People' (PhD Thesis, Griffith University, 2015) 47.

[146] Richards (n 138) 6–7.

[147] Ibid 7.

[148] Ibid.

[149] Ibid 8.

youth offending services.[150] Such changes, as well as those focusing on improving life skills, are likely to provide a more meaningful assessment of a young person's 'offending trajectories in the longer term'.[151]

- The length of the follow-up period to access recidivism may be insufficient to accurately gauge the extent of reoffending.
- The time limited nature of youth offending and recidivism means that it is uncertain whether a criminal justice intervention was effective or whether the young person would have naturally desisted without the intervention, unless the study has a control group.
- The nature of youth offending means that there are unique challenges in measuring juvenile recidivism including that it is more likely to come to the attention of police.[152] For example, Richard and Lee have highlighted features of some children's involvement in the criminal justice system, including the increased scrutiny that is applied to some young people such as those on bail, those in out-of-home care, those from 'criminal families' and those from non-metropolitan areas that means their offences are more likely to be detected and recorded.[153] Research demonstrates that:

  > Some cohorts of young people in trouble with the law — principally those known to the criminal justice system and/or related agencies — are subject to a higher level of criminal justice intervention than other young people with similar offending profiles: 'selection effects at each stage of the youth justice process mean that certain categories of young people — "the usual suspects" — become propelled into a repeat cycle of referral into the system whereas other equally serious offenders escape the tutelage of agencies altogether'.[154]

For this reason, Richards and Lee write that:

> Statistics on young people's patterns of recidivism should therefore not be taken as objective 'truths' about young people's reoffending, but as a reflection of a complex interplay of factors including, but not limited to, the frequency and nature of the young people's offending … In some instances, young people's repeat reconvictions may be a reflection of the intensive scrutiny some young people … come under following initial contact with the youth justice system.[155]

Research conducted by the New South Wales Bureau of Crime Statistics ('BOCSAR') examined reoffending rates for adults and juveniles in NSW who were convicted of at least one offence in a NSW court in 2004 over a period of 10 years and found that 56% of adult offenders and 79% of juvenile offenders were reconvicted within 10 years.[156] Reoffending occurred mostly within a few years of the reference offence with 41% of juveniles

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[150] Tim Bateman and Alexandra Wigzell, 'Exploring Recent Trends in Youth Justice Reconvictions: A Challenge to the Complexity Thesis' (2019) *Youth Justice* 1, 6.

[151] Richards (n 138) 9.

[152] Ibid 10.

[153] Kelly Richards and Murray Lee, 'Beyond the "Three Dogmas of Juvenile Justice": A Response to Weatherburn, McGrath and Bartels' (2013) 36(3) *University of New South Wales Law Journal* 839, 850–853.

[154] Richards and Lee (n 153) 852 quoting Lesley McAra and Susan McVie, 'Youth Justice? Impact of System Contact on Patterns of Desistance from Offending' (2007) 4 *European Journal of Criminology* 315, 319. See also Lesley McAra and Susan McVie, 'Youth Crime and Justice: Key Messages for the Edinburgh Study of Youth Transitions and Crime' (2010) 10 *Criminology and Criminal Justice* 179.

[155] Richards and Lee (n 153) 852–853.

[156] Winifred Agnew-Pauley and Jessie Holmes, 'Reoffending in NSW' (Issues Paper no 108, Crime and Justice Statistics, NSW Bureau of Crime Statistics and Research, 2015) 1.

reoffending in first year.[157] Reoffending was highest for those convicted of unlawful entry (85% adults and 90% of juveniles reoffended).[158] Other New South Wales research also analysing BOCSAR data has examined reoffending using a wider range of 'initial contacts' with the justice system. This research found that 58% of those who had their first known police caution, conference or proven court appearance in 1999 were reconvicted within a 10-year follow-up.[159] This was 68.5% for those where the first known criminal justice court was a court appearance and 53.1% where it was a caution. It also found that overall, 11% of those young offenders who had their first contact with criminal justice system in 1999 received a custodial penalty (control order or sentence of imprisonment) within the 10-year follow-up period. This was 17.2% for those where the first known criminal justice court was a court appearance and 8.5% where it was a caution.[160]

In Victoria, VSAC has conducted a detailed assessment of youth reoffending and examined offending patterns using a six-year follow-up period for young people sentenced in the Children's Court in 2008–09. It found that 61% of young people had reoffended within the follow up period and 44% reoffended more than once.[161] It also retrospectively examined whether the young person had been sentenced in the four years before their 2008–09 sentence and found that 34% had at least one prior sentence event.[162] The study also tracked offenders into the adult court criminal jurisdiction (for the follow-up period) and found that 52% of the young people sentenced in 2008–09 had progressed to the adult jurisdiction.[163]

There is Tasmanian data that provides very limited information about reoffending contained in the RoGS, which sets out the number of young people returned to sentenced youth supervision (defined as the proportion of young people released from sentenced supervision who are aged 10–16 years at the time of release who returned to sentenced supervision within 12 months). This is extremely limited because it only reports on those whose sentences are 'supervision' and so excludes those who are proceeded with by way of caution or those where the sentence imposed by the court that was not supervision.[164] It is also noted that return to sentenced supervision may be due to breach of an order rather than a new offence.[165] For this reason, it is noted that this measure cannot be interpreted as a measure of recidivism.[166]

[157] Agnew-Pauley and Holmes (n 156) 2.

[158] Ibid.

[159] Weatherburn, McGrath and Bartels (n 22) 803. See also Jason Payne and Don Weatherburn, 'Juvenile Reoffending: A Ten-Year retrospective Cohort Analysis' (2015) 50 *Australian Journal of Social Issues* 349.

[160] Weatherburn, McGrath and Bartels (n 22) 805.

[161] VSAC, *Reoffending by Children and Young People in Victoria* (Report, 2016) xi.

[162] Ibid 17.

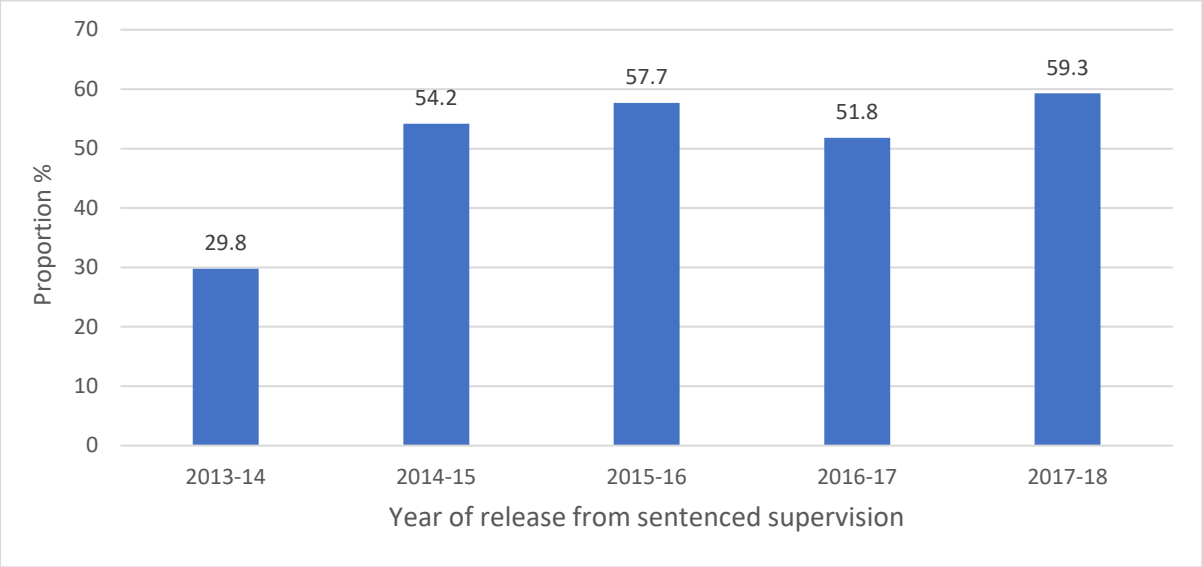
[163] Ibid xii.

[164] See Productivity Commission (n 17) Box [17.19].

[165] See ibid.

[166] Ibid.

Figure 2.10: Proportion of young people released from sentenced supervision, aged 10–16 years at time of release, who returned to sentenced supervision within 12 months, Tasmania



Source*: Report on Government Services 2021* Table 17A.25.[167]

Information about return to sentenced youth justice supervision is also provided by the AIHW using a longitudinal person-based data set that sets out return to sentenced youth justice supervision for young people while aged 10–17.[168] As with the RoGS, this information only includes supervised sentences and not all sentences imposed, and does not distinguish between return to supervision due to a breach of a previous order imposed by the court rather than a new offence and so it is clearly stated in the report that these data do not provide a measure of recidivism.[169] Its base population is restricted to those who received a supervised sentence and 'relates specifically to young people who have committed an offence or offences serious enough to result in a supervised sentence'.[170] It does not provide a longitudinal picture of young offenders whose offending was more minor and so is not representative of all young offenders in Tasmania. Instead, it provides an insight into the offending pattens of youths who commit more serious offences, and even for this cohort, it shows that a majority do not return to sentenced supervision. The AIHW data show that for Tasmania there were 46.89% of youths who had more than one supervised sentence from 2000–01 to 2018–19.[171]

2.4.2 Factors associated with reoffending

As noted above, there are complexities in measuring levels of offending and reoffending. However, recognising these limitations, research has identified the following factors as being relevant to a greater likelihood of reoffending:

[167] Note the following caveat: The data include young people on community service orders who were assisted by Youth Justice to complete their hours but who were not supervised by a Youth Justice Worker. Tasmania also complies with the counting rules for this indicator in that an order is considered to be unsuccessfully completed where a court has decided that an order was breached, irrespective of the court-ordered outcome. Further, as Tasmanian data is subject to small numbers of young people under supervision, trend information should be interpreted with caution.

[168] AIHW, *Young People Returning to Sentenced Youth Justice Supervision 2018–19* (Juvenile Justice Series No 24 Cat no JUV 133, 2020) 1.

[169] Ibid 2.

[170] Ibid.

[171] Ibid Table S6.

Age of first contact with criminal justice system. In VSAC's examination of reoffending by young offenders, it found:

> that age at first sentence is strongly associated with future contact with the criminal justice system. The younger children were at their first sentence, the more likely they were to reoffend generally, reoffend violently and be sentenced to a term of adult imprisonment before their 22nd birthday. Children who were first sentenced at a young age proceeded to commit a disproportionate volume of all youth crime.[172]

The study found that over 80% of children who were first sentenced aged 10–13 reoffended.[173] This finding reflects other research conducted in Australia and internationally.[174]

Gender. Gender is a significant factor in youth offending and research has consistently shown that male offenders are more likely to reoffend than female young offenders.[175] For example, VSAC found that 'the likelihood of reoffending was nearly 150% higher for males than for females'.[176] VSAC also found that there were gender differences in the type of offences where young offenders reoffended. Male young offenders were more likely to be sentenced for road safety offences and property damage, and slightly more likely to be sentenced for offences against the person. However, 'approximately equal proportions of male and female reoffenders were sentenced for a theft/deception offence'.[177]

A history of family violence either as the victim or a perpetrator. Shirley conducted a study in Victoria examining reoffending rates after one-year using matched caution and charged young people and found that 'a history of family violence (as either victim or perpetrator) significantly increased the likelihood of reoffending on both the cautioned and charged groups.'[178]

Indigenous status. As outlined above, Indigenous youth are over-represented in the juvenile justice system in Australia. Research has also shown that young Indigenous offenders are more likely to reoffend after sentencing.[179] A study by Weatherburn, McGrath and Bartels found that 84.3% of Indigenous young offenders who had their first contact with the juvenile justice system in 1999 were reconvicted in contrast to 57.6% of all juveniles.[180]

'Crossover kids': Child protection involvement and trauma. Research has shown that adverse childhood events are associated with reoffending.[181] A study published in 2019 by the AIC found that crossover kids were 'charged with a disproportionately high number of offences compared with other children charged with offences'.[182] The data from the AIC

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[172] VSAC (n 40) 1 referring to VSAC (n 161) 27, 30–31.

[173] VSAC (n 161) 27 Table 5.

[174] Armytage and Ogloff (n 65) 149–150; Shirley (n 137) 15. Cf Payne and Weatherburn (n 159) who found that age at first contact appear to have no significant impact on the risk of reoffending after the influence of other facts is held constant': at 355.

[175] Andrew McGrath and Don Weatherburn, 'The Effect of Custodial Penalties on Juvenile Reoffending' (2012) 45(1) *Australian and New Zealand Journal of Criminology* 26; Payne and Weatherburn (n 159) 365; Cunneen, White and Richards (n 5) 66; VSAC 2016, 31.

[176] VSAC (n 161) 31.

[177] Ibid 32.

[178] Shirley (n 137) 15. See also Armytage and Ogloff (n 65) 169–172.

[179] Cunneen, White and Richards (n 5) 67–68.

[180] Weatherburn, McGrath and Bartels (n 22). See also Payne and Weatherburn (n 159) 365.

[181] Melissa Kowalski, 'Adverse Childhood Experiences and Justice-Involved Youth: The Effect of Trauma and Programming on Different Recidivism Outcomes' (2019) 17(4) *Youth Violence and Juvenile Justice* 354, 355.

[182] Baidawi and Sheehan (n 115) 18.

study 'suggest that the "life-course persistent" offending profile is likely more prevalent among crossover children compared to youth offenders overall'.[183]

Homelessness. Research has identified homelessness as a factor related to reoffending for youth offenders.[184]

Nature of the interaction with the criminal justice system. In 2020, the AIC stated that 'extensive research has found that detention is damaging and criminogenic, serving to entrench young people further in disadvantage'.[185] Research conducted in New South Wales,[186] Victoria[187] and Queensland[188] indicates that there were lower rates of reoffending among young offenders who received police cautions compared to those who were charged and brought to court. This research is useful to inform approaches in Tasmania, but caution needs to be taken in regard to direct inferences given the differences in the youth justice systems in each jurisdiction and differences in youth populations.

A Queensland study of the reoffending after the issue of a caution conducted by Little found that:

> young people who were cautioned were significantly less likely than young people who appeared in court to have recontact [further caution, youth justice conference or court appearance] within two years … regardless of whether it was their first, second or third formal system contact with the youth justice system.[189]

Little also found that, regardless of whether it was their first, second or third contact, young people who were cautioned had significantly fewer recontacts within two years.[190]

In Victoria, Shirley examined one year reoffending rates for matched cautioned and charged young people and found that 'young people who were cautioned were less likely to have a reoffending incident than those charged' (35.9% of those cautioned reoffended compared to 47.8% of young people who were charged).[191] There was also a 'statistically significant difference in the frequency of further offences between young people who were cautioned and those who were charged. Cautioned young people were more likely to have only one offence, while those who were charged were more likely to have five or more offences recorded in the year after their index offence'.[192]

In New South Wales, Wang and Weatherburn compared the rates of reoffending for young offenders who were cautioned with those referred to court and found that 'cautioning young offenders who had committed comparatively minor offences and who had not previously been referred to court results in a lower risk of reoffending than referral to court'.[193] Further, the authors found that '[j]uveniles receiving a caution were about 14% less likely than those referred to court to receive a caution or be referred again within 24 months of their index

[183] Ibid.

[184] Armytage and Ogloff (n 65) 163.

[185] Clancey, Wang and Lin (n 7) 8.

[186] Jai Wang and Don Weatherburn, 'Are Police Cautions a Soft Option? Reoffending Among Juveniles Cautioned or Referred to Court' (2019) 52(3) *Australian and New Zealand Journal of Criminology* 334.

[187] Shirley (n 137).

[188] Little (n 145).

[189] Ibid 180.

[190] Ibid 181.

[191] Shirley (n 137) 16.

[192] Ibid 18.

[193] Wang and Weatherburn (n 186) 343.

contact.'[194] Accordingly, it was concluded that referring young offenders 'who commit minor offences to court rather than cautioning them … seems to result in rates of juvenile offending that are higher than they would otherwise be'.[195] In considering the mechanisms that are responsible for this difference, Wang and Weatherburn point to a lack of investigation into whether it is the court process per se (rather than the use of diversion) or the penalty imposed by courts that accounted for the differences seen in reoffending rate in their study.[196]

Detention of young offenders has been accepted as being criminogenic because it 'foster[s] further criminality'.[197] This is supported by a Canadian longitudinal study conducted by Gatti et al that found that an offender's criminal career 'increases as the type of intervention imposed becomes more intense and constrictive'.[198] This aligns with the findings of a Tasmanian report released by Noetic Solutions Pty Ltd in 2016, which stated that Tasmania's recidivism rates show that 'the majority of young people reoffend within 6 to 12 months [and that] the current custodial model does not effectively divert young people away from the custodial system'.[199] Other research conducted in NSW compared the reoffending rate of young offenders given custodial sanctions as compared to community-based sanctions and found that there were no differences between the two groups and that 'the imposition of a custodial sentence had no effect on the risk of reoffending.'[200] However, McGrath and Weatherburn indicated that their research did not settle the question of whether custody has a criminogenic effect as it only followed offenders for an average of 21 months following conviction and longer-term effects may be quite different to short-term effects given potential consequences for future employment arising from incarceration.[201] Further, they argued that their results 'strengthen the argument in favour of using custodial penalties with juvenile offenders as sparingly as possible'[202] in view of the cost effectiveness of community-based programs.

[194] Ibid 342.

[195] Ibid 344–345.

[196] Ibid 344.

[197] Richards (n 6); Richards and Lee (n 153) 841. See also Troy Allard et al, *The Efficacy of Strategies to Reduce Juvenile Offending* (Griffith University, 2007) 51–52.

[198] Uberto Gatti et al, 'Iatrogenic Effect of Juvenile Justice' (2009) 50(8) *Journal of Child Psychology and Psychiatry* 991, 996.

[199] Noetic Solutions Pty Ltd, *Custodial Youth Justice Options Paper: Report for the Tasmanian Government Department of Health and Human Services* (2016) 11.

[200] McGrath and Weatherburn (n 175) 39. See also Don Weatherburn et al, *The Specific Deterrent Effect of Custodial Penalties on Juvenile Re-Offending* (Crime and Justice Bulletins: Contemporary Issues in Crime and Justice No 132, [2009]).

[201] McGrath and Weatherburn (n 175) 39.

[202] Ibid 40.

3 Legislative and theoretical framework and public opinion

'Our approach to children who are identified as offenders depends crucially on how we understand childhood itself'.[203]

This chapter outlines the development of youth justice policy and legislation in Tasmania, as well as the international human rights framework that underpins contemporary youth justice principles.

3.1 Legislative and theoretical development

Historically, children were viewed as 'mini adults' and the same criminal justice processes applied to both children and adults.[204] A separate category of 'juvenile offender' did not exist until the 19th century, when changing notions of children and childhood led to the recognition that juveniles should be treated differently to adult offenders.[205] As Cunneen, White and Richards write:

> The key period in understanding the development of a separate system for dealing with juvenile offenders is the second half of the nineteenth century. This was an important period in the construction of other age-based differences involving young people, including restrictions on child labour and the introduction of compulsory schooling. The state began to intervene actively in the provision of 'welfare' for the children of the 'perishing classes'.[206]

Based on the concerns of the 'child saving' movement, early approaches to juvenile justice created a separate system for youth offenders that was welfare focussed.[207] Reflecting these concerns, a separate court with exclusive jurisdiction over juveniles was created in Tasmania by the *Children of the State Act 1918* (known as the Children's Charter) in 1918.[208] This Act was repealed by the *Infant Welfare Act 1935*, which was replaced by the *Child Welfare Act 1960* (Tas).

The *Child Welfare Act 1960* (Tas) was 'an expression of the "Welfare Model" of juvenile justice',[209] clearly expressed in s 4 which provided that 'each child suspected of having committed, charged with, or found guilty of an offence shall be treated, not as a criminal, but as s child who is, or may have been, misdirected or misguided'. Under the welfare model,

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[203] Kevin Haines et al (n 44) 3.

[204] Richards (n 6) 1.

[205] Cunneen, White and Richards (n 5) 3–4, 7.

[206] Ibid 3.

[207] Ibid 12.

[208] Jeremy Prichard, 'Juvenile Conferencing and Restorative Justice in Tasmania' (PhD Thesis, University of Tasmania, 2004) 49.

[209] Tasmania, *Parliamentary Debates*, House of Assembly, 2 October 1997, Part 2, 40–95 ('*Youth Justice Bill 1997* second reading speech').

offending was viewed as a 'symptom of an underlying disturbance in a child, resulting from parental neglect or some other circumstances outside the child's control'.[210] Accordingly, under the *Child Welfare Act 1960* (Tas), the focus was on 'needs' rather than the 'deeds' of the young people who offend.[211] As described by VSAC, the welfare model offered 'treatment and rehabilitation rather than punishment. It [was] based on the premise that offending is the project of influences external to the individual offender rather than free moral choice'.[212]

In contrast, the *Youth Justice Act 1997* (Tas) was intended to 'represent a fundamental change in the philosophy' to a model more in line with a justice model.[213] Under the justice model, 'young offenders are considered rational, responsible and accountable. As offending [was] 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'.[214] Changes to the Tasmanian legislation reflected concerns that a system based on the 'welfare' approach did not encourage young people to be accountable for their actions. Further, due process rights of young people were not protected under the old legislation as the court had little say in what happened to a young person after a court order. Instead, a young person sentenced to detention was made a ward of the state with administrative decision-makers assuming responsibility for decisions about institutional care and where the child was required to live, with whom and for how long.[215]

The *Youth Justice Act 1997* (Tas) introduced a greater range of responses to youth offending. The *Child Welfare Act 1960* (Tas) model provided the police with two options: to caution the youth and not proceed or to refer the matter to the children's court. In contrast, as explained by Prichard, under the new *Youth Justice Act 1997* (Tas), there was 'a four-tiered system involving informal cautions, formal cautions, community conferences, and the children's court'.[216] This reflects the third model of juvenile justice which has emerged based on restorative principles.[217] Restorative justice responses to youth offending focus on reconciliation, reparation and reintegration.[218] An important aspect of restorative justice is that there is agency from the youth, with justice being something that is done *by* you rather than *to* you (punishment) or *for* you (welfare).[219] A key focus of the introduction of the *Youth Justice Act 1997* (Tas) and subsequent reforms to the legislation has been on a restorative youth justice model. Restorative principles are reflected in the *Youth Justice Act 1997* (Tas) s 4(i) which sets out that a main objective of the Act is:

> to ensure that, wherever practicable, a youth who has committed an offence is provided with appropriate opportunities to repair any harm caused by the commission of the offence to the victim of the offence and the community and to reintegrate himself or herself into the community.

[210] Ibid.

[211] Ibid.

[212] VSAC, *Sentencing children and Young people in Victoria* (Report, 2012) 22.

[213] *Youth Justice Bill 1997* second reading speech (n 209).

[214] VSAC (n 212) 22.

[215] *Youth Justice Bill 1997* second reading speech (n 209).

[216] Prichard (n 208) 1.

[217] VSAC (n 212).

[218] See Cunneen, White and Richards (n 5) 337.

[219] White (n 136).

The general principle also focus on restorative justice goals of encouraging the youth to accept responsibility for their behaviour,[220] that sanctioning is designed to give him or her an opportunity to develop a sense of social responsibility,[221] to allow victims of the offence to participate in the process of dealing the youth,[222] and that 'compensation and restitution should be provided, where appropriate, for victims of offences committed by youths'.[223] This reflected a desire to create a system 'based on young persons being held responsible for their actions, together with promoting the idea of diverting young people away from court in the first instance'.[224]

There have been reviews conducted of the approach to youth justice in Tasmania, which have resulted in a greater rehabilitative and restorative focus. In 2007, a Legislative Council Select Committee conducted a comprehensive review of Ashley Detention Centre and Youth Justice. The review received evidence about the operation of the *Youth Justice Act 1997* (Tas) that indicated that the Act was not 'intrinsically flawed.'[225] Following this review, the government consulted with stakeholders and then released a paper for public consultation. This consultation 'reconfirmed the underlying principles of the Act which are accountability and restorative justice, encouraging young people who offend to take responsibility for their acts and restore the harm done to victims and the community'.[226] This consultation (and a subsequent targeted consultation) led to the *Youth Justice Amendment Bill 2012.* Key features of these reforms were to remove the term 'punishment' in the Act and replace this with 'sanction':

- In the broadest sense, a sanction is a penalty for wrongful action; however, unlike a punishment, which is only ever punitive, a sanction can be either reparative or punitive. A reparative sanction links the nature of the penalty to the offence to be sanctioned and can evoke responsibility from the young person for his/her actions.
- The use of the word 'sanction' under the Objectives and Principles of the Act encourages the use of sanction in its reparative form.
- In addition, the objectives have been broadened to include a more restorative justice focus.[227]

Another focus of the reform was to provide for an increased focus on rehabilitation in sentencing. This was effected by amending the *Youth Justice Act 1997* (Tas) to ensure that the court gives more weight to the rehabilitation of a youth over any other individual matter and to be required to consider the impact of orders on a youth's chances of finding or retaining employment.

Accordingly, reflecting a similar observation made by VSAC about the operation of the Victorian youth justice system, the current approach to youth justice in Tasmania can be seen to contain elements of all three models — welfare, justice and restorative justice.[228]

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220 *Youth Justice Act 1997* (Tas) s 5(1)(a).

221 Ibid s 5(1)(h).

222 Ibid s 5(1)(d).

223 Ibid s 5(2)(a).

224 *Youth Justice Bill 1997* second reading speech (n 209). See also Tasmania, *Parliamentary Debates*, House of Assembly, I July 1999, Part 2, 38–116 (Jackson).

225 Tasmania, *Parliamentary Debates*, House of Assembly, 30 May 2013, 23 (Farrell).

226 Ibid.

227 Ibid.

228 VSAC (n 212) 22–23.

The operation of the *Youth Justice Act 1997* (Tas) is considered in more detail in subsequent chapters.

As noted, more recently, there has been an awareness of the need to recognise the vulnerabilities of youth offenders and to adopt a trauma-informed approach into all facets of a young person's contact with the criminal justice system.[229] A trauma-informed approach reflects basic knowledge of the impacts of stress on the brain and body,[230] and has as a core principle that service delivery (including through the youth justice system) should not re-traumatise young people.[231]

Adopting a trauma focused approach, some international jurisdictions have a more integrated approach to children's offending than is evident in Australian jurisdictions. For example, in Scotland there is a predominantly welfare-based approach to offending by children:

> Children and young people who are involved in offending behaviour are first and foremost, children. Their welfare and potential need for protection must be the paramount concern for all agencies involved with the child and their family. Young people who offend are more likely than the general population to have experienced child abuse and to have been in local authority care. The Edinburgh Study of Youth Transitions and Crime has identified that young people involved in violent offences are more likely than non-violent youths to have been victims of crime and adult harassment and have more problematic family backgrounds. Research has also revealed that 88% of children under the age of 12 who are referred to the Scottish Children's Reporter Administration due to a pattern of offending, have parents who pose a risk to them. These findings suggest that if the emotional, physical, developmental and social needs of children are met and they are protected from abuse and neglect, they are less likely to offend.
>
> The National Guidance for Child Protection in Scotland reinforces the need to assess children holistically, placing a responsibility on professionals to consider all aspects of a child and family's circumstances, including offending behaviour, in determining whether a child is at risk of significant harm and therefore in need of child protection measures. The guidance makes clear '… a young person involved in offending behaviour is often a young person in need of care and protection'.[232]

Similarly, in New Zealand, there is an increased focus on the provision of assistance and services required to address a child's needs instead of instituting criminal proceedings.[233] This approach was recommended by TLA who have argued that there should be legislative recognition of a trauma-informed approach that aims to reduce involvement in the criminal justice system.[234] TLA supported the principles set out in the Victorian Youth Justice Strategic Plan 2020–2030 that:

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[229] See Clancey, Wang and Lin (n 7). See also [2.3] for a discussion of trauma and its association with youth offending and [7.1.4] for a discussion of the relevance of trauma to sentencing.

[230] Cathy Kezelman and Pam Stavropoulos, *Trauma and the Law: Applying Trauma-Informed Practice to Legal and Judicial Contexts* (Blue Knot Foundation, 2016) 5.

[231] Armytage and Ogloff (n 134) 48. See also Precious Skinner-Osei et al, *Justice-Involved Youth and Trauma-Informed Interventions* (2019) 16(2) *Justice Policy Journal* 1; Clancey, Wang and Lin (n 7); Melissa Kingston, *A Literature Review in Best Practice in Provision of Therapeutic Custodial Youth Justice Services* (Department of Communities Tasmania, 2020).

[232] VSAC (n 54) 37, quoting Centre for Youth and Criminal Justice, *A Guide to Youth Justice in Scotland: Policy, Practice and Legislation* (2018) 3 (citations omitted).

[233] See VSAC (n 54) 37.

[234] TLA (n 23) 17.

1. Recognises that children and young people must be treated differently from adults and delivers developmentally distinct and appropriate services.
2. Understands that prevention, diversion and early intervention are the most effective and fiscally responsible ways of reducing youth crime in the long term.[235]

Accordingly, TLA have recommended amending the *Youth Justice Act 1997* (Tas):

> to explicitly reflect the different approach to be adopted for children and focus on early intervention and diversion. While there would be consequences for behaviour there would also be the proper recognition and response to trauma experienced by children and the impact this has on offending, rehabilitation and recidivism. The Act should include a focus on the strengths of children to support their positive growth and development. To be effective, this needs to flow through to the sentencing options and programs implemented by youth justice services.[236]

This approach reflects the greater recognition of the relevance of trauma to young offenders, including in the sentencing process, in Australia.[237]

Consultations with stakeholders indicated a commitment to the adoption of a trauma-informed approach in developing responses to youth offenders. However, it has been observed that the *Youth Justice Act 1997* (Tas) framework is not trauma-informed and does not reflect contemporary evidence-based understandings of youth offenders. Instead, the legislative framework focuses on young people taking responsibility for their behaviour and does not sufficiently focus on the need to treat youth offenders differently from adult offenders with the associated recognition of the trauma experienced by children.[238] A related perspective was that the *Youth Justice Act 1997* (Tas) was written with a particular type of 'youth offender' in mind, one who was readily engaged and compliant with orders, whereas the reality was that the majority of youth offenders come from complex backgrounds of generational poverty, drug use and trauma. Stakeholders highlighted the commitment of many individuals working in youth justice who have the interests of young people at the centre of their approach and draw from trauma-informed practice. However, it was noted that appropriate infrastructure was lacking, and frequent reference was made to the absence (or unavailability for many youth offenders due to regional differences and capacity issues) of programs and services.

3.2 International human rights context

Australia has ratified a number of international treaties that provide for the rights of children. The two key United Nations instruments that relate to juvenile justice are the *Standard Minimum Rules for the Administration of Juvenile Justice* (the 'Beijing Rules')[239] and the *Convention on the Rights of the Child* ('*CROC*').[240]

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235 Ibid 18.

236 Ibid 18.

237 See [7.1.4].

238 TLA (n 23) 17–18.

239 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, UN Doc A/RES/40/33 (29 November 1985) (the 'Beijing Rules').

240 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CROC*') art 3.1; See discussion in Cunneen, White and Richards (n 5) 91–95, 256–261.

The *CROC* sets out a range of human rights principles including the fundamental principle of the 'best interest of the child'.[241] This is clearly relevant to sentencing.[242] In addition, there are other principles relevant to sentencing including the need for detention to be a measure of last resort and for the shortest appropriate period of time;[243] the preference for alternative diversionary measures over formal judicial proceedings;[244] the importance of rehabilitation for children;[245] the availability of a range of sentencing options;[246] and the requirement of proportionality.[247]

Many of these human rights principles are evident in the purposes and objectives contained in the *Youth Justice Act 1997* (Tas) and are discussed in this paper.[248]

[241] *CROC* (n 241) art 3.1. See Cunneen, White and Richards (n 5) 92.

[242] VSAC (n 40) 61.

[243] *CROC* (n 241) art 37(b).

[244] Ibid art 40.3; Beijing Rules (n 239) r 11.

[245] *CROC* (n 241) art 40.1; Beijing Rules (n 239) r 17.

[246] *CROC* (n 241) art 40.4; Beijing Rules (n 239) r 18.1.

[247] *CROC* (n 241) art 40.4; Beijing Rules (n 239) r 5.1.

[248] See [7.1.4].

4 Public opinion and sentencing young offenders

This chapter sets out research examining public opinion and the sentencing of young offenders.

Responses to youth offending (often as a reaction to a perceived 'youth crime crisis')[249] regularly rest on 'law and order commonsense' that contends that the justice system is 'soft on crime' and the solution is for tougher penalties.[250] This is the message commonly portrayed in the media and in the political debate about youth crime where '[e]mpirical evidence and calls for reasoned debate on juvenile justice policy are lost when populist politics are in command'.[251] Public opinion on youth crime and sentencing contributes to this discourse and can provide an impetus for changes to sentencing policy.[252] This also applies to sentencing for adult offenders and there has been considerable research, in Australia and elsewhere, that has sought to explore understandings of public opinion and sentencing. This research has shown that while most people consider that sentencing is too lenient if asked to provide an a 'top of the head' view, people's views of punishment and the use of alternatives to prison are more nuanced.[253] In addition, informed members of the public would impose a sentence slightly more lenient than judges.[254]

As part of larger studies examining public opinion and sentencing more generally, there have been some insights into public views about the sentencing of young people. For example, as part of a national Australian survey, Mackenzie et al sought to identify participant's 'top of the head' views about leniency in sentencing and included a question about juvenile property offenders. Approximately two-thirds of participants (64%) considered that sentences for juvenile property offenders were too lenient.[255] However, 80% of respondents agreed that instead of going to prison, young offenders should take part in programs that teach job skills, moral values and self-esteem.[256] Other studies have also found a willingness to support alternatives to prison for young offenders.[257]

Studies have also more specifically sought to understand public perceptions of youth offenders and have also found a willingness to accept alternatives to punitive sentencing

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[249] See for example, Deb Frecklington, 'Youth Crime Crisis Now Out of Control' (Web Page, 5 March 2020) <https://www.deb2020.com.au/youth-crime-crisis-now-out-of-control/>.

[250] Cunneen, White and Richards (n 5) 78–82.

[251] Ibid 80.

[252] Geraldine Mackenzie et al, 'Sentencing and Public Confidence: Results for a National Australian Survey on Public Opinions Towards Sentencing' (2102) 45(1) *Australian and New Zealand Journal of Criminology* 45, 46; Nigel Stobbs, Geraldine Mackenzie and Karen Gelb, 'Sentencing and Public Confidence in Australia: The Dynamics and Foci of Small Group Deliberations' (2015) 48(2) *Australian and New Zealand Journal of Criminology* 219, 220.

[253] See Lorana Bartels, Robin Fitzgerald and Arie Freiberg, 'Public Opinion on Sentencing and Parole in Australia' (2018) 65(3) *Probation Journal* 269, 272–273.

[254] VSAC, *Public Opinion About Sentencing: A Research Overview* (Report, 2018) 1.

[255] Mackenzie et al (n 252) 53.

[256] Ibid 53–54.

[257] See VSAC (n 254) 7.

measures. The relevance of offender age as a factor in the public perception of sentencing was explored in an Australian study by Spiranovic et al. This study examined public views of sentencing taking into account offender age, offence type and offence history using a series of vignettes including scenarios involving a 17-year-old offender. The study found that '[p]eople believe that when it comes to sentencing first-time and young offenders as well as less serious offences, the most important purpose is rehabilitation'.[258] Criminal history had the strongest influence on whether rehabilitation as opposed to punishment was chosen as the most important purpose of sentencing, followed by offender age and then offence type.[259]

A Western Australian study specifically examined public opinion in relation to sentencing under the *Young Offenders Act 1994* (WA) by using a short vignette and manipulating the scenario within the vignette to determine how the public would sentence young offenders and the circumstances in which members of the public would change the sentence.[260] This research found that there was generally a lack of knowledge about sentencing options for young offenders and so the 'default position [was] punishment'.[261] However, when provided with 'context and alternatives', respondents were 'supportive of other responses to youth crime'.[262] Respondents 'were more likely to be lenient if the young person was "younger" in age, was a first time offender and had completed a rehabilitative drug program' (where one of the offenders had a drug habit).[263] However, while the participants in the study 'believed a young offender should be given a '*second chance*',[264] if the person reoffended 'then the penalties should be harsher because they had not '*learned their lesson*'.[265] Accordingly, a prior record meant that participants 'were more likely to opt for a harsher sentence'.[266] A harsher sentence was also nominated if the young person was older or was carrying a weapon.[267]

The study also sought to explore the most important outcome of sentences and 'overwhelmingly the response was rehabilitation', followed by 'learning' and 'to stop offending'.[268] The researchers observed the tension in the views held by members of the public who saw the components of reform simultaneously being rehabilitation (addressing the underlying causes of the offending), consequences (taking responsibility in the form of receiving punishment) and repentance (meaning 'to "*truly understand*" the impact of their actions on individuals and the community, and to learn right from wrong').[269] In conclusion, the authors wrote that 'while media representations often portray an outraged public, the findings of this study suggest a more considered public that support consequential

[258] Caroline Spiranovic et al, 'Public Preferences for Sentencing Purposes: What Difference does Offender Age, Criminal History and Offence Type Make?' (2011) 12 (3) *Criminology and Criminal Justice* 289, 301.

[259] Ibid 302.

[260] Suzanne Ellis et al, 'Give Them a Chance: Public Attitudes to Sentencing Young Offenders in Western Australia' (2018) 18(2) *Youth Justice* 169, 172.

[261] Ibid 185.

[262] Ibid.

[263] Ibid.

[264] Ibid 181.

[265] Ibid.

[266] Ibid 185.

[267] Ibid.

[268] Ibid 182.

[269] Ibid 182–184.

responses crime [sic] but also are open to treating the underlying causes through alternatives to “tough on crime” measures’.[270]

Recent research conducted by the Scottish Sentencing Council explored public perceptions of youth offending and sentencing to support the development of a guideline for the courts on sentencing young people. This research found that rehabilitation was identified as the single most important thing that courts should be trying to achieve when sentencing young people (54%) followed by protecting the public (27%) and punishing crime (12%).[271] As with Ellis et al’s Western Australian study, views were expressed about giving young people a ‘second chance’.[272] Rehabilitation was also associated with concerns around the need for punishment and consequences to be imposed so that young offenders ‘understand’ and ‘reflect on what they’ve done’.[273] The importance of accepting responsibility as well as apologising and demonstrating remorse was also a factor identified in earlier English research conducted by Roberts and Hough where ‘the public want young offenders to apologise, express remorse and to accompany this emotion with some form of practical reparation for the crime victim. When this occurs, the public is significantly less interested in punitive sanctions’.[274]

[270] Ibid 186.

[271] Carolyn Black et al, *Public Perceptions of Sentencing: National Survey Report* (Scottish Sentencing Council, 2019) 20.

[272] Gordon Jack, Andrew Bell and Dawn Griesbach, *Report of Focus Groups on Youth Offending and Sentencing: Summary Report* (Scottish Sentencing Council, 2019) 11.

[273] Ibid 8.

[274] Julian Roberts and Mike Hough, ‘Sentencing Young Offenders: Public Opinion in England and Wales’ (2005) 5(3) *Criminal Justice* 212, 228.

5 Pre-court diversionary practices

As explained in Chapter 2, diversion is a key feature of the youth justice system in Tasmania and under the *Youth Justice Act 1997* (Tas), police have a significant gate-keeping function in relation to a youth's diversion by way of caution or community conference. The use of diversion provides a mechanism to give effect to the principle that detention should be a last resort option for young people.[275] This reflects key international human rights principles in relation to juvenile justice.[276] Recent reviews and inquiries have recommended that diversion should be more frequently used, where appropriate.[277] As noted by TLA, research by the Productivity Commission found that diversion 'can fundamentally change the life trajectory of young people. … diversion can lead to lower rates of reoffending, save money and lead to better community outcomes'.[278]

This chapter sets out the pre-court diversionary framework in Tasmania and provides an overview of the use of these diversionary mechanisms including a discussion of the role of the Youth Crime Intervention Unit.

5.1 Legislative framework

Part 2 of the *Youth Justice Act 1997* (Tas) provides the legislative framework for diverting youths from the court system. As stated by the *Youth Justice Act 1997* (Tas) s 7, the 'purpose of this Part is to divert, in an appropriate case, a youth who admits committing an offence from the courts' criminal justice system'.

Under the *Youth Justice Act 1997* (Tas), there are three tiers to the diversionary processes available: (1) informal caution by police; (2) formal caution by police; and (3) community conferences convened by the Department of Communities Tasmania at the request of police. There is also a mechanism for informal diversion for unlawful occurrences on school grounds within the behaviour management response of schools, particularly those schools that adopt a restorative justice model. This school-based process may also involve the participation of Tasmania Police's Youth Crime Intervention Unit.

A youth who has allegedly committed a prescribed offence is ineligible for pre-court diversion.[279] As explained at [6.1.2], prescribed offences are generally serious offences, and the offences that are classified as prescribed offences change depending on the age of the young person. However, diversion is still possible for serious offences such as wounding, assault and indecent assault.[280]

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[275] Clancey, Wang and Lin (n 7) 9. See [7.1.3] for discussion of detention as a last resort.

[276] See [3.2].

[277] Clancey, Wang and Lin (n 7) 5.

[278] TLA (n 23) 14–15.

[279] *Youth Justice Act 1997* (Tas) s 3(1) (definition of 'offence'), (definition of 'prescribed offence').

[280] See discussion in Prichard (n 208) 60.

Under the *Youth Justice Act 1997* (Tas) s 8, a police officer has the discretion to informally caution a youth who admits committing an offence; in such instances no further proceedings are taken.

If a youth admits to the commission of an offence, and the police officer considers that the matter warrants more formal action than an informal caution, then the police officer may require the youth to be formally cautioned, require a community conference to be convened or file a complaint for the offence before the court.[281] However, there is legislative guidance that limits the filing of a complaint by police to circumstances where the seriousness or nature of the offence would mean that the matter could not be adequately dealt with by a formal caution or a conference.[282] The youth's response (see below) may also mean that a complaint may be filed.[283]

Before a police officer requires a youth to be formally cautioned or requests that a community conference is convened, the police officer must provide the youth with information about the nature of the offence and the circumstances, explain that the youth is entitled to legal advice and that the youth can request the matter be dealt with by the Magistrates Court (Youth Justice Division) ('Youth Division').[284] If the youth does not require the matter to be dealt with by the court, the police officer must record the admission and request the youth to sign it.[285] A youth must agree to being formally cautioned or to the convening of a community conference.[286] If the matter is referred to a community conference, the youth must sign an undertaking to attend.[287]

The matter may be referred to court if the youth does not agree to a formal caution or a community conference being convened or does not sign the undertaking to attend the community conference.[288]

5.2 Procedure at formal caution

A formal caution against further offending is administered by a police officer.[289] However, a formal caution may also be administered by an Aboriginal Elder or a representative of a recognised Aboriginal organisation.[290] It may also be administered to a youth who is or considers him or herself to be a member of a religious, ethnic or other community group by a representative of that group.[291]

Under the *Youth Justice Act 1997* (Tas) s 9(3), there is provision for a victim of an offence to be present at the administration of the formal caution.

A unique feature of formal cautions under the *Youth Justice Act 1997* (Tas) is that the system operates in a similar way to community conferences arranged by Communities

281 *Youth Justice Act 1997* (Tas) s 9(1).

282 Ibid s 9(6)(d).

283 Ibid ss 9(6)(a)–(c).

284 Ibid s 9(2)(a).

285 Ibid s 9(2)(b).

286 Ibid s 9(2)(c).

287 Ibid s 9(4).

288 Ibid s 9(6).

289 Ibid s 10(1).

290 Ibid s 11.

291 Ibid s 12.

Tasmania, except that police are the facilitators.[292] From a police perspective, the power to facilitate youth conferences is supported by the provision for the victim to be present for the formal caution and also (as set out below) that police officers can require youths to enter into undertakings for the benefit of victims.[293]

As part of the formal caution process, there is power for the police officer to require the young person to undertake a range of activities some of which are akin to sentencing orders that may be made under the Youth Division.[294] In addition to administering a formal caution, under the *Youth Justice Act 1997* (Tas) s 10(2), the youth may be required to enter one or more undertaking:

- to pay compensation for loss of or damage to property, injury suffered, expenses incurred or other loss suffered by the victim or any other person by reason of the offence
- to make restitution of offence-affected property
- if the youth is 13 or more years old when required to enter into the undertaking, an undertaking to perform a specified period (of not more than 35 hours) of community service consisting of a community service activity which is for the benefit of the victim of the offence or education or training programs, programs run for the purpose of assisting youths who have committed offences to reintegrate into the community or health and personal development programs
- if the youth is less than 13 years old when required to enter into the undertaking, an undertaking to perform a specified period (of not more than 35 hours) of community service consisting of a community service activity such as an education or training program or health and personal development program
- to apologise to the victims
- anything else that may be appropriate in the circumstances of the case.[295]

These undertakings have a maximum duration of three months.[296]

If the youth fails (without reasonable excuse) to substantially comply with an undertaking, when aged 13 years old or older, the police officer may decide to take no further action or may (after consulting with the Secretary) deal with the youth again according to *Youth Justice Act 1997* (Tas) s 9.[297]

5.3 Procedure at community conference

Once notice is received by Communities Tasmania that a community conference is required, a facilitator must be appointed.[298] Prior to the conference, the facilitator prepares the young person and the victim for the conferences.[299] The following people need to be invited to the conference:

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[292] Nicholas Thomas, 'Working Restoratively: A Study of Youth Justice Professional in Tasmania' (PhD Thesis, University of Tasmania, 2017) 133; Prichard (n 208) 35.

[293] Prichard (n 208) 65.

[294] See Chapter X.

[295] *Youth Justice Act 1997* (Tas) s 10(2).

[296] Ibid s 10(7).

[297] See ibid ss 12A(1)–(2).

[298] Ibid s 14(1).

[299] Information provided by Communities Tasmania, Stakeholder Consultations.

- the youth
- guardians of the youth
- any relatives who may be able to participate usefully in the community conference
- any person who has a close association with the youth or has been counselling or aiding the youth
- the victim
- a youth justice worker
- if the youth is a member of an Aboriginal community, an Elder or other representative of that community
- any other person considered appropriate.[300]

At the conference, the community conference consists of:

- the facilitator
- the youth
- the persons above who attend in response to the invitation to attend
- the police officer who required the conference or a representative of the police.[301]

The victim and the youth are also entitled to be accompanied by a person (youth) or persons (victim) of their choice.[302]

At a community conference, under the *Youth Justice Act 1997* (Tas) s 16, one or more of the following sanctions may be imposed on the youth:

- a caution against further offending
- require the youth to enter into an undertaking to pay compensation for injury suffered by the victim or any other person by reason of the commission of the offence
- require the youth to enter into an undertaking to pay compensation for loss or destruction of, or damage to, offence-affected property
- require the youth to enter into an undertaking to make restitution of offence-affected property
- if the youth is 13 years old or older, require the youth to enter into an undertaking to perform a specified period, not exceeding 70 hours, of community service
- with the agreement of the victim of the offence, require the youth to enter into an undertaking to apologise to the victim
- require the youth to enter into an undertaking to do anything else that may be appropriate in the circumstances of the case.

An undertaking may have a duration not exceeding 12 months.[303]

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300 *Youth Justice Act 1997* (Tas) s 14(2).

301 Ibid s 15(1).

302 Ibid ss 15(2)–(3).

303 Ibid s 16(2).

In deciding the appropriate sanction, the community conference is directed to have regard to the objectives in the *Youth Justice Act 1997* (Tas) s 4 and the principles in the *Youth Justice Act 1997* (Tas) s 5.[304] The community conference is also directed to consider the sanctions imposed by courts, community conferences and police officers on youths in respect of similar offences if that information is readily available to the community conference.[305]

A decision about the sanction to be imposed should be reached by consensus, if practicable,[306] and the community conference fails to reach a decision unless the youth, the police officer and the victim (if present) agree.[307]

A youth is not liable to be prosecuted for an offence in respect of which the community conference is convened if the community conference cautions the youth but does not require the youth to enter into any undertaking or the youth enters an undertaking and performs the obligations arising from those undertakings.[308]

A police officer may file a complaint before the Youth Division if:

- the youth fails to attend the conference, or
- the conference fails to reach a decision, or
- the youth fails to enter any undertaking as required by the community conference, or
- the youth fails to perform the obligations arising from undertakings entered into at the community conference.[309]

It is noted that Youth Division can also refer a youth to a community conference.[310]

5.4 Use of pre-court diversionary practices

Aside from the legislative requirements that set out the framework for diversionary practices, the Tasmania Police Manual provides that a youth is not to be informally cautioned for offences of assault.[311] Diversion is not used for prescribed offences. Prescribed offences are generally serious offences, and the offences that are classified as prescribed offences change depending on the age of the young person.[312]

From an operational perspective, Tasmania Police have advised that the use of formal cautions and conferences are generally guided by the youth and their willingness to accept responsibility for their actions:

> The youth must make full and frank confessions and take ownership of their wrongdoing. They must sign an 'agreement to attend' also. If we have a failure specific to these areas we then recommend the youth would go to Youth Justice Division and explain their behaviour to the magistrate. So there is a limitation that exists with the 'agreement to attend' and that will often dictate if a caution/conference can and will occur.

[304] Ibid s 17(2)(a). See discussion in Chapter 7.

[305] Ibid s 17(2)(b).

[306] Ibid s 17(3).

[307] Ibid s 17(4).

[308] Ibid s 20(1).

[309] Ibid s 20(2).

[310] Ibid s 37.

[311] *Tasmania Police Manual* (June 2020) [9.1.4].

[312] The meaning of prescribed offence is set out at [6.1.2].

> Further, you have the matters where youths may be eligible by admission and signing an agreement to attend, however due to recidivism they are not deemed suitable. As a rule the Youth Justice Act and police will 'step up' with youth offenders. If the offending is consistent or escalating the youth will generally have an informal caution (multiple are common), then a formal caution (sometimes up to three or occasionally more) then to a conference (maybe two, on occasion three) then to court. It would be the exception rather than the rule that a youth at court was not afforded all of these opportunities (informal caution/formal caution/community conference) before going to court.
>
> The determination of the overall process will be made by the Sergeant at Youth Crime Intervention Unit (YCIU) based upon a review of past offending, recommendations of attending members, YCIU knowledge of the offender and whether or not they are engaged in some process with us and an assessment of their demonstrated behaviours to the event. Ultimately, the Sergeant can make the change to a recommendation pre-determined by an attending team.[313]

As noted, Tasmania Police is the gatekeeper in relation to entry into the youth justice system, and the tiered step-up approach to diversion has the consequence that youth offenders tend to only have their first contact with Youth Justice Services when they have been involved in the broader youth justice system for some time.[314]

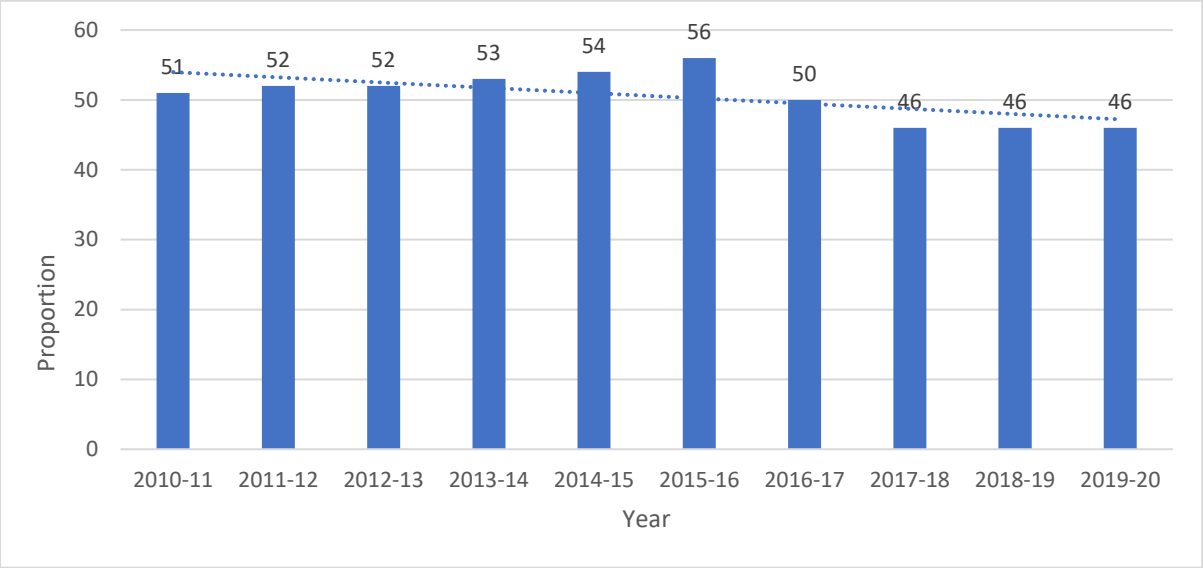
Official data on the use of diversion are contained in the RoGS. The report provides information about the number of alleged young offenders who would otherwise be proceeded against (that is, taken to court) but who are diverted by police as a proportion of all young offenders formally dealt with by police. However, this does not provide a break-down by category of diversion used. As shown in Figure 5.1, Tasmanian data show that there is a downward trend in the use of diversion. Diversion in this context includes diversions of offenders away from the courts by way of community conference, diversionary conference, formal and informal cautioning by police, family conferences, and other programs (for example, drug assessment/treatment).[315]

[313] Email from Steve Keiselis, Sergeant, Youth Crime Intervention Unit to Rebecca Bradfield, 16 October 2020.

[314] Areas of additional research beyond the scope of this paper include the administration and monitoring of juvenile conferencing, in particular, the protocols and processes of police caution conferences (outcomes and records of completion/referral), the protocols and processes of 'department conferences' (outcomes and records of completion/referral), diversion selection in regards to profile of young people and the effect of diversionary measures and juvenile conferencing in regard to recidivism.

[315] Productivity Commission (n 17), Part C, Section 6 (Police Services data tables) Table 6A.20, explanatory material.

Figure 5.1: Youth diversions as a proportion of offenders, Tasmania, 2010–11 to 2019–20



Source: RoGS, Table 6A.20

Data provided to the Council by Tasmania Police also contain information about those who were cautioned (formally and informally) or referred to conferences for the period 2010–11 to 2018–19. As with other data, these show that there has been a significant decrease in the number of youth offender files over the period from a total of 4,615 in 2010–11 to 1,993 in 2018–19. These data also show a reduction in the proportion of youth files diverted from 51.9% of files in 2010–11 (2,427 out of 4615) to 47.4% in 2018–19 (944 out of 1993). These data show a reduction in the use of informal cautions from 30.3% of youth offender files in 2010–11 (1,396 files) to 24.2% of youth offender files in 2018–19 (482 files). There has been an increase over this time in the use of formal cautions (15.1% to 17.6%) and a reduction in the use of community conferences (7.1% to 5.4%). There has been a corresponding increase in the proportion of briefs sent to prosecution (an increase from 47.6% of files to 52.6%).

In consultations with stakeholders, there were several possible reasons provided for a decline in the use of diversion over time, including different policing priorities and the involvement of schools for lower-level offending behaviour. Some stakeholders expressed the view that the decline in the overall number of youth offenders, along with the corresponding concentration on a smaller cohort of more frequent youth offenders ('frequent flyers'), meant that matters escalated through the system more quickly and that these offenders would be referred to the court with a larger list of charges. Stakeholders also reported that diversion numbers may be influenced by a 'class' factor with the response of young people to police and parental attitudes and support being factors in the use (or non-use) of diversion. Young people are generally dependent on parental support to be able to attend a formal caution or conference. TLA also identified the need for more diversionary programs across the state 'to help children access supports they need, without formally entering the youth justice system. Similarly, where children are charged there needs to be more universally available programs that police and courts can utilise'.[316]

In relation to the use of formal cautions and community conferences, stakeholders identified a perception among young people with knowledge of the system that there were likely to be harsher results from the undertakings imposed at formal cautions and conferences than the

[316] TLA (n 23) 15.

orders made in the Youth Division. In light of this perception, young people may decide to proceed to court rather than participate in a diversionary process.

Table 5.1: Count of youth offender files by financial year (for incidents that occurred between 1 July 2010 and 30 June 2019)[317]

Caution Type	2010–11	2011–12	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–19
Diversions									
Community Conference	328	320	293	281	168	127	118	114	108
Diversion 1st Level (Caution)					1				
Diversion 2nd Level (Brief Intervention)				1					
Formal Caution	699	558	444	401	431	378	424	354	351
Informal Caution	1,396	1,594	1,143	933	834	743	685	644	482
Unknown Type	4	6	4		2		1	1	3
Diversions–Total	**2,427**	**2,478**	**1,884**	**1,616**	**1,436**	**1,248**	**1,228**	**1,113**	**944**
****Briefs–Total**	**2,188**	**2,186**	**1,597**	**1,404**	**1,114**	**910**	**1,152**	**1,276**	**1,049**
Total Youth Offender Files	**4,615**	**4,664**	**3,481**	**3,020**	**2,550**	**2,158**	**2,380**	**2,389**	**1,993**

**Briefs are files sent to prosecution

5.4.1 Informal cautions

Table 5.2 shows the age of the youth at the offence date for matters where an informal caution was given in the period 2010–11 to 2018–19. For files where the offender's age is known, it shows that a relatively small proportion of young people aged 10, 11 and 12 are informally cautioned. For most years, the largest proportion of offenders who were informally cautioned were aged 17 at the date of the offence, followed by those aged 16 and then 15. In 2018–19, offenders aged 17 at the time of the offence accounted for 25.9% of youth offenders cautioned, offenders aged 16 accounted for 23.4% and offenders aged 15 accounted for 17.2%.

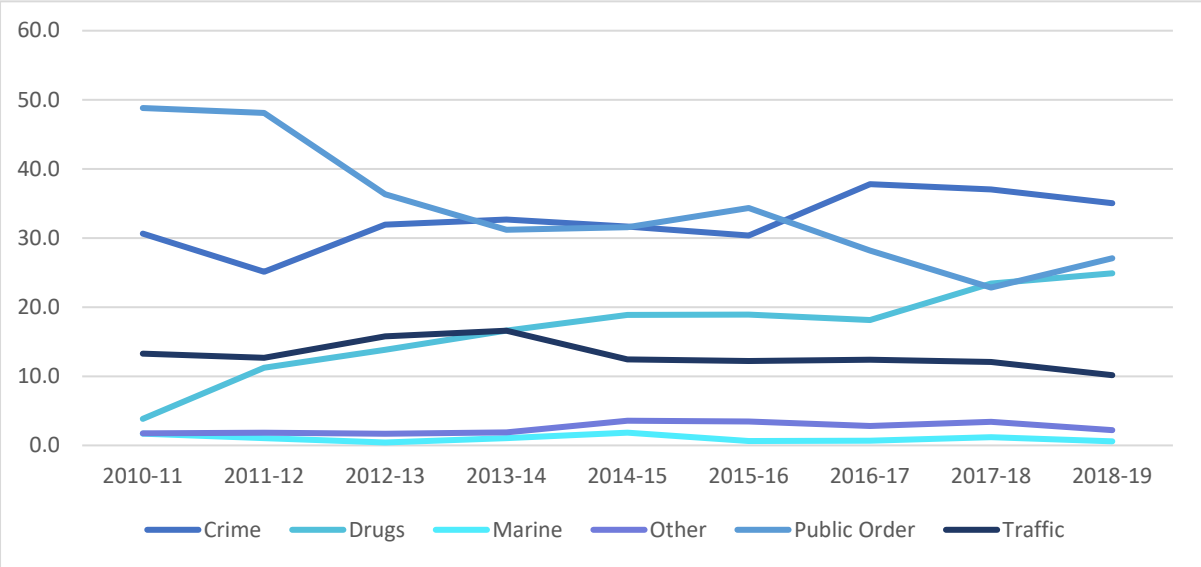
[317] Department of Police, Fire and Emergency Management, unpublished data from: Prosecution System, Information Bureau, Drug Offence Reporting and Fines and Infringement Notices Database. Extraction date: 30 October 2020.

Table 5.2: Proportion of informal caution files by financial year by age of offender at offence date (for incidents that occurred between 1 July 2010 and 30 June 2019)[318]

Age (Offence Date)	2010–11 (n=1396)	2011–12 (n=1594)	2012–13 (n=1143)	2013–14 (n=933)	2014–15 (n=834)	2015–16 (n=743)	2016–17 (n=685)	2017–18 (n=644)	2018–19 (n=482)
10	1.3	1.5	1.0	1.6	2.5	1.9	1.6	2.5	1.7
11	2.5	2.0	1.9	4.0	2.0	2.4	3.2	2.8	2.7
12	3.7	3.9	5.3	3.3	4.6	5.4	6.0	6.2	5.4
13	8.4	8.0	10.4	10.8	6.7	8.6	9.9	8.7	10.6
14	14.0	12.9	13.9	16.6	15.6	11.2	16.2	13.4	12.4
15	17.8	16.8	19.8	16.7	18.3	17.2	12.7	16.5	17.2
16	24.9	24.4	23.9	24.3	24.5	24.8	22.3	22.2	23.4
17	26.4	28.9	22.7	21.5	24.7	27.3	27.3	26.9	25.9
Unknown	1.3	1.6	1.0	1.1	1.1	1.2	0.7	0.9	0.6

Figure 5.2 shows the proportion of youth offender files resulting in an informal caution in the period 2010–11 to 2018–19 by offence category. These data show that 'crime' is now largest category of offence where informal cautions are used (accounting for 176 out of 502 or 35.1% of informal cautions in 2018–19).[319] However, there has been an increase in the proportion of informal cautions given for drug offences (3.8% to 24.9%). In the same period, there has been a decrease in the proportion of informal cautions given for public order offences (48.8% to 27.1%).[320]

Figure 5.2: Proportion of youth offender files with an informal caution by financial year by offence category (for incidents that occurred between 1 July 2010 and 30 June 2019)[321]



[318] Department of Police, Fire and Emergency Management, unpublished data from: Information Bureau. Extraction date: 1 August 2020.

[319] Crime includes arson, assault, burglary, fraud-related offences, injure or destroy property, stealing and trespass.

[320] Public order offences include liquor-related offences, tobacco offences and street offences.

[321] Department of Police, Fire and Emergency Management, unpublished data from: Information Bureau. Extraction date: 30 October 2020.

The use of informal cautions for drug offences is also evident in an analysis of sub-categories of offences.[322] The largest offence sub-category resulting in an informal caution were drug offences categorised as 'not-serious drug' which accounted for 123 informal cautions in 2018–19. This is followed by:

- stealing (74 informal cautions)
- liquor related public order offences (60 informal cautions)
- street public order offences (57 informal cautions)
- trespass offences (37 cautions)
- tobacco offences (20)
- traffic offences related to driver licences (17)
- cyclist/animal rider (16) and
- seatbelt/safety (13).[323]

5.4.2 Formal cautions

Table 5.3 shows the age of the youth at the offence date for matters where formal caution was given in the period 2010–11 to 2018–19. For files where the offender's age is known, it shows that a relatively small proportion of young people aged 10, 11 and 12 are informally cautioned. As with informal cautions, for most years, a proportion of offenders who were formally cautioned were aged either 16 or 17 at the date of the offence. For example, in 2018–19, offenders aged 17 at the date of the offence accounted for 21.1% of offenders formally cautioned, and offenders aged 16 accounted for 17.7%. However, there were relatively more offenders aged 15 who were formally cautioned than informally cautioned.

Table 5.3: Count of formal caution files by financial year by age of offender at offence date (for incidents that occurred between 1 July 2010 and 30 June 2019)[324]

Age (Offence Date)	2010-11 (n=699)	2011-12 (n=558)	2012-13 (n=444)	2013-14 (n=401)	2014-15 (n=431)	2015-16 (n=378)	2016-17 (n=424)	2017-18 (n=354)	2018-19 (n=351)
10	1.4	1.8	1.1	1.0	1.6	1.3	0.9	1.4	1.7
11	2.4	3.0	2.0	3.0	2.1	2.6	3.5	2.3	4.0
12	4.0	3.8	7.0	4.5	3.0	5.3	3.5	6.5	4.8
13	10.6	9.9	10.4	10.7	3.3	12.4	11.6	10.5	12.0
14	15.6	18.5	19.6	19.0	11.2	10.1	18.2	15.8	17.9
15	19.5	18.3	17.8	18.2	13.2	20.4	13.7	20.6	18.8
16	24.5	19.2	21.4	24.4	13.2	23.8	23.1	16.1	17.7
17	20.2	24.9	19.6	18.5	11.6	20.9	20.5	23.4	21.1
Unknown	1.9	0.7	1.1	0.7	2.6	3.2	5.0	3.4	2.0

Figure 5.3 shows the proportion of youth offender files resulting in a formal caution in the period 2010–11 to 2018–19 by offender category.[325] These data show that crime is the largest category of offence where formal cautions are used (accounting for 288 out of 383 or

[322] See Table B.1 in Appendix B.

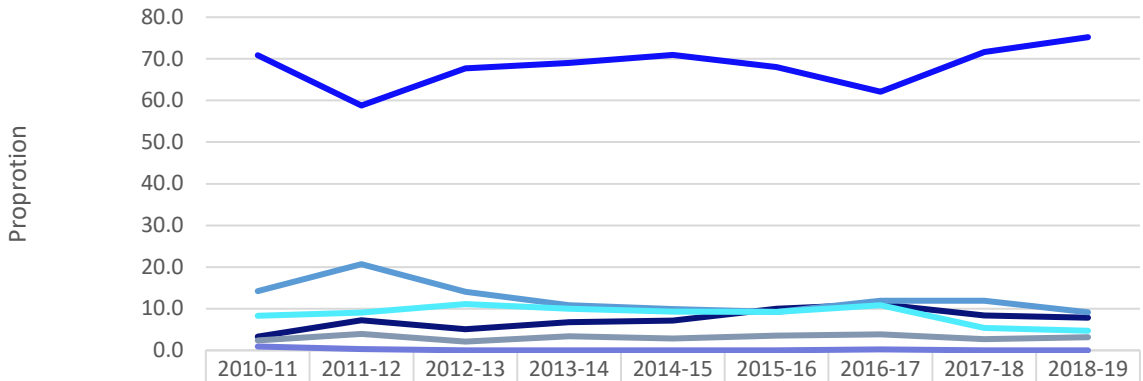
[323] See Table B.2 in Appendix B.

[324] Department of Police, Fire and Emergency Management, unpublished data from: Information Bureau. Extraction date: 1 August 2020.

[325] Also see Table B.3 in Appendix B that sets out count of youth offender files with a formal caution.

70.9% of formal cautions in 2018–19). As with informal cautions, there has been an overall increase in the proportion of formal cautions given for drug offences (3.3% to 8.4%) and a decrease in the proportion of formal cautions given for public order offences (14.2% to 9.1%).

Figure 5.3: Proportion of youth offender files with a formal caution by financial year by offence category (for incidents that occurred between 1 July 2010 and 30 June 2019)[326]



	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
Crime	70.9	58.8	67.7	69.0	70.9	68.0	62.1	71.6	75.2
Drugs	3.3	7.2	5.0	6.8	7.1	10.0	11.1	8.4	7.8
Marine	0.9	0.3	0.0	0.0	0.0	0.0	0.2	0.0	0
Other	2.4	3.9	2.1	3.4	2.8	3.6	3.8	2.7	3.1
Public Order	14.2	20.7	14.0	10.9	9.9	9.2	11.9	11.9	9.1
Traffic	8.3	9.0	11.1	10.0	9.3	9.2	10.9	5.4	4.7

In contrast to informal cautions, where drug offences had the largest number of cautions, for formal cautions used in 2018–19, 'crime' accounts for the largest sub-categories of offences with stealing (96 formal cautions), assault (82) (excluding assaulting a police officer) and injure/destroy property (54) being the three most common sub-category of offending where formal cautions were used.[327] Drug offences classified as 'not serious' accounted for 28 formal cautions.

Closer examination of the crime category shows the range of crimes for which formal cautions are used. There were 111 formal cautions given for offences against the person (assault, assault police, sexual assault, robbery) and 235 formal cautions given for offences against property (trespass, stealing, arson, burglary, injure property).[328]

5.4.3 Community conference

Table 5.4 shows the age of the youth at the offence date for matters where a formal conference was held in the period 2010–11 to 2018–19. For files where the offender's age is known, it shows that a relatively small proportion of young people aged 10 and 11 were referred to a community conference. However, unlike cautions which were given to relatively more older youth offenders, the largest proportion of community conference files were generally for offenders aged 13, 14 and 15. For example, in 2018–19, offenders aged 17 at the date of the offence accounted for 13% of offender community conference files, and

[326] Department of Police, Fire and Emergency Management, unpublished data from: Information Bureau. Extraction date: 30 October 2020.

[327] See Table B.2 in Appendix B.

[328] See Figure B.4 in Appendix B.

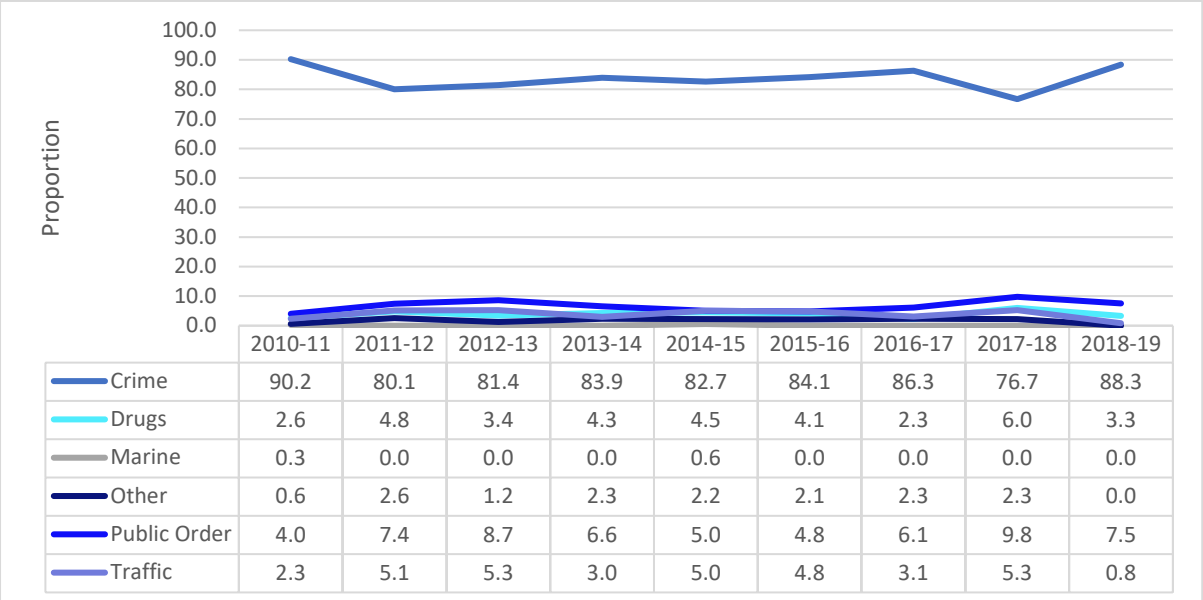
offenders aged 16 accounted for 10.2%. There were 18.5% of young offenders who were 15 at the time of the offence, 14.8% who were 14 and 25% who were 13.

Table 5.4: Count of community conference files by financial year by age of offender at offence date (for incidents that occurred between 1 July 2010 and 30 June 2019)[329]

Age (Offence Date)	2010–11 (n=328)	2011–12 (n=320)	2012–13 (n=293)	2013–14 (n=281)	2014–15 (n=168)	2015–16 (n=127)	2016–17 (n= 118)	2017–18 (n =114)	2018–19 (n=108)
10	2.4	0.6	3.8	1.8	4.2	2.4	0.8	2.6	0.9
11	4.9	0.9	2.0	6.8	6.5	3.9	4.2	4.4	6.5
12	9.5	4.7	5.1	7.8	10.1	8.7	4.2	8.8	11.1
13	11.0	12.2	17.7	19.9	6.0	9.4	22.0	12.3	25.0
14	19.5	17.5	17.4	18.9	17.9	13.4	19.5	20.2	14.8
15	19.8	24.1	17.4	16.0	20.2	26.8	17.8	16.7	18.5
16	19.2	25.0	20.5	17.8	23.8	18.1	19.5	18.4	10.2
17	12.5	14.1	15.0	10.7	11.3	16.5	10.2	15.8	13.0
Unknown	1.2	0.9	1.0	0.4	0.0	0.8	1.7	0.9	0.0

Figure 5.4 shows the proportion of youth offender files where the caution type was community conference in the period 2010–11 to 2018–19 by offence category.[330] As with cautions, these data show that crime is the largest category of offence where the caution type was community conference (accounting for 106 out of 120 or 88.3% in 2018–19). Community conferences are seldom used for other offence categories with only four community conferences held for drug offences and nine for public order offences in the period 2018–19.

Figure 5.4: Proportion of youth offender files where caution type was 'community conference' by financial year by offence category (for incidents that occurred between 1 July 2010 and 30 June 2019)[331]



	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
Crime	90.2	80.1	81.4	83.9	82.7	84.1	86.3	76.7	88.3
Drugs	2.6	4.8	3.4	4.3	4.5	4.1	2.3	6.0	3.3
Marine	0.3	0.0	0.0	0.0	0.6	0.0	0.0	0.0	0.0
Other	0.6	2.6	1.2	2.3	2.2	2.1	2.3	2.3	0.0
Public Order	4.0	7.4	8.7	6.6	5.0	4.8	6.1	9.8	7.5
Traffic	2.3	5.1	5.3	3.0	5.0	4.8	3.1	5.3	0.8

[329] Department of Police, Fire and Emergency Management, unpublished data from: Information Bureau. Extraction date: 1 August 2020.

[330] See also Table B.5 in Appendix B that sets out the count of youth offender files where the caution type was community conference in the period 2010–11 to 2018–19 by offender category.

[331] Department of Police, Fire and Emergency Management, unpublished data from: Information Bureau. Extraction date: 30 October 2020.

In the crime sub-category, the three most common offences for which community conferences were held in 2018–19 were stealing (45), assault (33) (excluding assaulting a police officer) and injure/destroy property (24).[332]

5.5 Programs to support diversion by Tasmania Police

The Youth Crime Intervention Unit is a specialist unit of Tasmania to address youth crime. Its role is diverse, and it works with a range of stakeholders in an attempt to effectively intervene with youth offenders.

There are a range of programs used by Tasmania Police to support diversion by way of caution or conference. These include the Youth Crime Intervention Unit working closely with the Police Citizens Youth Club ('PCYC') in a mentoring capacity. Police have access and partnership with many stakeholders who can assist with a range of interventions including:

- attending prescribed courses at Brain Injury Association of Tasmania
- attending the Junior Firelighting Intervention Program (through Tasmanian Fire Service)
- the First Tee program through PCYC
- the bike rebuilding program
- writing letters of apology to victims
- access to Men's Shed for programs including mechanical mentorship.[333]

[332] See Table B.6 and Figure B.3 in Appendix B.

[333] Keiselis (313).

6 Magistrates Court (Youth Justice Division)

In Tasmania, there are two specialist divisions of the Magistrates Court that deal with matters relating to children and young people. The *Magistrates Court (Children's Division) Act 1988* (Tas) established the Children's Division of the Magistrates Court which deals with child protection matters under the *Children, Young Persons and Their Families Act 1997* (Tas). The *Youth Justice Act 1997* (Tas) creates the Magistrates Court (Youth Justice Division) ('Youth Division') which is a specialist criminal court for young people who are aged 10 to 17 years at the time of an alleged offence.

This chapter sets out the jurisdiction of the Youth Division and provides details about the operation of the court.

6.1 Jurisdiction of the Youth Division

Under the *Youth Justice Act 1997* (Tas) s 161, the Youth Division can hear and determine both summary and indictable offences in relation to 'youth', except for 'prescribed offences'. Even if the Youth Division has jurisdiction, a youth aged 15 years old or older may choose to have indictable offences tried before a jury in the Supreme Court.[334]

Indictable offences are more serious offences and many of these offences are contained in the *Criminal Code* (Tas). Indictable offences are generally dealt with by the Supreme Court for adult offenders. Summary offences are less serious offences and, for adults, are determined and sentenced in the Magistrates Court.

The Youth Division can also hear and determine an application for restraint orders if the only respondent to the application is a person who is less than 18 years old at the time the application is first made.[335] A restraint order is a civil order that imposes restraints on a person in circumstances where they have caused or threatened to cause personal injury or damage to property, and is likely to again cause personal injury or damage or is likely to carry out the threat unless restrained.[336] A restraint order can also be made if a person behaves in a provocative manner and the behaviour is such that it is likely to lead to a breach of the peace and, unless restrained, the person is likely to behave the same or in a similar manner or has stalked a person.[337]

6.1.1 Definition of 'youth'

For the Youth Division to hear a matter, the defendant must be a 'youth'. A 'youth' is a person who is 10 or more years old but less than 18 years old at the time when the offence the person has committed, or is suspected of having committed, occurred.[338]

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334 *Youth Justice Act 1997* (Tas) ss 161(2)–(3).

335 Ibid s 161(1)(c).

336 *Justices Act 1959* (Tas) ss 106B(1)(a)–(b).

337 Ibid ss 106B(1)(c)–(d).

338 *Youth Justice Act 1997* (Tas) s 3(1) (definition of 'youth').

6.1.2 Definition of prescribed offences

The Youth Division cannot hear 'prescribed offences'.[339] Prescribed offences are generally serious offences and the offences that are classified as prescribed offences change depending on the age of the young person.

For all youth offenders, murder, manslaughter and attempted murder are prescribed offences.[340]

For youths aged 14, 15 and 16, the following offences are also prescribed offences:

- aggravated sexual assault
- rape
- persistent sexual abuse of a child or young person
- armed robbery
- aggravated robbery
- being found prepared for the commission of a crime (ready to commit a crime) armed with a dangerous or offensive weapon or instrument
- evade (escape/avoid) police.[341]

For a youth aged 17 years old, all the offences listed above are prescribed offences.[342] In addition, the following offences are also prescribed offences:

- offences in relation to excessive noise or smoke for vehicles and racing a vehicle
- offences in relation to drink driving, drug driving, offences under the *Traffic Act 1925* (Tas) (this includes negligent driving causing death or serious injury, reckless driving), offences under the *Vehicle and Traffic Act 1999* (Tas) (this includes driving without a licence, driving while disqualified, excessive speeding) unless there are proceedings that involve other offences that are not prescribed offences.[343]

In relation to prescribed offences, the Supreme Court or Magistrates Court (depending on the court that would deal with the matter if it involved an adult) determines the matter and may sentence the youth under the *Sentencing Act 1997* (Tas) and/or under the *Youth Justice Act 1997* (Tas).[344]

6.1.3 Other matters relating to jurisdiction

There are limitations on the power of the Youth Division to hear and determine matters if the youth is 15 years or older and jointly charged with an adult. The Youth Division cannot hear and determine a charge against a youth in this situation if both the adult and the youth plead not guilty to the charge.[345] If the youth or both plead guilty, the Youth Division must hear and determine the matter against the youth unless the prosecutor objects.[346]

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339 Ibid (definition of 'offence'), (definition of 'prescribed offence') s 161.

340 Ibid s 3(1) (definition of 'prescribed offence' para (a)).

341 Ibid (definition of 'prescribed offence' para (b)(i)).

342 Ibid (definition of 'prescribed offence' para (c)(i)).

343 Ibid (definition of 'prescribed offence' paras (c)(ia)–(ii)).

344 Ibid s 107(2).

345 Ibid s 28(1).

346 Ibid s 28(2).

There are also provisions that apply if a person was under the age of 18 years at the time of the offence but is 18 years old or older at the time that the matter is dealt with in court.

If a person was under 18 years old at the time of the offence but is 18 at the time that proceedings commence, the proceedings must be commenced under the *Youth Justice Act 1997* (Tas), and if found guilty, the person must be sentenced under the Act as a youth.[347]

If a person was under 18 years old at the time of the offence but is 19 years or older at the time that proceedings commence, the proceedings must be commenced and determined in the Youth Division, and if found guilty, the Court must proceed to sentence the person under the Act as a youth and a sentence of detention is taken to be a sentence to serve a term of imprisonment in a prison.[348]

However, if a youth offender is 18 years or older at the time when they are being sentenced, the Youth Division may exercise the powers of a court of petty sessions under the *Sentencing Act 1997* (Tas) in addition to, or instead of, any other power it may exercise under the *Youth Justice Act 1997* (Tas).[349]

6.2 Court's procedures

The Youth Division operates as a specialised court list statewide. There is a 'dedicated magistrate in each registry to hear all youth justice cases in which the Court promotes a therapeutic strengths-based approach'.[350] In adopting an approach aligned with therapeutic jurisprudence, the Youth Division operates differently to traditional court procedures and 'involves a collaborative, largely non-adversarial approach. It aims to be forward-looking and is more concerned with participants' needs'[351]. These procedures have been adopted to allow 'for a consistent approach and more time to deal with the issues experienced by many young offenders such as alcohol and drug use, homelessness, illiteracy and education problems'.[352] This has been the approach adopted in Tasmania since the Hobart Specialised Youth Justice Court Pilot (the 'Pilot') conducted between 2011–13.[353] Prior to the Pilot, matters within the jurisdiction of the Youth Division could be heard by any of the magistrates as part of their usual list.

Following the Pilot, there has also been greater coordination and cooperation between the various agencies involved in youth justice, including Tasmania Police (Early Intervention Unit), TLA, Department of Health and Human Services, Youth Justice Services and Child Protection Services, the Department of Education and Save the Children.[354] In its feedback, the Law Society of Tasmania described the approach of the Youth Division as the 'gold standard' for young people in the justice system in Tasmania. A key aspect of the approach in the Youth Division is institutionalisation of 'special lists' and the use of specialised

[347] Ibid s 103(1).

[348] Ibid s 103(2).

[349] Ibid s 161A(1).

[350] Magistrates Court of Tasmania, *Annual Report 2018–19* (Report, 2019) 17.

[351] Victor Stojcevski, *Hobart Specialised Youth Justice Court Pilot: Evaluation Report* (Report, 2013) 62.

[352] Magistrates Court of Tasmania, 'Youth Justice Court' <https://www.magistratescourt.tas.gov.au/about_us/youth_justice_division>.

[353] See Stojcevski (n 351).

[354] Ibid 21–23.

magistrates. Feedback received in consultations highlighted the need to formalise and institutionalise special lists and protocols for the selection of both judges and magistrates.[355]

There are restrictions that apply in relation to persons who may be present in the court sitting as the Youth Division,[356] as well as restrictions on reporting proceedings.[357]

6.3 Procedures following a finding of guilt

6.3.1 Pre-sentence report

After finding a person guilty of an offence, but before passing sentence, the court may order a pre-sentence report about the person.[358] The court will then adjourn (postpone) the court hearing to allow the report to be prepared.

A court must order a pre-sentence report if it is considering making a:

- youth probation order
- youth community service order
- youth detention order.[359]

Pre-sentence reports for young offenders are prepared by youth justice workers.

In relation to young offenders, a pre-sentence report will normally include the following information:

- Sources of information on which the report is based. This will usually include reference to the young person, their parent or guardian, the Education Department, Child Safety Services and the like.
- Circumstances of the offence of which the young person has been found guilty and attitude of the young person to the offence.
- Any previous orders in respect of the young person involving the Secretary. This sets out both previous sentencing Orders, remand Orders and any Child Safety Services involvement.
- Family circumstances of the child or young person.
- Education/training of the child or young person.
- Employment/job history of the young person.
- Recreation and leisure activities (hobbies) of the child or young person.
- Medical or health matters relating to the child or young person.
- Drug or alcohol matters relating to the child or young person.
- A recommendation for sentence.

In stakeholder consultations with Communities Tasmania, there were several complexities identified in relation to the provision of reports and the supervision of community-based

[355] White (n 136).

[356] See *Youth Justice Act 1997* (Tas) s 30.

[357] Ibid s 31.

[358] Ibid s 33.

[359] Ibid s 48(2).

orders in circumstances where an offender was a youth at the time of the offence and an adult at the time of sentence. These included:

- Providing a pre-sentence advice about appropriate sentences for a young person who offended under the age of 18 and is sentenced when they are 18 or older and have been previously unknown to Youth Justice Services.
- If the court intends to sentence under the *Sentencing Act 1997* (Tas) s 161A(1), Community Corrections (which provides pre-sentence reports and supervises adult community-based orders) may also need to prepare a report.

Difficulties are created for youth justice workers in using assessment tools designed for young people as well as advising on appropriate sentences and supports for 'youth offenders' who are now adults. The services and programs that exist for youth offenders are different than those for adult offenders, and Youth Justice Services may not have the same familiarity with these as they would with the services and programs in the youth sector. It was noted that these issues would be exacerbated by the extension of compulsory education to the age of 18, with Youth Justice Services unlikely to have the same networks and contacts in relation to work skills and job services.

Additional difficulties were identified in relation to the interface between the youth justice system and the adult justice system including:

- If a young person is sentenced to a term of imprisonment when they are under 18, this will currently be served at Ashely Youth Detention Centre ('AYDC'). In some cases, the youth offender is eligible for parole when they are 17 years or younger (that is, they are still a youth) and difficulties are created because parole is supervised by Community Corrections who do not work with youth offenders.
- Where a young person has been supervised by Youth Justice Services in relation to a suspended detention order (which extends until the youth is an adult) and as an adult the person reoffends in circumstances where original suspended detention order is breached and activated. In the usual case, if Community Corrections are supervising an adult order, they will also supervise a youth order. However, difficulties arise in a case where there is a supervised release order (a youth order) that requires the person to be supervised and an adult sentencing order with no conditions that require supervision by Community Corrections.

6.3.2 Deferral of sentence

Since March 2014, under the *Youth Justice Act 1997* (Tas), a magistrate can grant bail and defer sentencing on a young person for period of 12 months from the date of finding of guilt.[360] Under the *Youth Justice Act 1997* (Tas) s 56A(2) a sentence can be deferred:

> (a) for the purpose of assessing the youth's capacity, and prospects, for rehabilitation; or
>
> (b) for the purpose of allowing the youth to demonstrate that rehabilitation has taken place; or
>
> (c) for the purpose of assessing the youth's capacity, and prospects, for participating in an intervention plan; or
>
> (d) for the purpose of allowing the youth to participate in an intervention plan; or
>
> (e) for any other purpose that the Court thinks appropriate in the circumstances.

[360] *Youth Justice Act 1997* (Tas) ss 47(1)(j), (1A).

If the magistrate is satisfied that deferral is appropriate, he or she may admit the youth to bail and sentencing is deferred for all the offences for which the court may sentence the youth.[361] Even if the seriousness of the offence justifies a sentence of detention or imprisonment, the magistrate may still defer sentencing.[362] However, the magistrate can only defer sentence if the youth is not serving a term of imprisonment or detention for another offence.

As part of the bail conditions imposed by the magistrate as part of the deferral of sentence, the magistrate may require the youth to comply with an intervention plan and may require the young person to appear for regular judicial monitoring.[363]

This formalises the approach of the Youth Division developed as part of the Pilot conducted between 2011–13, where there was a modification of the arrangements under the Youth Division to create two streams: (1) a general stream in which all youth justice matters were listed and (2) a specialist list as a 'subset of general youth justice that would hear and determine complex matters assessed as needing a therapeutic jurisprudence approach — concerned with vulnerable young offenders such as those with drug and alcohol and/or mental health problems or other serious vulnerability'.[364] The specialist list relied on provisions under the *Bail Act 1994* (Tas) to allow for the magistrate to develop and impose a bail support plan for young defendant's including 'case management by relevant agencies under the supervision of the court'.[365] Bail support planning typically addressed a defendant's engagement with treatment and case management, compliance with court orders, area restrictions and non-association with certain individuals, accommodation needs and court review and supervision.[366] This allowed the court to adopt a 'problem-solving and therapeutic approach' by allowing the magistrate to tailor the response to the individual and maintaining supervision by regular reviews.[367]

Data from the AIHW show that in the period 2019–20, there were 65 orders made for supervised and conditional bail or other unsentenced orders, and that out of the 61 supervised or conditional bail orders that ended during 2018–19, 55 (90.2%) were successfully completed.[368]

Some stakeholder consultations identified the utility of deferred sentencing as an option for some youth offenders, particularly those on the cusp of a sentence of detention. TLA observed that a properly structured and supported comprehensive deferred sentence order intervention plan with judicial monitoring implemented as part of deferred sentence could be effective at bringing an end to offending for youths 'right on the edge of detention'. Other feedback received queried the utility of a deferred sentence for a young person by providing another layer of supervision in circumstances where there may already be supervision by child protection or youth justice services.

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361 Ibid s 56A(3).

362 Ibid s 56A(5).

363 Ibid s 56B(2).

364 Stojcevski (n 351) 6.

365 Ibid 23.

366 Ibid 24.

367 Ibid.

368 AIHW, 'Data tables: Youth justice in Australia 2019–20 supplementary tables—Characteristics of young people under community-based supervision: S36 to S73' *Youth justice in Australia 2019–20* (28 May 2021) Table S62, S70 < https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2019-20/data>.

6.3.3 Court-ordered community conference

Another option available to the Youth Division, instead of proceeding to sentence a youth, is to order a community conference.[369] The procedure for a court-ordered conference is generally the same as conferences requested by police.[370] If a decision is made that the youth is not required to enter an undertaking at the community conference or if the youth fulfils all undertakings entered into at the community conference, then this information must be filed with the court.[371] Once this has occurred (or if a report of a contravention has not been filed within 60 days commencing on the day by which all undertakings are to be fulfilled), the charge is dismissed.[372] If there is an unsuccessful community conference (either the young person does not appear or the conference fails to reach a decision) or if the young person does not fulfil an undertaking, the court must proceed to make an order under the *Youth Justice Act 1997* (Tas) s 47.[373]

6.4 Delay in the Youth Division

Court delay is an issue for all courts in Tasmania.[374] However, some stakeholders raised the issue of delay in the court process as a particular issue for young people. In a practical sense, young people may be excluded from school when there are matters still before the court and this may result in a prolonged interruption in education. The delay also serves to 'keep' children in the youth justice system in circumstances where they may have addressed issues related to their offending and have already adopted pro-social behaviour. The concern was also raised that the consequence of offending was not imposed close in time to the offending behaviour.

[369] *Youth Justice Act 1997* (Tas) s 37(1).

[370] Ibid ss 38–40.

[371] Ibid s 40A.

[372] Ibid s 41.

[373] Ibid ss 42(2), 43(2).

[374] See TSAC, *Statutory Discounts for Guilty Pleas* (Final Report 10, 2018) Chapter 2.

7 Sentencing under the Youth Justice Act 1997 (Tas)

This chapter examines the sentencing principles set out in the *Youth Justice Act 1997* (Tas) as well as consideration of these principles by the Supreme Court of Tasmania. It also outlines the sentencing options that are available under the *Youth Justice Act 1997* (Tas).

7.1 Sentencing principles

The sentencing framework set out in the *Youth Justice Act 1997* (Tas) differs significantly from the approach under in the *Sentencing Act 1997* (Tas). There are no express purposes for sentencing contained in *Sentencing Act 1997* (Tas) and the purpose of the Act is expressed as promoting the protection of the community as a primary consideration in sentencing offenders as well as to help prevent crime and promote respect for the law by allowing courts to impose sentences aimed at deterrence, rehabilitation and denunciation.[375] In contrast, the objectives of the *Youth Justice Act 1997* (Tas) are focused on treatment, rehabilitation and, if necessary, the imposition of an appropriate sanction.[376]

As discussed, a significant focus of the *Youth Justice Act 1997* (Tas) is on restorative justice (accepting responsibility and repairing harms) as well as the rehabilitation of the young person. The objectives refer to strengthening and reinforcing the roles of guardians and families and communities in reducing youth crime, sanctioning and managing youths who have committed crime and rehabilitating youths.[377] 'Sanction' is explicitly used in preference to 'punishment' to connote the focus on reparative justice. The objectives also include having a matter dealt with in a manner that:

- is culturally appropriate and recognises and enhances the youth's cultural identity[378]
- takes into account the youth's social and family background and that enhances the youth's capacity to take personal responsibility for their behaviour[379]
- provides appropriate opportunities to repair any harm caused by the commission of the offence to the victim and the community and to reintegrate himself or herself into the community.[380]

The Act also specifically identifies principles relevant to the exercise of powers in the Act (including sentencing powers). These include:

- to deal with the youth in a way that encourages the acceptance of personal responsibility

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375 *Sentencing Act 1997* (Tas) ss 3(c), (e).

376 *Youth Justice Act 1997* (Tas) s 4(e).

377 Ibid ss 4(e)–(f).

378 Ibid s 4(g).

379 Ibid s 4(h).

380 Ibid s 4(i).

- not treating the youth more severely than an adult would be
- the need for community protection
- the opportunity for the victim of crime to participate in the process
- encouraging and supporting guardians to fulfil their responsibility for care and supervision
- detention should only be used as a last resort and for as short a time as is necessary
- any sanctioning should be designed to give the youth an opportunity to develop a sense of social responsibility and develop in beneficial and socially acceptable ways
- any sanctioning is to be appropriate to the age, maturity and cultural identity of the youth
- any sanctioning is to be appropriate to the previous offending history of the youth.[381]

In individual cases, the Act requires the court to give effect to the following principles (in so far as the circumstances of the individual case allows):

- compensation and restitution should be provided for victims
- the need to strengthen and preserve the relationship between the child and their family
- the need to ensure that the youth is not withdrawn unnecessarily from their family environment
- no unnecessary interruption to education or employment
- a youth's sense of racial, ethnic or cultural identity should not be impaired
- an Aboriginal youth should be dealt with in a way that involves his or her cultural community.[382]

In any proceedings under the *Youth Justice Act 1997* (Tas), the court has a duty to take into account these principles and objectives.[383]

In sentencing, the *Youth Justice Act 1997* (Tas) also directs the court to have regard to all the circumstances of the case including:

- the nature of the offence
- the youth's age and any other sentences or sanctions previously imposed
- the impact any orders will have on the youth's chance of finding or retaining employment or attending education and training.[384]

In understanding the operation of the *Youth Justice Act 1997* (Tas), guidance is not available from the decisions of the Youth Division as it does not publish sentencing remarks. However, decisions of the Supreme Court of Tasmania and the Tasmanian Court of Criminal Appeal can provide guidance on the interpretation of the objectives of the *Youth Justice Act 1997* (Tas) as stated in s 4, the general principles of youth justice set out in s 5 and the sentencing options available under s 47, in relation to matters dealt with in that jurisdiction.

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[381] Ibid s 5(1).

[382] Ibid s 5(2).

[383] Ibid s 29(2).

[384] Ibid s 47(4). See also ss 5(1)(i)–(j).

These publicly available cases arise from appeals against sentence imposed by magistrates in the Youth Division as well as sentences imposed at first instance in the Supreme Court (as well as appeals against these sentences).

7.1.1 Rehabilitation

Rehabilitation is expressly recognised as one of the main objectives of the Act.[385] In determining the sentence to impose on a youth, the court is to give more weight to the rehabilitation of the youth than any other individual matter.[386] Rehabilitation is fundamental to the principles of the Act — the Act specifies that effect is to be given to the preservation of family relationships, the family environment, and the continuation of education and employment (among other things) so far as the circumstances of the individual case allow.[387] Section 5(1)(h) states that 'any sanctioning of a youth is to be designed to give him or her an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways'. These legislative factors require the court to consider the 'cluster of "needs" [of the child] … associated with the social development and educational environment of the child'.[388] This focus supports the principle that non-custodial sanctions are preferrable to custodial sanctions and that 'matters that might contribute to the young person's realisation of their law-abiding potential are to be given considerable weight in arriving at sentence'.[389] As discussed at [3.2], the focus on rehabilitation for children is also recognised by international human rights law. Judicial statements from the Supreme Court clearly recognise the importance of rehabilitation in sentencing youth offenders.[390] However, as discussed below, in serious cases, the Court's view is that deterrence becomes a significant consideration.

7.1.2 Deterrence, punishment and denunciation

The Supreme Court has recognised that there are tensions in the aims and purposes of sentencing under the *Youth Justice Act 1997* (Tas) that can be difficult to reconcile, particularly in relation to serious offending.[391] It has been consistently accepted that while rehabilitation is often a predominant factor, both general and personal deterrence can have a role to play, particularly in relation to serious offending.[392] For example, in *DPP v NOP*,[393] a case involving a conviction for rape, Evan J wrote that 'whilst rehabilitation is ordinarily the primary consideration for youthful offenders, this does not mean that the Court must disregard the needs of general deterrence and denunciation'.[394] Similarly in *LWR v Lusted*, Porter J adopted the principles expressed by the Western Australian Court of Appeal that 'where rehabilitation seems unlikely, or where the offending or course of offending is serious, or the character and antecedents of the offender justify it, deterrence becomes a significant

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385 Ibid ss 4(e), (f)(iii).

386 Ibid s 47(3A).

387 Ibid ss 5(2)(b)–(d). This reflects the approach in other jurisdictions, for example see discussion of the Victorian *Children, Youth and Families Act 2005* (Vic) s 362 in VSAC (n 40) 52.

388 Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson, 3rd ed, 2014) 928.

389 Ibid.

390 See *DPP v NOP* [2011] TASCCA 15; *Director of Public Prosecutions v JSP* [2020] TASCCA 3.

391 See *Conroy v S* (2005) 156 A Crim R 569 [9]–[10] (Slicer J); *LWR v Lusted* (2009) 19 Tas R 233, [23]–[28] (Porter J).

392 See for example, *LWR v Lusted* (2009) 19 Tas R 233, [26] (Porter J); *TAP v Tasmania* [2014] TASCCA 5 [24]–[28] (Porter J); *DPP v NOP* [2011] TASCCA 15, [41]–[42] (Evans J).

393 [2011] TASCCA 15.

394 Ibid [41].

consideration once more'.[395] This also reflects the approach in New South Wales.[396] However, this is in contrast to the approach in Victoria and South Australia, where it has been accepted (based on an interpretation of the relevant legislation in each of those jurisdictions) that general deterrence is not an appropriate consideration in sentencing youths.[397]

Most recently, in *Director of Public Prosecutions v JSP*,[398] Estcourt J quoted the comments of the Court of Criminal Appeal in *TAP v Tasmania*:[399]

> There is no need to set out those provisions [in the *Youth Justice Act*]. Those relevant to sentencing restate the relevant principles concerning the sentencing of juvenile offenders which have long been established by the courts. The principles are that rehabilitation of the offender is always an important, if not the dominant consideration, and that any sentence should be tailored with greater emphasis on the welfare of the youth; the emphasis on rehabilitation is consistent with the broader sentencing goal of community protection …
>
> It is true that the justification for the principles concerning the sentencing of youthful offenders is that such offenders are not able to appreciate the nature and extent of their criminality. They are most likely to make ill-considered and immature decisions. … the importance of rehabilitation of a youthful offender is usually far more important than general deterrence, but that there are cases in which just punishment and general deterrence become at least equally important.[400]

In the same case, Pearce J observed that

> [o]ne of the reasons that the law generally allows lenience to young offenders is they, being immature, are 'more prone to ill-considered or rash decisions'. They 'may lack the degree of insight, judgment and self-control that is possessed by an adult' and 'may not fully appreciate the nature, seriousness and consequences of their criminal conduct'.[401]

In this case, while Estcourt J would have allowed no leniency on account of youth, Pearce J considered that youth still played a role: '[t]he sentencing factors of general deterrence directed to young men for crimes of this nature and punishment are competing countervailing considerations with allowance for the immaturity and lack of judgment of a young man'.[402]

7.1.3 Detention as a matter of last resort

International law rules and conventions state that detention is a matter of last resort for young people.[403] Under the *Youth Justice Act 1997* (Tas), it is clear that detention is expressly stated to be only imposed as a last resort and only for the shortest time necessary.[404] This is reiterated in sentencing and appeal decisions. Case law has also observed that the objectives of the *Youth Justice Act 1997* (Tas) reflect an understanding

395 (2009) 19 Tas R 233, [26] citing *JA (A Child) v Western Australia* [2008] WASCA 70, [31].

396 See *JA (A Child v Western Australia* [2008] WASCA 70; *R v GDP* (1991) 53 A Crim R 112; *Campbell v R* [2018] NSWCCA 87.

397 *CNK v The Queen* (2011) 32 VR 641; *R v P, A* [2013] SASCFC 3.

398 [2020] TASCCA 3, [45].

399 [2014] TASCCA 5.

400 [2014] TASCCA 5 [24], [26] (Porter J with whom Blow CJ and Wood J agreed).

401 Ibid [109] citations omitted.

402 Ibid.

403 See [3.2].

404 *Youth Justice Act 1997* (Tas) s 5(1)(g).

that, historically, detention can be counterproductive.[405] In *R v Chokljat*,[406] Slicer J wrote that '[t]heory and practice, research and judicial experience, show that a custodial sentence, too readily imposed or made too easily, is counterproductive'.[407] However, it has been accepted that the legislation does allow for the imposition of detention and that in some instances it may be appropriate to impose a sentence of detention 'not through reason of punishment or retribution, but as a form of control and the provision of a stable environment'.[408] In *Conroy v S*,[409] Slicer J wrote that '[t]he problem confronting the court was not one of punishment but of protection, both for the child and the community. Despite the limitations of juvenile institutions, they can provide a place of security'.[410] In a similar vein, in *LWR v Lusted*,[411] Porter J dismissed a motion to review a sentence of detention imposed by a magistrate in the Youth Division on the ground that it was manifestly excessive:

> It can properly be said that period of reasonably lengthy detention might in fact assist in the applicant's rehabilitation by providing the opportunity to address issues of substance abuse, and more generally by providing him with a secure place of stable control and influence. … The magistrate's comments on passing sentence show that his principal concern was the protection of the community. Given the applicant's history of offending, it cannot be said the magistrate erred in giving that consideration the prominence which he did.[412]

In *Tasmania v KM*, the youth offender was sentenced for aggravated armed robbery and Brett J considered that detention was the only alternative and that an 'extended period of detention will give you the opportunity to benefit from the educational and developmental resources available in Ashley, and will hopefully ensure your abstinence from drugs.'[413] In addition, in Supreme Court sentencing cases, detention has been considered appropriate to reflect the seriousness of the offending and the importance of deterrence (specific and general).[414]

7.1.4 Trauma and disadvantage

Complex issues arise as to the role of a young person's background in the sentencing process and the weight to be given to an offender's traumatic background and the effect of trauma on the neurological and psychological development of young offenders.[415] As noted, 'trauma is likely to affect children's overall functioning, their ability to interact positively with others and their risk of negative outcomes, including criminal justice involvement'.[416] Research also shows that a young person's vulnerabilities and complex needs 'might be exacerbated by spending time in custody, especially in segregation and isolation'.[417] As outlined in Part 2, the effect of trauma on adolescent behaviour and its association with offending is well documented in the literature. Studies that have examined the

[405] *Conroy v S* (2005) 156 A Crim R 596, 573 (Slicer J).

[406] [2006] TASSC 71.

[407] Ibid [2] (Slicer J).

[408] *Conroy v S* (2005) 156 A Crim R 596, 574 (Slicer J). See also *LWR v Lusted* (2009) 19 Tas R 233 (Porter J).

[409] *Conroy v S* (2005) 156 A Crim R 596.

[410] Ibid 574 (Slicer J). See also *R v Chokljat* [2006] TASSC 71, [3] (Slicer J).

[411] (2009) 19 Tas R 233.

[412] Ibid [38].

[413] Comments on passing sentence ('COPS') 16 August 2019 (Brett J).

[414] See *Tasmania v LGH*, COPS (3 May 2018).

[415] See VSAC (n 54) Chapter 2.

[416] Ibid 6.

[417] Clancey, Wang and Lin (n 7) 5.

characteristics of young offenders have highlighted the over-representation of children from areas of socioeconomic disadvantage, with problematic family backgrounds/child protection involvement and associated trauma. While child protection data does not necessarily capture the extent of childhood trauma experienced by young offenders, in Tasmania, as noted, nearly 40% of children in the youth justice system had received child protection services.

In the context of adult offending, the High Court has recognised the relevance of an offender's deprived background in determining the appropriate sentence and the relevance of childhood trauma in making an assessment of moral culpability for the purposes of sentencing.[418] In *Bugmy v The Queen*[419] ('*Bugmy*'), the High Court stated:

> The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.[420]

While the effects of childhood deprivation did not diminish over time, the High Court observed that 'the offender's deprived background [did not have] the same mitigatory relevance for all the purposes of punishment'[421] and stated that on remittance to the New South Wales Court of Criminal Appeal for sentence, it would be necessary to determine 'whether the appellant's background of profound childhood deprivation allowed the weight that would ordinarily be given to personal and general deterrence to be moderated in favour of other purposes of punishment, including rehabilitation.[422]

The principles in *Bugmy* have been accepted by the Tasmanian Supreme Court in *Tasmania v West*,[423] where Tennent J acknowledged that 'I do not cavil with the propositions stated to the effect that clearly weight needs to be given in the sentencing process to the deprived background of an offender; and that there is a recognition that the effects of profound deprivation do not diminish over time'. However, her Honour considered that while the Court should have regard to the background, 'it cannot give it so much weight that potentially the community is put at risk of your further offending following either a very short sentence or an early release from any sentence'.[424] In other cases, the court has outlined the deprived background of the offender but only referred to relevance of youth and the prospect of rehabilitation as mitigating factors that were moderated by other sentencing considerations: 'for a grave crime any entitlement to lenience arising from the appellant's age and the

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418 VSAC (n 54) 9.

419 (2013) 249 CLR 571.

420 *Bugmy v The Queen* (2013) 249 CLR 571, [43] (French CJ, Hayne, Crennan, Keifel, Bell and Keane JJ) ('*Bugmy*').

421 Ibid [44].

422 Ibid [46]. *Bugmy* was applied by the Victorian Court of Appeal in *DPP v Green* [2020] VSCA 23, where the Court stated that 'the respondent was subjected to significant abuse and degradation during the important formative years of his life … in essence, in the present case, the respondent's subjective culpability for his offending could not be realistically equated with that of a person who committed the same offences, but who had the advantage of a normal, stable and regular home environment, and who had not been subjected to sexual and physical abuse of the kind experienced by the respondent while in custody. In that way, the respondent's background constituted an important mitigating circumstance in the determination of the sentences. In addition, and importantly, the abuse perpetrated on the respondent, and the conclusions by Dr Brann, were also relevant to an evaluation of the weight to be given to the respondent's lengthy criminal history. In particular they explain, at least in part, the respondent's pattern of repeat offending over a period of more than two decades': at [82]–[84].

423 COPS, 27 October 2015 (Tennent J).

424 Ibid.

prospect of his reform is to be subordinated to the dominant sentencing considerations of general and specific deterrence, denunciation, punishment and vindication of the victim'.[425] In *Tasmania v RDA*,[426] the accused was sentenced for historical sexual abuse that occurred when he was aged between 17 or 18 and 22. In sentencing, expert evidence was adduced that at the time of the offending, 'he was still suffering from symptoms relating to trauma reflective of being raised in a dysfunctional family', that the was likely suffering from a 'Trauma-and-Stressor-Related Disorder' and that it was probable that 'this condition interfered with the defendant's normal development and may therefore have played a role in his psychosexual development'. In sentencing, Wood J noted that this evidence drew 'a causal link between his childhood trauma and a level of psychological and sexual immaturity and I give this some weight'. However, notwithstanding his age and immaturity, the level of culpability was assessed as high. The offender was originally sentenced to five years' imprisonment. However, this was reduced on appeal to five years' imprisonment with three years suspended due to the period of 40 years that had elapsed since the offences were committed and the fact that the defendant had not committed any further offences. The Court still acknowledged the gravity of the offences but imposed a suspended sentence to recognise the offender's rehabilitation.[427]

In the context of youth offenders, VSAC has written that '[t]he approach to considering childhood trauma when sentencing adults also applies to sentencing children'.[428] In Tasmania, there is limited legislative guidance on the relevance of childhood trauma under the *Youth Justice Act 1997* (Tas) and limited case law guidance from the Supreme Court on its relevance in the sentencing process for young offenders in the context of serious offending.[429] While the court is directed to have regard to dealing with a youth 'in a manner that takes into account the youth's social and family background',[430] much of the legislative focus on family in the *Youth Justice Act 1997* (Tas) views family as positive influence (enhancing role of families to minimise youth crime, manage youths and rehabilitate youth offenders;[431] preserving and strengthening family relationships;[432] and not withdrawing unnecessarily from family environment)[433] and does not provide much guidance on how to approach this in the context of a young person without a stable home or who is not safe within the family.[434] The family is viewed as protective and this has been reflected in case law:

> The rehabilitation and reformation of the young person, consistently with the need to protect the public, remains the primary consideration and focus of the Court and in that regard the court is expressly directed not to lose sight of the importance of the young person continuing in a supportive family situation and in the processes of education and employment.[435]

[425] *Cordwell v Tasmania* [2017] TASCCA 14, [23] (Estcourt J) referring to *Kirkwood v Tasmania* [2017] TASCCA 7, [9] (Pearce J).

[426] COPS, 15 May 2020 (Wood J).

[427] *RDA v Tasmania* [2021] TASCCA 4, [3] (Pearce J), [63] (Geason J), [118] (Porter AJ).

[428] VSAC (n 54) 10.

[429] See ibid Chapter 2 for a discussion of this issue in the context of Victoria.

[430] *Youth Justice Act 1997* (Tas) s 4(h).

[431] Ibid s 4(f).

[432] Ibid s 5(2)(b).

[433] Ibid s 5(2)(c).

[434] VSAC (n 54) 7.

[435] *LWR v Lusted* (2009) 19 Tas R 233, [27] (Porter J) citing *AM (A Child) v The Queen*, [30].

There is less clarity in relation to the approach to be taken to a deprived childhood without a supportive family. While trauma and disadvantage are detailed in many of the Supreme Court sentencing comments for youth offenders,[436] the recounting of these details is generally included as part of the description of the personal circumstances of the offender and factors relating to the seriousness of the offence, and the need for deterrence and denunciation are stressed in the imposition of sentence.

As recognised by VSAC, childhood trauma is relevant in the sentencing context 'in a number of ways, including a child's culpability for an offence and their ability to comprehend, comply with and respond to their sentence'.[437] VSAC has identified four ways in which childhood trauma is applicable to sentencing children:

(1) The focus of the *Youth Justice Act 1997* (Tas) is on rehabilitation and, as noted by VSAC, '[r]ehabilitation becomes especially relevant for children who have experienced trauma and neglect as they are at a particular risk of engaging in challenging behaviour and experiencing difficulty in complying with and responding to sentencing interventions'.[438] Understanding the causes of offending and the responses to be best positioned to respond to those causes is implicit in this focus on rehabilitation.[439]

(2) Consistent with the treatment of children as less culpable or blameworthy than adults due to immaturity and being '"less able to form moral judgments, less capable of controlling impulse, less aware of the consequences of acts", and they are less responsible in the sense of being less able to make wise, fully considered decisions'.[440] As discussed at [2.3.10], the 'developmental impacts of trauma can further exacerbate these attributes'.[441]

(3) Understanding of behaviour and moral norms, as well as 'capacity to control their behaviour' can be affected by trauma and related developmental issues.[442] This 'may be particularly relevant … for children who have spent time in highly conflictual, violent or abusive environments or family environments involving intergenerational criminal behaviour'.[443]

(4) Trauma may not be past trauma and so 'the court may consider the extent to the child's *current* experiences of trauma at the time of offending and sentencing in addition to considering how *past* trauma may have affected the child's development, culpability and capacity to avoid offending'.[444] As VSAC has written '[e]ven repeat offending may be symptomatic of unaddressed and ongoing trauma rather than entrenched offending patterns'.[445]

TLA has suggested that there needs to be legislative recognition of a trauma informed approach in the *Youth Justice Act 1997* (Tas) because it does not currently 'recognise the

[436] See examples in the extracts in Chapter 2 (above).

[437] VSAC (n 54) 7.

[438] Ibid 5.

[439] Ibid.

[440] Ibid 11.

[441] Ibid.

[442] Ibid.

[443] Ibid.

[444] Ibid 12.

[445] Ibid.

need for a different approach that is focused on a trauma informed approach and diverting children from the system'.[446]

7.1.5 Other factors relevant to the youth offender

Other factors relevant to the sanctioning of a youth are the age, maturity and cultural identity of the youth.[447] It has often been stressed to the young person in sentencing comments that a considerable prison sentence (or a heavier sentence) would be appropriate but for their age.[448] The court is also directed to have regard to the previous offending history of the youth.[449] As discussed, many of the cases where youths are sentenced in the Supreme Court involve repeat offenders, particularly for robbery offences. Sentencing comments make it clear that a bad record reduces the mitigation arising from the young age of the offender.[450] It would also seem to reduce the relevance of an offender's deprived childhood. Prior history has been relevant to the decision to make a detention order[451] and to the decision to sentence the youth under the *Sentencing Act 1997* (Tas) rather than the *Youth Justice Act 1997* (Tas).[452]

7.2 Sentencing options

The sentencing options available under the *Youth Justice Act 1997* (Tas), as well as the other orders that can be made, are set out in s 47 of the Act.

7.2.1 Orders served in the community

Dismissal

Dismissal is the least severe sentencing option for young offenders sentenced under the *Youth Justice Act 1997* (Tas). Dismissal means that a youth is found guilty, but the charge is dismissed and no other sentence is ordered.[453] A conviction cannot be recorded.[454]

Reprimand

A reprimand means that a youth is found guilty and the charge is dismissed and the youth is reprimanded.[455] This is a formal warning by the court. A conviction cannot be recorded.[456]

Dismissal with undertaking to be of good behaviour

A dismissal with an undertaking to be of good behaviour is a form of conditional unsupervised release. An undertaking to be of good behaviour is an agreement by a youth

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446 TLA (n 23) 17.

447 *Youth Justice Act 1997* (Tas) s 5(1)(i).

448 See for example, *Tasmania v JJL*, COPS, 3 June 2019 (Porter AJ); *Tasmania v KJW*, COPS, 10 February 2017 (Pearce J); *Tasmania v BLW*, COPS, 5 December 2017 (Porter AJ); *Tasmania v SAT,* COPS, 26 March 2019 (Pearce J); *Tasmania v DJB*, COPS, 7 December 2017 (Pearce J).

449 *Youth Justice Act 1997* (Tas) s 5(1)(j).

450 See *Tasmania v CJL*, COPS, 29 September 2017 (Pearce J).

451 For example, *Tasmania v JLR*, COPS, 9 May 2019 (Pearce J).

452 For example, *Tasmania v LTR*, COPS, 31 May 2018 (Pearce J); *Tasmania v TAD*, COPS, 27 February 2018 (Pearce J); *Tasmania v JTWR*, COPS,14 March 2019 (Geason J).

453 *Youth Justice Act 1997* (Tas) s 47(1)(a).

454 Ibid s 49(1).

455 Ibid s 47(1)(b).

456 Ibid 49(1).

to do, or not do, some particular thing for a period of no more than six months.[457] If a child breaches this undertaking, the court can take no further action.[458] A conviction cannot be recorded.[459]

Release and adjournment with conditions

Under this sanction, the youth is released and sentencing is postponed for a nominated period (no more than 12 months) on conditions set out by the court.[460] A conviction cannot be recorded.[461]

At the conclusion of the adjournment with conditions, if the youth does everything required by the conditions, the youth is discharged from the order. If the youth does not do everything required under the conditions, the youth may have to return to court and the court may impose a new order.[462]

Fine

The Youth Division can impose a fine on a youth offender.[463] When imposing a fine, the Youth Division looks at how much the youth can afford to pay, and the maximum fine amount for the youth's age.[464]

Fine amounts are described in penalty units. For the financial year 1 July 2021 to 30 June 2022, one penalty unit is $173.[465] The amount of a penalty unit is changed each year in line with inflation.

For youths aged under 15 years, the maximum fine is two penalty units (or the maximum fine that would apply to an adult offender, whichever is lower) if they are sentenced for one offence, and five penalty units (or the maximum fine that would apply to an adult offender, whichever is lower) if they are sentenced for more than one offence.[466]

For youths aged 15 or 16, the maximum fine is five penalty units (or the maximum fine that would apply to an adult offender, whichever is lower) if the youth is sentenced for one offence, and 10 penalty units (or the maximum fine that would apply to an adult offender, whichever is lower) if they are sentenced for more than one offence.[467]

For youths aged 17 or more, the maximum fine is the maximum fine which may be imposed on an adult for the same offence.[468]

The court may or may not record a conviction.[469]

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457 *Youth Justice Act 1997* (Tas) ss 47(1)(c), 51(2).

458 Ibid s 53.

459 Ibid s 49(1).

460 Ibid ss 47(1)(d), 54.

461 Ibid s 49(1).

462 Ibid s 56(4).

463 Ibid s 47(1)(e).

464 Ibid s 58.

465 *Penalty Units and Other Penalties Act 1987* (Tas) s 4.

466 *Youth Justice Act 1997* (Tas) ss 57(1), (2)(a), 3(a).

467 Ibid ss 57(1), (2)(b), 3(b).

468 Ibid ss 57(1), (2)(c), 3(c).

469 Ibid s 49(2).

Probation order

The court can impose a probation order for youths who are sentenced under the *Youth Justice Act 1997* (Tas).[470] Young people on probation orders must report to youth justice workers as required.[471] The court can attach special conditions, such as attending school or other educational programs, counselling or treatment. The youth may also be required to abstain from drinking alcohol or using controlled substances, submitting to testing for controlled substances or alcohol, to live at a specified address, and/or comply with a curfew.[472]

In stakeholder consultations, concern was raised about the lack of services to support the conditions made in orders imposed by the court. There may not be the appropriate services at all or wait lists may be too long to allow the young person to access the program or service in a timely way.

The youth must not reoffend during the order by committing an offence which, if committed by an adult, could be punishable by imprisonment.[473]

Probation orders must not last for more than two years if it is an offence for which an adult could receive a sentence of imprisonment of two years or more, and in all other cases the probation order must not last for more than one year.[474]

The court may or may not record a conviction.[475]

Community service order

The Youth Division can impose a community service order.[476] A community service order is an order that the youth do community service under the direction of a youth justice worker.

The court can attach special conditions, such as attending school or other educational programs, counselling or treatment. The youth may also be required to not drink alcohol and use controlled substances, submit to testing for controlled substances and alcohol, to live at a specified address, and/or comply with a curfew.[477]

Community service orders can only be made if a youth is 13 years or older and agrees to comply with the order. The presentence report must also state that the youth is a suitable person to perform community service and that there are appropriate community service activities available in which the youth could participate.[478] The Secretary of Communities Tasmania can approve types of activities that can be undertaken as community service, which may include education or training programs, programs run for the purpose of assisting youths who have committed offences to reintegrate into the community or health and personal development programs.[479]

[470] Ibid s 47(1)(f).

[471] Ibid s 65(1).

[472] Ibid ss 65(1), (4).

[473] Ibid s 65(1)(d).

[474] Ibid s 66.

[475] Ibid s 49(2).

[476] Ibid s 47(1)(g).

[477] Ibid ss 69(2), (4).

[478] Ibid s 70.

[479] Ibid ss 6A(1), (3).

Community service orders cannot be for more than 70 hours if the youth is 13, 14 or 15 years old and cannot be for more than 210 hours if the youth is 16 years or older.[480]

The court may or may not record a conviction.[481]

7.2.2 Orders served in detention

Young people sentenced under the *Youth Justice Act 1997* (Tas) cannot be sentenced to imprisonment. However, they can be sentenced to detention.[482]

Detention is the most severe sentence that can be imposed on a youth. Detention is a sentence of last resort — it can only be used if the court has considered all other available sentences and is satisfied that no other sentence is appropriate.[483] It cannot be imposed if an adult who committed the same offence could not be sentenced to imprisonment.[484]

A detention order must not be for more than two years.[485] At the time of sentencing, if the youth is already serving or has been sentenced to a detention order for another offence, the detention orders are served concurrently unless the court orders otherwise.[486]

If the court imposes a detention order and does not suspend the whole period of detention, the court must record a conviction.[487]

A feature of detention under the *Youth Justice Act 1997* (Tas) is the process for early release. Unlike adult offenders, non-parole periods are not set for detention orders and the parole board does not decide if a youth is released from detention. Instead, the *Youth Justice Act 1997* (Tas) makes provision for early release according to a youth's 'earliest release date'. This was explained in *LWR v Lusted*:[488]

> The Act provides for a scheme of early release from a period of detention, not unlike the adult parole system, with the significant exception that the time of early release is essentially not a discretionary exercise after serving a period set by a court, but one provided by the Act itself … That certainty of release, operating as it does in relation to a percentage of the detention period ordered, is an inherent recognition of the prospects of rehabilitation, based on youth alone.[489]

In making a detention order, the court must calculate the earliest release date.[490] This means 'the day immediately following the completion of 50% of the period of detention during which a youth is liable to be detained or 3 months, whichever is the longer'.[491]

Under the *Youth Justice Act 1997* (Tas), generally, a youth must be released under a supervised release order on the earliest release date.[492] A supervised release order is made

480 Ibid s 70(1).

481 Ibid s 49(2).

482 Ibid s 47(1)(h).

483 Ibid s 80.

484 Ibid s 81(a).

485 Ibid s 81(b).

486 Ibid ss 84, 85.

487 Ibid s 49(3).

488 (2009) 19 Tas R 233.

489 Ibid [16].

490 *Youth Justice Act 1997* (Tas) s 89A.

491 Ibid s 3.

492 Ibid s 109(1).

by the Secretary of the Department of Health and Human Services and has effect until the end of the detention period in respect of which it is made.[493]

A young person on a supervised release order is subject to certain core conditions, including that the youth:

- not commit another offence that has imprisonment as the maximum penalty during the time that the sentence is in force
- report to a youth justice worker and comply with any reasonable direction
- not move to a different residential address unless approved by the youth justice worker.[494]

The supervised release order may also include special conditions.[495] There is power for the Secretary to cancel all or any of the special conditions when the youth has been the subject of a supervised release order for six months or longer.[496]

If a young person breaches the conditions of the supervised release order (other than by committing an offence), the youth may be warned that further contravention may result in application being made to the court and if a further contravention is committed, the Secretary may apply to the court for an order to be made.[497] If the youth contravenes the order by committing an offence, the Secretary may warn the youth or apply to the court for an order.[498] On such an application, the court may cancel the order and so the youth returns to detention, continue the order as is or amend the special conditions to which the order is subject.[499] If the supervised release order is breached by further offending and the court sentences a young person to a detention order or a term of imprisonment, the supervised release order is cancelled.[500]

Suspended detention order

A suspended detention order is a term of detention that is suspended fully or in part for a specified period.[501] This is an order that is made in addition to the sentences that the court may impose under the *Youth Justice Act 1997* (Tas) s 47(1).[502] It can be made with or without recording a conviction.[503]

Where detention is fully suspended, the young person does not go to detention and is released into the community.

All suspended detention orders are made conditional on the young person:

- not committing another offence that has imprisonment as the maximum penalty during the time that the sentence is in force

493 Ibid ss 110(1), (3).
494 Ibid ss 111(1), (1A).
495 Ibid s 111(2).
496 Ibid s 115.
497 Ibid ss 117(2)(a), (4).
498 Ibid s 117(2)(b).
499 Ibid s 117(9).
500 Ibid s 119.
501 Ibid s 90(1).
502 Ibid s 47(2)(a).
503 Ibid s 49(2).

- reporting to a youth justice worker and following reasonable directions
- attending educational, personal, health and other programs as directed
- submitting to testing for controlled substances or alcohol
- undergoing medical, psychiatric, psychological and drug counselling and treatment.[504]

There are also special conditions that a young person may be required to comply with, including:

- not unreasonably missing school
- not drinking or using controlled substances
- living at a particular address
- attending educational, personal, health and other programs specified in the order
- not leaving the state without permission
- complying with a curfew order.[505]

There are limits on the length of a suspended detention order that can be imposed on a young person. If the youth is less than 16 years old, the order cannot be longer than 12 months. If the youth is 16 or 17 years old, then the order cannot be longer than two years.[506]

If the young offender does not follow the conditions of the suspended detention order, they could be ordered to serve part or all of the suspended detention order at Ashley.[507]

Rehabilitation program order

If a youth is found guilty of a family violence offence, the court may make a rehabilitation program order.[508]

The court may or may not record a conviction.[509]

7.2.3 Recording a conviction

In consultations with the Youth Crime Intervention Unit, concern was expressed that youth offenders in the Youth Division did not receive any consequences for their offending behaviour, and a particular concern was that convictions were not being recorded.

As noted, under the structure of the *Youth Justice Act 1997* (Tas), limits are placed on the types of sentences where a conviction can be recorded, with orders of detention being the only sanctions where the court must record a conviction for youth offenders. There are several sentencing orders (dismissal, reprimand, discharge with undertaking and release and adjournment with conditions) that are imposed without a conviction being recorded. It is not possible to record a conviction in these cases. In relation to fines, probation and community service orders, the magistrate has a discretion as to whether or not to record a

504 Ibid s 90(3).
505 Ibid ss 90(4), (6).
506 Ibid s 91(2).
507 Ibid s 94.
508 Ibid s 47(1)(i).
509 Ibid s 49(2).

conviction. In relation to these sentencing orders, the *Youth Justice Act 1997* (Tas) s 49(4) provides that in deciding whether or not to record a conviction:

> The Court must have regard to all the circumstances of the case, including –
>
> (a) the nature of the offence; and
>
> (b) the youth's age; and
>
> (c) any sentences or sanctions previously imposed on the youth by any court or community conference and any formal cautions previously administered to the youth; and
>
> (d) the impact the recording of a conviction will have on the youth's chances of rehabilitation generally or finding or retaining employment.

Further, s 29(4A) provides that '[i]n determining whether or not to record a conviction, the Court must ensure that the matter of the rehabilitation of the youth is given more weight than is given to any other individual matter'.[510]

7.2.4 Other orders

In addition to imposing an order under the *Youth Justice Act 1997* (Tas) s 47(1), the Youth Division may make a number of other orders.

Restitution

A restitution order can be imposed under s 47(2)(b) and contains one or more of the following requirements:

> (a) that a person who has possession or control of stolen goods restore them to the person entitled to them;
>
> (b) that the youth deliver to another person goods that are the proceeds of any disposal or realisation of the whole or part of –
>
> (i) stolen goods; or
>
> (ii) goods obtained by the disposal or realisation of the whole or part of the stolen goods;
>
> (c) that an amount not exceeding the value of stolen goods be paid to another person out of money taken from the youth's possession on his or her arrest.[511]

Compensation

There is a discretion for the Youth Division to impose a compensation order under s 47(2)(c). Preference is to be given to making a compensation order rather than fine if the youth has insufficient resources to pay both amounts.[512]

Other orders the court may make

Under the *Youth Justice Act 1997* (Tas) s 47(2)(c), the Youth Division can make any other order a court may make under another Act in respect of the offence of which the youth is found guilty (subject to the requirements of the *Youth Justice Act*). This would include orders such as driving disqualification orders under *Road Safety (Alcohol and Drugs) Act 1970* (Tas). The Youth Division can also make an area restriction order under pt 3 div 3 of the

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[510] For further information about non-conviction sentences, see TSAC, *Non-Conviction Sentences: 'Not Recording a Conviction' as a Sentencing Option* (Final Report 3, 2014).

[511] *Youth Justice Act 1997* (Tas) s 95(1).

[512] Ibid s 47(3).

Sentencing Act 1997 (Tas).[513] This is an order that means that the person must not loiter in an area or class of area specified in the order, at any time or at the times that are specified in the order. An example might be for the magistrate to make an area restriction order requiring that the young person not loiter in the Elizabeth Street or Brisbane Street Malls.

There is also a provision under the *Police Offences Act 1935* (Tas) ss 37F(2) and (3) that requires the court to impose a mandatory disqualification from driving in cases where a person under the age of 17 is convicted of motor vehicle stealing or procuring the hire or use of a motor vehicle by fraud. There is provision for the court to revoke the disqualification for a period beginning before the person obtained a driver's licence if there is sufficient evidence of rehabilitation.[514] This mandatory disqualification penalty offends against the principle contained in the *Youth Justice Act 1997* (Tas) that a youth should not be treated more severely than an adult, as the court retains a discretion as to whether to disqualify an adult offender whereas the court must impose a disqualification period on a youth.[515]

The court must also impose a disqualification from driving order until the person has paid in full the compensation order (if an order is made under the *Youth Justice Act 1997* (Tas) s 98) if the person was convicted of motor vehicle stealing or procuring the hire or use of a motor vehicle by fraud.[516] This applies to adult and youth offenders.

513 *Sentencing Act 1997* (Tas) s 5.

514 *Police Offences Act 1935* (Tas) ss 37F(6)–(7).

515 See [7.1].

516 *Police Offences Act 1935* (Tas) s 37F(4).

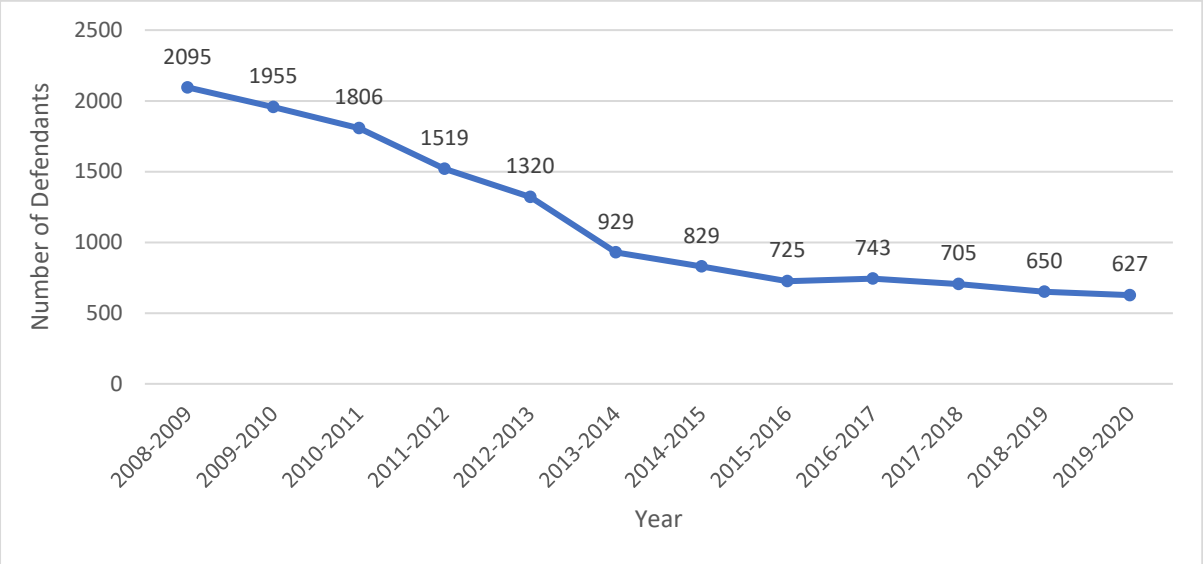
8 Overview of guilty finalisations in the Magistrates Court (Youth Justice Division)

This chapter provides an overview of guilty finalisations in the Magistrates Court (Youth Justice Division) ('Youth Division'). It examines the distribution of proven offences in the Youth Division for the period 2014–15 to 2019–20.

8.1 Overview of defendants finalised and proven guilty

As shown by Figure 8.1, there has been a significant decline in the matters finalised by the Youth Division since the late 2000s. There were close to 2000 finalisations per year in 2007–08 and 2008–9, but this dropped rapidly over the next five years and has not exceed 1000 in any financial year from 2013–14 onwards. There were 650 youth justice defendants finalised in 2018–19 and only 627 in 2019–20.[517] This needs to be understood in the context of the declining rates of youth crime.

Figure 8.1: Defendants finalised, Magistrates Court (Youth Justice Division), 2008–2009 to 2019–2020

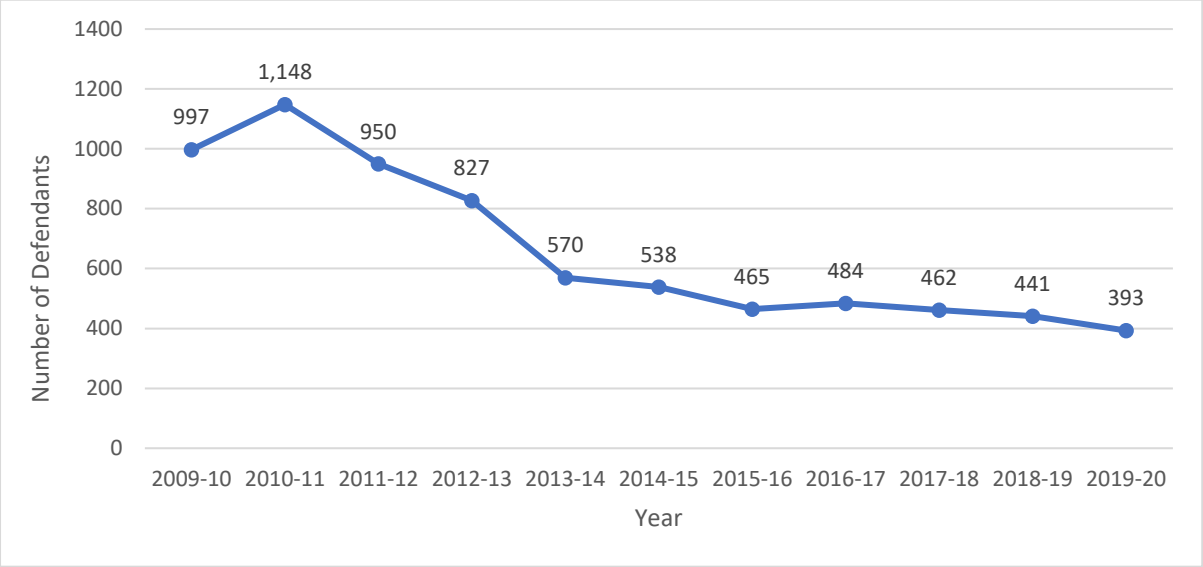


Source: Department of Justice, unpublished data

[517] Information provided by Betty Evans. This excludes breaches of court orders but includes breaches of bail which is an offence under the *Bail Act 1994* (Tas) s 9.

Figure 8.2 shows there has also been a dramatic decline in the number of defendants proven guilty in the Youth Division, where the number of young offenders declined from a high in 2010–11 of 1148 individuals to 441 in 2018–19. This is a 62% decrease.

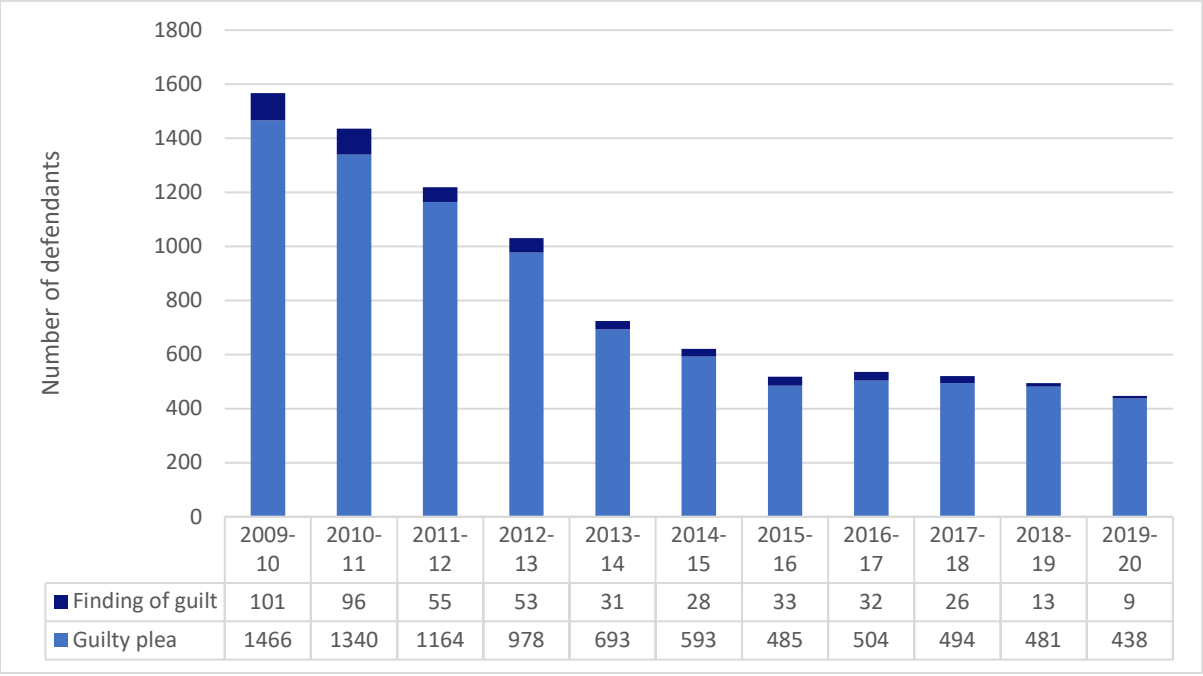
Figure 8.2: Defendants proven guilty 2009–10 to 2018–19 Magistrates Court (Youth Justice Division)



Source: Australian Bureau of Statistics, *Criminal Courts*, Data Tables 2009–10 to 2019–20

As shown by Figure 8.3, a high proportion of young offenders who are proven guilty enter a plea of guilty rather than being found guilty.

Figure 8.3: Defendants proven guilty 2009–10 to 2019–20 Magistrates Court (Youth Justice Division), by method of finalisation

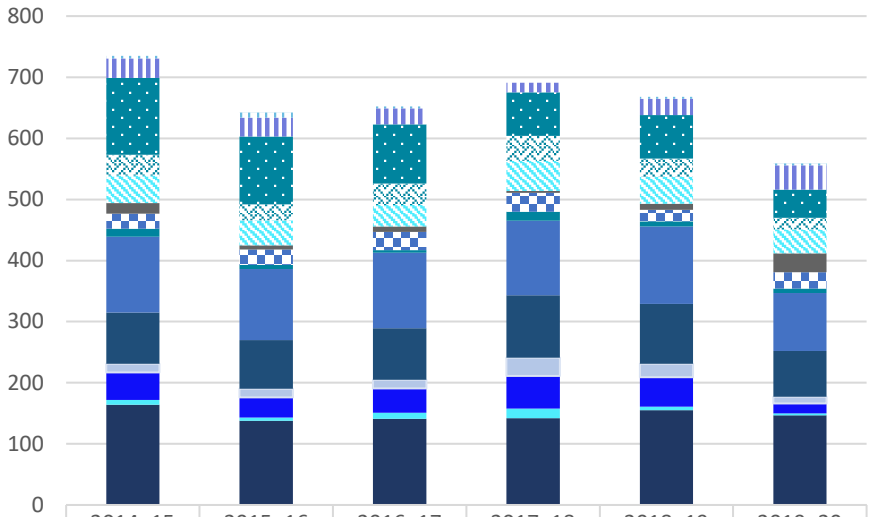


Source: Unpublished data, Department of Justice

8.2 Offence categories for defendants finalised

In relation to the matters finalised in the Youth Division, acts intended to cause injury (assault) was also the most common principal offence followed by theft. These accounted for 27.3% (assault) and 17.6% (theft) of matters finalised in 2019–20.

Figure 8.4: Offence types where matter finalised in Youth Justice Division, Tasmania 2014–15 to 2019–20



	2014–15	2015–16	2016–17	2017–18	2018–19	2019–20
Miscellaneous offences	4	8	3	0	3	3
Offences against justice	32	31	26	16	27	40
Traffic and vehicle regulatory offences	126	111	97	71	71	46
Public order offences	34	26	35	41	30	19
Property damage and environmental pollution	45	41	35	49	44	39
Weapons/explosives	17	7	9	3	10	31
Illicit drug offences	25	25	30	31	19	27
Fraud/deception	13	7	4	15	8	7
Theft	124	116	124	122	127	95
Unlawful entry with intent	84	80	84	102	98	75
Robbery/extortion	14	14	14	30	22	11
Dangerous/negligent acts	45	33	40	53	48	16
Sexual assault and related offences	8	5	10	16	6	3
Assault	164	138	141	142	155	147

ABS Criminal Courts 2019–20, Table 41

Figure 8.5 provides information about the 3115 matters where there was a guilty finalisation (a plea of guilty or a finding of guilt) in the period 2014–15 to 2019–20 based on six broad categories:[518]

Offences against the person includes offences such as assault, robbery and driving offences where there is a risk of injury to the person. Assault is the most common offence for this category.

[518] This information was provided by Department of Justice.

Offences against property include offences involving stealing, property damage, burglary, and motor vehicle stealing. Stealing offences followed by burglary are the most common offence for this category.

Driving offences include offences carried out by the driver of the vehicle. Driving offences that result in injury or risk of injury to a person are counted as offences against the person. Driving without a licence and drink driving offences are the most common offence for this category.

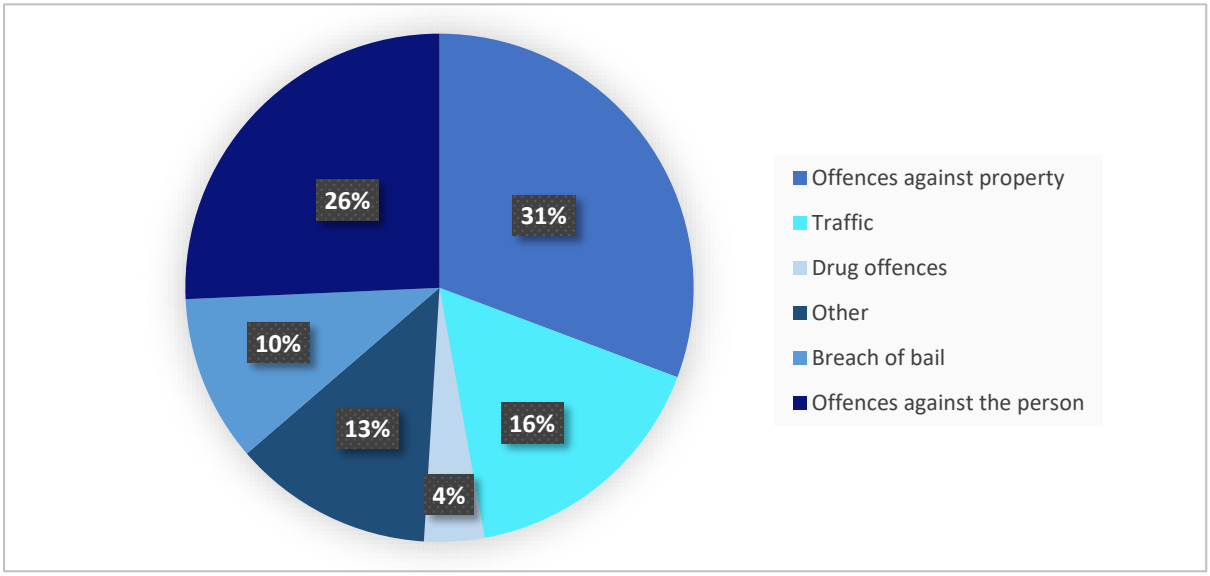
Drug offences include possession and sale of drugs.

Bail offences are offences where a young person has breached the conditions of their bail or not appeared in court as required.

Other offences include public order offences, justice procedures offences, weapons, fraud, and miscellaneous offences. The most common 'other offence' was possessing a dangerous article in a public place.

Figure 8.5 shows that offences against property followed by offences against the person represent the largest proportion at 31% and 26% of the total principal proven offences respectively. Traffic offences were the next largest category, making up 16% of total principal proven offences.

Figure 8.5: Distribution of principal proven offences, by category of offence, 2014–15 to 2019–20



Source: Department of Justice, unpublished data, 2021

In terms of the most frequently proven principal offences, in the period 2014–15 to 2019–20, common assault contrary to the *Police Offences Act 1935* (Tas) was the most frequent offence and accounted for 14.2% of all cases with guilty finalisations.[519] This was followed by stealing (9.9% or 308 cases). Burglary offences (burglary and aggravated burglary) accounted for 351 cases (11.3%). Breach of bail and breach of police bail together accounted for 302 cases finalised with a guilty plea (9.7%). The other offences in the 10 most common principal offences were:

[519] See Appendix C Table C1.

- drive while not holding a driver licence or exemption
- drive with prescribed illicit drug in blood
- motor vehicle stealing s 37B(1)
- assault a police officer.

Together, these 10 offences accounted for 59% of guilty finalisations in the period.

8.2.1 Offences against the person

There were 801 total guilty finalisations for offences against the person in the Youth Division in the period 2014–15 to 2019–20. Assault offences (common assault and *Code* assault, and assault against police officers) were the most common principal offence accounting for 68.2% of the offences against the person. Other offences in the 10 most common principal offences were:

- driving offences under the *Traffic Act 1925* (Tas)
- wounding
- aggravated robbery
- robbery.

Combined these 10 most common principal offences against the person account for 93% of guilty finalisations for offences against the person for guilty finalisations in the period and 24% of all guilty finalisations.[520]

8.2.2 Property offences

There were 957 total guilty finalisations for property offences in the Youth Division in the period 2014–15 to 2019–20. Stealing offences (stealing, motor vehicle stealing) were the most common principal offence accounting for 42% of the property offences. Other offences in the 10 most common principal property offences were:

- burglary
- aggravated burglary
- destroy or injure property
- unlawfully setting fire to property
- possession of stolen property
- arson
- graffiti.

Combined, these 10 most common principal offences account for 96% of guilty finalisations for property offences in the period and 29% of all guilty finalisations.[521]

8.2.3 Traffic offences

There were 512 total guilty finalisations for traffic offences. Offences relating to driving with alcohol or drugs in the body under the *Road Safety (Alcohol and Drugs) Act 1970* accounted

[520] See Appendix C Table C.2.

[521] See Appendix C Table C.3.

for 48.5% of all traffic offences followed by driving without a licence/drive while disqualified/suspended offences, which accounted for 38.3% of traffic offences. Other traffic offences were:

- unaccompanied learner drivers
- driving without L plates visible
- speeding.

The nine most common traffic offences against the person accounted for 88% of guilty finalisations for traffic offences in the period and 14% of all guilty finalisations.[522]

8.2.4 Other non-breach offences

There were 512 total guilty finalisations for other non-breach offences, which include fraud, weapons, public order, justice procedures and miscellaneous offences. In relation to the 11 most frequent principal proven other offences sentenced in the Youth Division in the period 2014–15 to 2019–20, unlawful possession of a dangerous article accounted for 23.3% of the other offences followed by offences under the *Misuse of Drugs Act 2001* (Tas) in relation to sell or supply a controlled plant (14%). Other offences were:

- trespass
- evade police
- minor drug offences (possess or use controlled plant or its products and cultivate controlled plant)
- public order offences (use abusive language to police officer, fail to comply with direction to leave public place and not return within specified time and disorderly conduct)
- recklessly discharge a missile
- use a computer with intent to defraud.

Combined these offences account for 71% of guilty finalisations for other offences in the period and 12% of all guilty finalisations.[523]

[522] See Appendix C Table C.4.

[523] See Appendix C Table C.5.

9 Sentencing outcomes for youths sentenced in the Magistrates Court (Youth Justice Division)

This chapter provides information about the sentences imposed in the Magistrates Court (Youth Justice Division) ('Youth Division') in the period 2014–15 to 2019–20.

9.1 Overview of sentences imposed

As noted, in the period 2014–15 to 2019–20, the Department of Justice data identified 3115 defendant guilty finalisations in the Youth Division and sentencing information was available for 3113 of these cases. Table 9.1 sets out details of the most serious sentence imposed on the defendant. Excluding sentences imposed under the *Sentencing Act 1997* (Tas), it shows that a majority of orders made under the *Youth Justice Act 1997* (Tas) are non-custodial orders (90.7%) with fewer than 1 in 10 youth offenders sentenced to a custodial order. There were few detention orders (5.8%), or fully suspended detention orders imposed by the Youth Division (3.5%).

Table 9.1: Youth Justice Division, Tasmania, most serious sentence 2014–15 to 2019–20

Sentence category	Count	Proportion (%)
Dismissed/reprimanded[524]	385	12.4
Undertaking[525]	295	9.5
Release on conditions[526]	810	26.0
Fine[527]	475	15.3
Probation[528]	213	6.8
Community service[529]	477	15.3
Suspended detention[530]	103	3.3
Detention[531]	170	3.8
Order under the *Sentencing Act 1997* (Tas)[532]	185	5.9

Source: Department of Justice, unpublished data, 2021

[524] This includes dismissals with no further sentence under the *Youth Justice Act 1997* (Tas) s 47(1)(a), dismissals with remand under the *Youth Justice Act 1997* (Tas) s 47(1)(b) and other sentences recorded as nominal penalties.

[525] This means undertakings under the *Youth Justice Act 1997* (Tas) s 47(1)(c).

[526] This means release on conditions under the *Youth Justice Act 1997* (Tas) s 47(1)(d).

[527] This includes fines imposed under the *Youth Justice Act 1997* (Tas) s 47(1)(e), court costs (imposed in four cases) and reparation orders (imposed in one case).

[528] This means probation under the *Youth Justice Act 1997* (Tas) s 47(1)(f).

[529] This means community service under the *Youth Justice Act 1997* (Tas) s 47(1)(g).

[530] This means a suspended sentence of detention under the *Youth Justice Act 1997* (Tas) ss 47(1)(h), (2)(a).

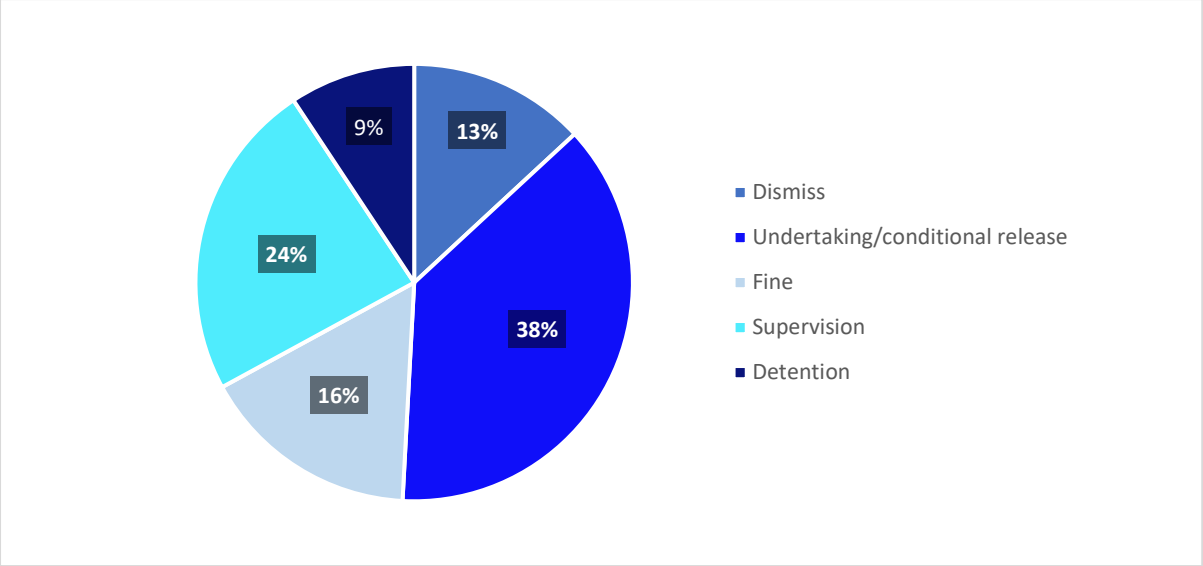
[531] This means a sentence of detention or a partially suspended sentence of detention under the *Youth Justice Act 1997* (Tas) s 47(1)(h).

[532] The court is able to make an order under the *Sentencing Act 1997* (Tas) that it is permitted to make under the *Youth Justice Act 1997* (Tas) s 161A, *Youth Justice Act 1997* (Tas) s 47(1)(ha).

Figure 9.1 shows the distribution of sentencing orders imposed by the Youth Division (excluding sentences under the *Sentencing Act 1997* (Tas)). Sentences are grouped in the following categories:

- dismissals (including dismissals with no further action and dismissals with reprimand)
- undertaking/release on conditions
- fines
- supervisory orders (including probation and community service orders); and
- detention (including suspended detention).

Figure 9.1: Distribution of sentences imposed under the *Youth Justice Act 1997* (Tas), Youth Division, 2014–15 to 2019–20



Source: Department of Justice, unpublished data, 2021

The most frequently used sentencing order for offences sentenced in the Youth Division was undertaking/released on conditions accounting for 38% of sentencing orders made, followed by supervisory orders (24%) and fines (16%).

As noted, under the *Youth Justice Act 1997* (Tas), a youth is defined for the purposes of the Act as a person under the age of 18 at the time of the offence.[533] However, an individual may no longer be under the age of 18 at the time of sentencing. In this case, the *Youth Justice Act 1997* (Tas) ss 47(1)(ha) and 161A provide that the Youth Division may exercise the powers of a court of petty sessions under the *Sentencing Act 1997* (Tas) in addition to, or instead of, any other power it may exercise under this Act. The use of these sentencing orders is set out in Table 9.2. Again, the majority of offenders received a non-custodial sentence (73.5%).

[533] See [6.1.1].

Table 9.2: Youth Justice Division, Tasmania, sentences imposed under the *Sentencing Act 1997* (Tas) 2014–15 to 2019–20

Sentence	Number	Proportion (%)
Imprisonment	14	7.6
Partially suspended sentence	12	6.5
Fully suspended sentence	23	12.4
Community Correction Order	18	9.7
Community Service Order	28	15.1
Probation Order	19	10.3
Undertaking	24	13
Driving Disqualification	43	23.2
Demerit Points	1	0.5
Discharged	2	1.1
Dismissed	1	0.5

Source: Department of Justice, unpublished data, 2021

9.2 Distribution of sentences within offence categories

For each offence category (offences against the person, property offences, driving offences, drug offences), information is provided in relation to the sentence distribution for each category for the period 2014–15 to 2019–20. This information only relates to the sentence distribution for youths sentenced to a sentencing order under the *Youth Justice Act 1997* (Tas) and not under the *Sentencing Act 1997* (Tas).[534]

9.2.1 Offences against the person

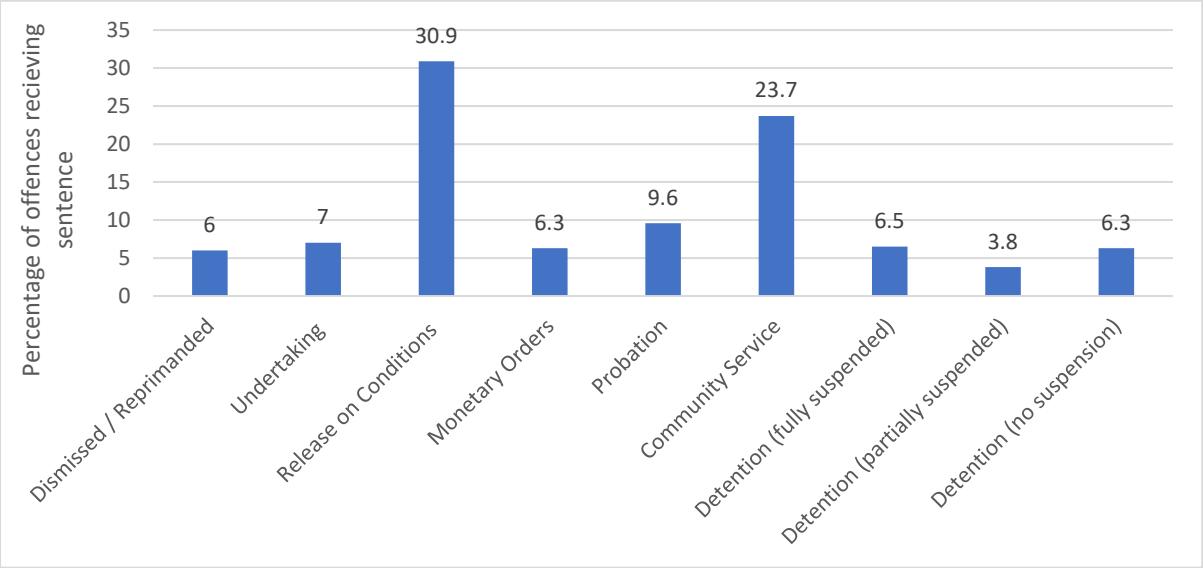
Figure 9.2 shows the sentencing pattern for offenders who committed offences against the person.

As noted, common assault contrary to the *Police Offences Act 1935* (Tas) s 35(1), assault a police officer contrary to the *Police Offences Act 1935* (Tas) s 34B(1)(a)(i) and operate a vehicle in public place in an exhibition of speed, acceleration or loss of traction contrary to the *Police Offences Act 1935* (Tas) s 37J(1) are the three most frequent offences against the person sentenced in the Youth Division, in decreasing order of frequency. These three offences accounted for 79% of all offences against the person.

The most frequent order was release on conditions (30.9%), followed by community service (23.7%) and probation (9.6%). There were 16.4% of youths who received a sentence of detention (including suspended detention) for offences against the person.

[534] It is noted that there were 185 youths sentenced to an order under the *Sentencing Act 1997* (Tas).

Figure 9.2: Sentencing distribution for offences against person, 2014–15 to 2019–20



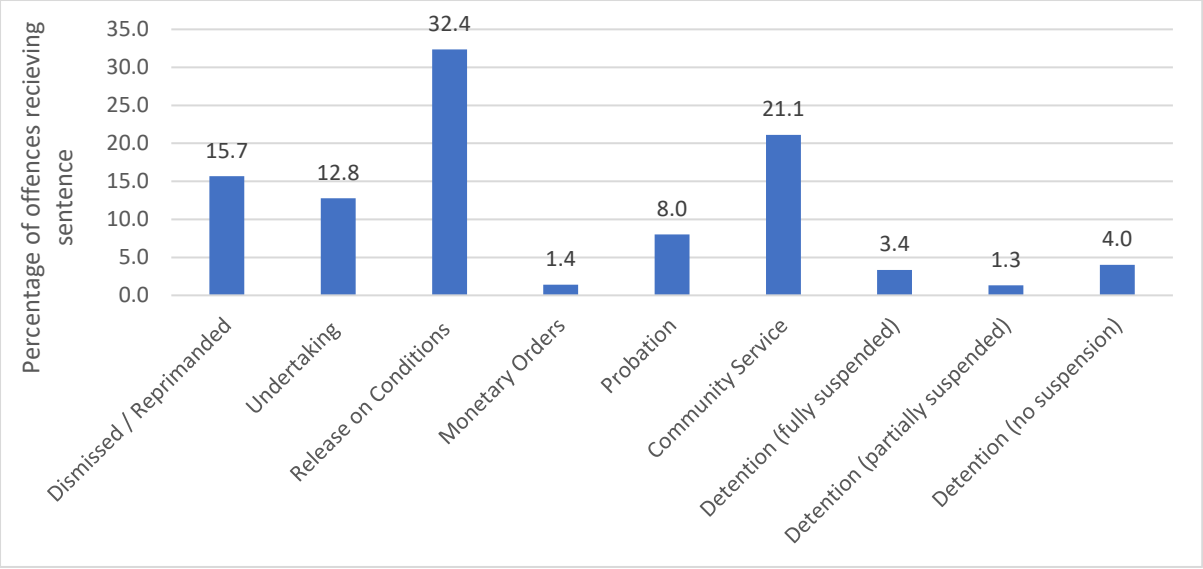
Source: Department of Justice, unpublished data, 2021

9.2.2 Property offences

Figure 9.3 shows the sentencing pattern for offenders who committed property offences. As noted, stealing contrary to the *Criminal Code* (Tas) s 234, burglary contrary to the *Criminal Code* (Tas) s 244 and aggravated burglary contrary to the *Criminal Code* s 245(a)(iii)) are the three most frequent property offences sentenced in the Youth Division, in decreasing order of frequency. These three offences accounted for 71.9% of all property offences sentenced in the Youth Division.

The most frequent order was release on conditions (32.4%), followed by community service (21.1%) and dismissal (15.7%). There were 8.3% of youths who received a sentence of detention (including suspended detention) for property offences.

Figure 9.3: Sentencing distribution for property offences, 2014–15 to 2019–20



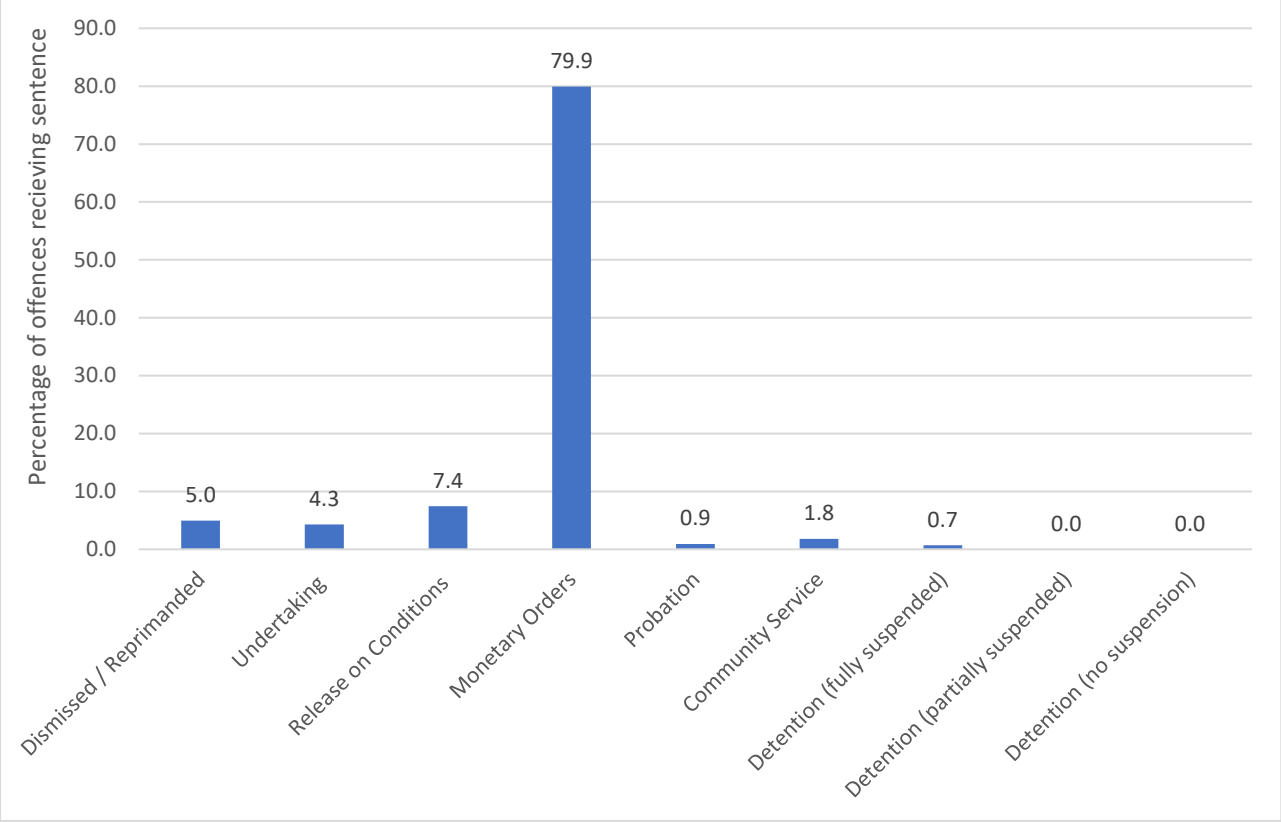
Source: Department of Justice, unpublished data, 2021

9.2.3 Driving offences

Figure 9.4 shows the sentencing pattern for offenders who committed driving offences. As discussed, the three most common driving offences (in decreasing order of frequency) were driving whilst not holding a licence, contrary to the *Vehicle and Traffic Act* (Tas) s 8(1), drive with prescribed illicit drug in blood contrary to the *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 6A(1) and drive without licence with alcohol in body contrary to the *Road Safety (Alcohol and Drugs) Act 1970* (Tas) s 6(2). These three offences accounted for 70.4% of traffic offences sentenced in the Youth Division.

The most frequent order was a monetary order (typically a fine) (79.9%), followed by release on conditions (7.4%) and dismissal (5%). There were no custodial orders made for driving offences and very few supervised sentences (2.5%).

Figure 9.4: Sentencing distribution for driving offences, 2014–15 to 2019–20



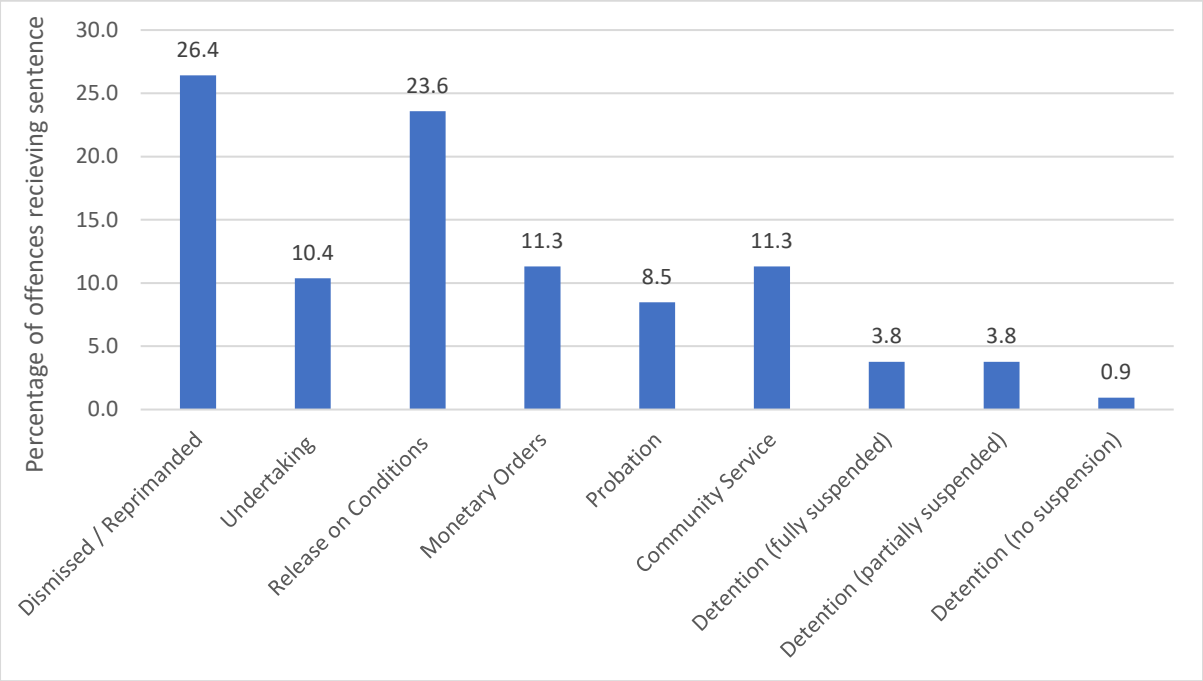
Source: Department of Justice, unpublished data, 2021

9.2.4 Drug offences

Figure 9.5 shows the sentencing pattern for offenders who committed drug offences. As discussed, the three most common drug offences (in decreasing order of frequency) were sell or supply a controlled drug, contrary to the *Misuse of Drugs Act* (Tas) s 27, possess or use a controlled plant or its products, contrary to the *Misuse of Drugs Act* (Tas) s 25, and cultivate a controlled plant, contrary to the *Misuse of Drugs Act* (Tas) s 22. These three offences accounted for 84% of drug offences sentenced in the Youth Division.

The most frequent order was a dismissal (26.4%), followed by release on conditions (23.6%) and community service and monetary orders (both 11.3%). Custodial orders were rarely imposed for drug offences (8.5% combined detention and suspended detention).

Figure 9.5: Sentencing distribution for drug offences, 2014–15 to 2019–20



Source: Department of Justice, unpublished data, 2021

10 Youths sentenced in the Supreme Court

As discussed at [6.1], the Magistrates Court (Youth Justice Division) ('Youth Division') does not have jurisdiction to hear 'prescribed offences' in relation to youths. These matters are dealt with in the Supreme Court. There are also cases where a youth will elect to have the matter determined in the Supreme Court or the Supreme Court must deal with the matter because the youth is jointly charged with an adult.[535]

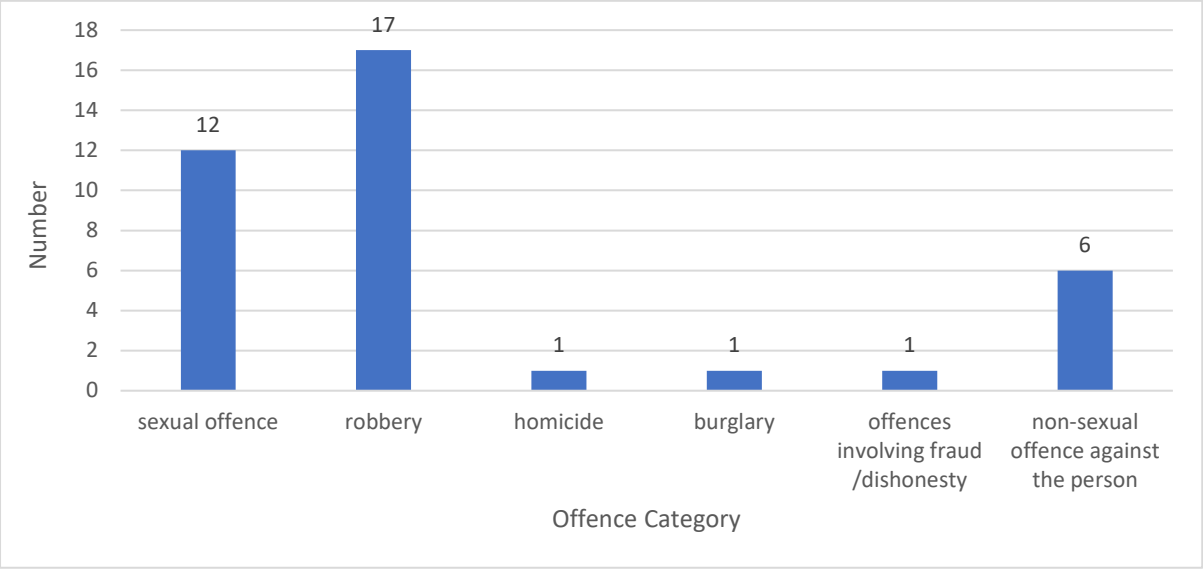
The Supreme Court may sentence a child under either the *Youth Justice Act 1997* (Tas) or the *Sentencing Act 1997* (Tas).

10.1 Youths sentenced in the Supreme Court

In the period 2016–17 to 2019–20, the Council identified 38 'youths' who were sentenced in the Supreme Court.

As shown by Figure 9.2, offences against the person were the most common broad offence category (as principal offence) for youths sentenced in the Supreme Court. This accounted for 37 out of 38 cases. This reflects the offences that are 'prescribed offences' that must be dealt with in the Supreme Court.[536] In the Supreme Court in the period 2016–17 to 2019–20, the most common offence category for which a youth was sentenced was robbery (44.7%) followed by sexual offences (31.6%).

Figure 10.1: Offence category where matter sentenced in Supreme Court, by principal offence, Tasmania, 2016–17 to 2019–20 (n = 38)



Source: Sentencing Advisory Council, Tasmania, unpublished data

[535] See [6.1.3].

[536] See [6.1.2].

In the period 2016–17 to 2019–20, there were 17 cases where robbery was the most serious offence category and there were an additional three cases where a youth received a global sentence for another offence against the person as well as a robbery offence. The most common robbery offence sentenced in the Supreme Court was aggravated armed robbery (14 out of 20 cases). There was more variation where a sexual offence was the principal offence category for offences against the person dealt with in the Supreme Court, with five of the 12 cases involving rape and four cases involving maintaining a sexual relationship with a young person/persistent sexual abuse. Other offences included indecent assault, aggravated sexual assault, attempted unlawful sexual intercourse with a young person.

An examination of the sentencing comments showed that 20 out of the 38 youths sentenced in the Supreme Court had records of prior offending (some very extensive). Of the 20 offenders who were sentenced in the Supreme Court for a robbery offence, only five had no prior convictions (and one of those five was being sentenced in the Magistrate Court the next day for other offending). An example was a case where the youth was sentenced for aggravated burglary and aggravated armed robbery committed when he was 17. He had many offences of dishonesty and violence, with a probation order being made when he was 14. He was first sentenced to actual detention when he was 15 and continued to offend until he was sentenced to imprisonment for offences committed when he was 19.[537] He was sentenced to 24 months imprisonment with six months suspended. He was in prison when he was sentenced for these offences. Similarly, in another case, the youth had a history of offending including a sentence of conditional release for a number of offences including burglary of a home, attempted motor vehicle stealing and stealing. He kept offending while subject to the conditional release order and on his next appearance in court received a deferred sentence subject to compliance with an intervention plan for a number of offences of dishonesty including aggravated burglary, stealing and common assault. He then committed the offence for which he was sentenced which was aggravated armed robbery. After this crime, he committed further offences of stealing, motor vehicle stealing and possession of cannabis.[538] He was sentenced to 18 months detention under the *Youth Justice Act 1997* (Tas) with 11 months partly suspended. The period of unsuspended detention reflected the time that he had been on remand.

In relation to individuals who were sentenced for sexual offences in the Supreme Court for offences committed when under the age of 17, in contrast to the number of youths sentenced for robbery offences with prior offences (75%), only two of the 12 youth offenders sentenced for sexual offences had prior convictions (16.6%).

Information about offender age was available in 37 out of the 38 cases, and these ranged from 10 to 17 at the time of offending (with two of these offenders being sentenced for offences committed while a youth and also for offences committed as an adult). Most offenders were sentenced when they were 18 years or older (28 out of 37 offenders) and generally these offenders were sentenced when they were aged 18 to 20. However, in relation to offenders sentenced for sexual offences, there were four out of the 12 offenders who were sentenced many years after the offence with their age at sentencing ranging from 31 to 60 years.

[537] *Tasmania v CJL*, COPS, 29 September 2017 (Pearce J).

[538] *Tasmania v NMM*, COPS, 19 October 2018 (Wood J).

10.2 Procedural matters

There are low numbers of youths sentenced in the Supreme Court, and during consultations with stakeholders, the lack of appropriate guidelines/practices for dealing with young people in that jurisdiction was raised as an issue (in contrast to the supports that are available in the Youth Division) by the Law Society. The view was expressed that the process in the Supreme Court generally treats children as 'mini adults'. The low number of youth offenders sentenced in the Supreme Court has bearing on infrastructure provision as well as the level of specialist knowledge of judges in dealing with young people.

The Office of the Director of Public Prosecutions observed that while the Supreme Court does not operate as a therapeutic court in the same way as the Youth Division, and service providers do not routinely attend the Supreme Court, in an appropriate case, such as where a deferred sentence was considered to be appropriate, accommodations would be made to ensure that bail support services and other supports were available for the youth.

A different perspective was obtained in consultations with Communities Tasmania, where a lack of information provided to Youth Justice Services in relation to matters involving young people in the Supreme Court was identified as an issue, as well as less clarity in relation to the role of a youth justice worker in the Supreme Court. It was noted that the Supreme Court did not have 'youth' specific forms and relied on adapting forms used for adult offenders. Communication gaps were also identified where an offender was currently supervised by Youth Justice Services but also had matters proceeding through the Supreme Court as an adult offender, with Community Corrections involved.

10.3 Sentencing outcomes in the Supreme Court.

10.3.1 Sentencing under the *Sentencing Act 1997* (Tas) or *Youth Justice Act 1997* (Tas)

As shown in Table 10.1, there were 17 youths who were sentenced under *Sentencing Act 1997* (Tas) and 21 youths sentenced under the *Youth Justice Act 1997* (Tas). In cases where a sexual offence was the principal offence, 9 out of 12 cases were sentenced under the *Sentencing Act 1997* (Tas). In contrast, in cases where robbery was the principal offence, only 3 out of 17 cases were sentenced under the *Sentencing Act 1997* (Tas).

Table 10.1: Sentencing under the *Sentencing Act 1997* (Tas) or *Youth Justice Act 1997* (Tas) by offence category 2016–17 to 2018–19

Offence category	*Sentencing Act 1997* (Tas)	*Youth Justice Act 1997* (Tas)
Burglary	0	1
Non-sexual offences against the person (exclude homicide and robbery)	4	2
Robbery	3	14
Sexual offences	9	3
Offences involving dishonesty	0	1
Homicide	1	0
Total	**17**	**21**

Source: Sentencing Advisory Council, Tasmania, unpublished data

In determining whether to sentence a youth under the *Sentencing Act 1997* (Tas) or *Youth Justice Act 1997* (Tas), the predominant concerns of the court identified in the sentencing comments were the seriousness of the offence and the appropriateness of the penalties available under the *Youth Justice Act 1997* (Tas) to provide a sufficient punishment. For

example, in *Tasmania v JJCH* the offender entered a plea of guilty to a count of rape. In discussing the issue of whether to sentence the offender under the *Sentencing Act 1997* (Tas) as opposed to the *Youth Justice Act 1997* (Tas), Geason J reasoned:

> The State on the other hand urges me to sentence you as an adult offender under the Sentencing Act as opposed to the Youth Justice Act. The gravity of the conduct which is involved in these charges lends support to that submission. I have decided that the obligation to impose a sentence which reflects the seriousness of the crimes for which you have been charged must prevail over my preference to deal with you under the Youth Justice Act, a preference based upon your youth and its emphasis on rehabilitation. That Act imposes sentencing maxima, and is not sufficiently flexible to accommodate the sentence I regard as appropriate.[539]

Under the principles applicable to sentencing young offenders under the *Sentencing Act 1997* (Tas), rehabilitation remains an important consideration, however, other sentencing considerations assume greater importance in cases where offending is grave.[540] In the context of sexual offending, Pearce J (with whom Wood J agreed) said:

> There was distinct need to impose a sentence which gave weight to general deterrence, denunciation and vindication of the victim. As to general deterrence, there was a need to uphold the policy of the consent and mistake provisions of the Code, to make clear to men, especially young men, their criminal responsibility for sexual acts committed against a person so affected by alcohol or drugs as to be unable to freely agree.[541]

In contrast to cases where offence seriousness and the need to mark the gravity of the conduct have resulted in sentencing under the *Sentencing Act 1997* (Tas), there was one case where the judge decided to sentence under the *Sentencing Act 1997* (Tas) as this would be an order that was in the interests of the offender. In this case, the offender entered a plea of guilty to wounding and defence counsel submitted that the offender should be sentenced as an adult because it opened up sentencing options which were not available if she had been sentenced as a youth. The offender had been diagnosed with schizophrenia and defence counsel submitted that a supervision order pursuant to s 75(2A) of the *Sentencing Act 1997* (Tas) should be made. A supervision order is an indefinite forensic order that remains in force until discharged by the Supreme Court.[542] This was accepted by the judge as being the most appropriate response and the offender was sentenced to supervision by the Chief Forensic Psychiatrist (with conditions).[543]

Discussions with the Office of the Director of Public Prosecutions indicated the approach of the Supreme Court to making decisions about whether to sentence under the *Sentencing Act 1997* (Tas) or the *Youth Justice Act 1997* (Tas) worked well in practice.

10.3.2 Sentence distribution in the higher courts

Figure 10.2 shows the sentencing outcomes for the 38 youth offenders sentenced in the Supreme Court between 2016–17 and 2019–20.

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539 COPS, 29 June 2019 (Geason J).

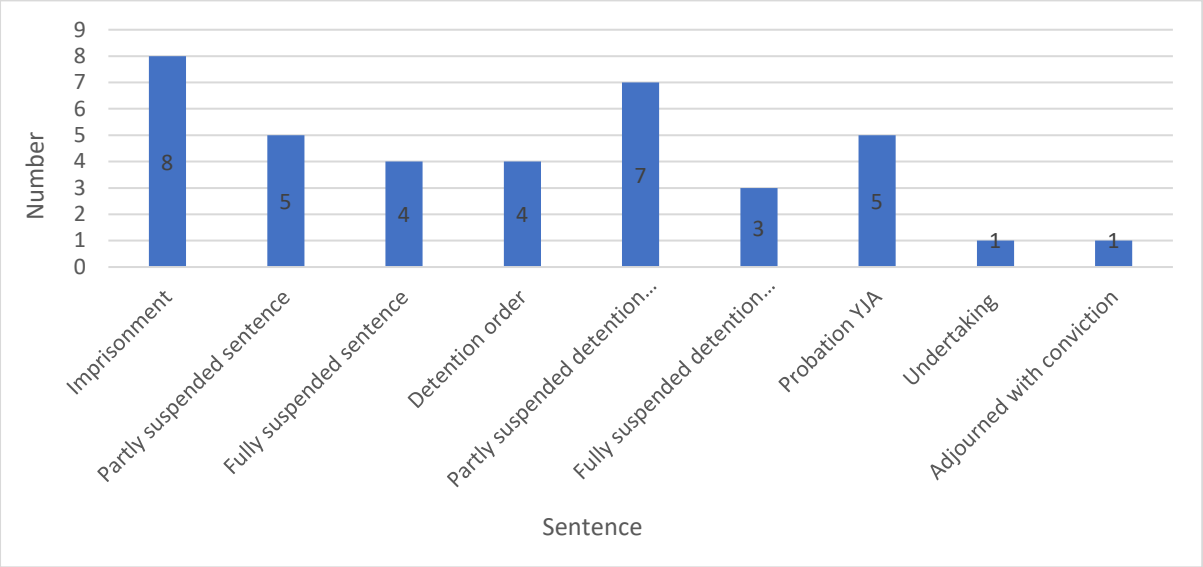
540 See *TPA v Tasmania* [2014] TASCCA 5, [23]–[29] (Porter J, Blow CJ and Wood J agreeing).

541 *Director of Public Prosecutions v JSP* [2020] TASCCA 3, [108] (Pearce J), [10] (Wood J).

542 See discussion of supervision order in Tasmania Law Reform Institute, *Review of the Defence of Insanity in s 16 of the Criminal Code and Fitness to Plead* (Final Report 28, 2019) 242–244.

543 *Tasmania v AMH*, COPS, 10 June 2015 (Tennent J). It is noted that there is power under the *Youth Justice Act 1997* (Tas) s 105 to adjourn proceedings to determine mental health or disability of youth and that the provisions of the *Criminal Justice (Mental Impairment) Act 1999* apply to all courts (this includes provisions in relation to fitness to stand trial and procedures for dealing with persons found not guilty by reason of insanity).

Figure 10.2: Number of people sentenced as youths in the Supreme Court, by sentence type, 2016–17 to 2019–20



Source: Sentencing Advisory Council, Tasmania, unpublished data

For the eight youth offenders who received a sentence of imprisonment, the longest sentence was 10 years (offending included six counts of rape and two counts of dangerous driving) and the lowest sentence was six weeks (aggravated burglary and assault). The median sentence was 48 months (four years). There were no non-custodial orders made for those youth offenders sentenced under the *Sentencing Act 1997* (Tas), which is not unexpected given the decision made that the nature of the offence required sentencing as an adult.

For the four youth offenders who received sentences of detention, the highest sentence was 20 months detention with an 18-month probation order on release (aggravated robbery and stealing). There were two youths sentenced to 12 months detention (one case involving aggravated armed robbery and the other armed robbery). In both cases, the offender was also sentenced to a probation order on release (12 months and 18 months respectively). The other sentences of detention were three months with an 18-month probation order on release (receiving stolen goods). A feature of four of the seven partly suspended detention orders imposed under the *Youth Justice Act 1997* (Tas) was the decision of the court to order that the suspension take place from the date of sentencing (with the unsuspended component reflecting the time on remand).

For the five youth offenders who received a probation order under the *Youth Justice Act 1997* (Tas) as the most serious sentence, the probation orders ranged in length from a maximum of two years (two cases) to low of 12 months (three cases)

11 Youth detention

This chapter provides information about young people held in detention in Tasmania. It provides details in relation to the division between sentenced and unsentenced detention, as well as the sentence lengths when youth offenders are sentenced to detention.[544]

11.1 Number of young people in detention

The 2021 AIHW publication, *Youth Justice in Australia 2019–20*, contains the most recent published data on the number of children held in detention. Other recent information is contained in the RoGS.

Using RoGS data, as shown by Figure 11.1, in 2019–20, on an average day (meaning the average number on any given day over the period examined) there were 14 youths aged 10 to 17 in detention in Tasmania.[545] This represented a rate of 2.8 per 10,000 young people. This is higher than the national rate of 2.7 per 10,000 young people.[546]

The AIHW data show that detention rates rose in Tasmania from 1.4 to 2.8 per 10,000 between 2015–16 to 2019–20 with the number of young people in detention rising by 68%.[547] This was contrary to the trend in most other states and territories.[548] However, as noted, there are very low numbers of young people in detention and so rates should be used with caution.

[544] Additional issues beyond the scope of this paper include the relationships between sanctions imposed and transfers between the adult and youth justice systems. These issues include the nature of system interfaces (ie between adult prison and youth detention) including transfer between systems; how is remand operationalised in regards the various forms of accommodation/institutions and the circumstances under which children/young adults are transferred from adult systems to AYDC and vice versa.

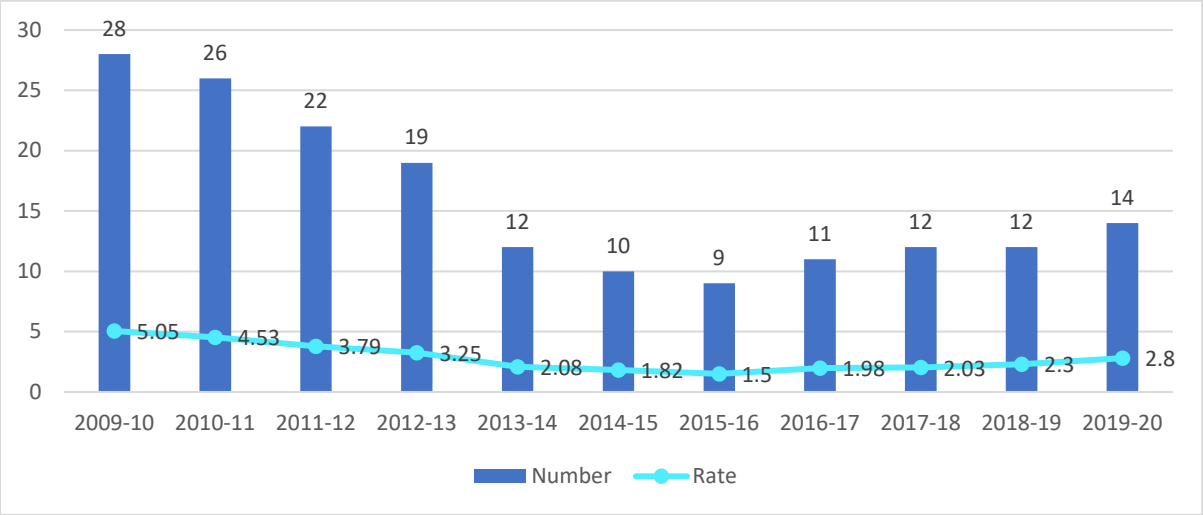
[545] Productivity Commission (n 17) Part F – Community Services, Chapter 17 – Youth Justice Services, Table 17A.1. It is noted that daily average figures are rounded to the nearest whole numbers. For 2019–20, it is also noted that only days where a young person was aged 10–17 are included. The number of days under supervision while the person was aged 18 years are not included. For earlier years, days after the young person turned 18 may have been included if the age at the start of the supervision period or financial year was 17. This means fewer days under supervision are counted in 2019–20 compared to previous year: see Productivity Commission (n 17) Part F – Community Services, Chapter 17 – Youth Justice Services, note (a) to Table 17A.1. Rates are calculated from the number of young people on an average day rounded to whole numbers and estimated population at 31 December: at note (j). It is noted that the AIHW specifies 15.7 young people in detention on an average day: AIHW, 'Data tables: Youth justice in Australia 2019–20 supplementary tables—Detentions: S74 to S127s' *Youth justice in Australia 2019-20* (28 May 2021) Table S109a <https://www.aihw.gov.au/reports-data/health-welfare-services/youth-justice/data>.

[546] Ibid.

[547] AIHW (n 59) 35.

[548] Ibid.

Figure 11.1: Young people aged 10–17 in detention on an average day 2009–10 to 2019–20, number and rate per 10,000, Tasmania

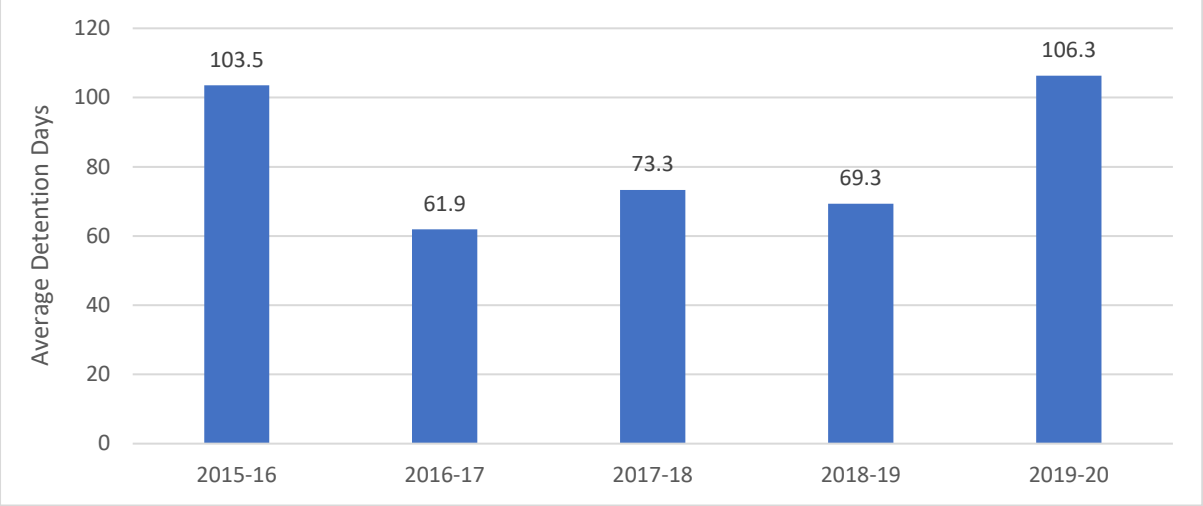


Source RoGS (2021) Table 17A.1

While there are relatively few young people in detention on an average day, the AIHW observed that 'almost half (46% or 4,717 of 10,222) of all young people who were supervised during 2019–20 had been in detention at some time during the year'.[549] In Tasmania, this proportion was 22% (or 53 of 242) of all young people supervised during that year.[550] The difference between the number of young people in detention on an average day and the number who had been in detention during the year is said to reflect 'the fact that young people spend substantially less time in detention'.[551]

As set out in Figure 11.2, the average length of time young people spent in detention in Tasmania was 106.3 days in 2019–20.

Figure 11.2: Average length of time young people spent in detention, 2014–15 to 2019–20 (days) Tasmania[552]



Source AIHW Table S104

[549] Ibid 5.

[550] Ibid.

[551] Ibid.

[552] Average duration is calculated from the summed length of periods of detention that occurred within the financial year, AIHW (n 545) Table S104 note 1.

11.2 Characteristics of young people in detention

Victorian research has shown that 'children who have suffered abuse, neglect and/or have been known to the child protection system … [are] over-represented among children and young people in custody (on sentence and on remand).[553] In addition, children with substance abuse issues, mental health issues and cognitive functioning difficulties are also over-represented.[554]

In terms of the characteristics of young people in detention, during the year for 2019–20 in Tasmania, there were 11 who were aged 15, 13 who were aged 16 and 23 who were aged 17.[555] For young people in detention, there were 11 young people who were between 10–13 years old at first supervision and 42 who were between 14–17 years old during this period. It is noted that this first supervision may not have been in 2019–20.[556]

During 2019–20 on an average day, there were 6.3 young Indigenous people in detention compared to 9.4 non-Indigenous young people.[557] In Tasmania, the rate of young Indigenous Australians aged 10–17 on an average day in detention in 2019–20 was 10.8 per 10,000 compared to a non-Indigenous rate of 1.9 per 10,000.[558]

Australian data also show that the majority of children in youth detention have not been sentenced. On an average day in 2019–20, of all young people in detention aged 10 or over, 68% (about two out of three) were unsentenced.[559] This means that they may have been charged with an offence and were awaiting the outcome of their court matter or they had been found or pleaded guilty and were awaiting sentence.[560] Data from Tasmania show that on an average day in 2019–20, there were 14.3 young people aged 10–17 in detention with a majority of young people aged 10 to 17 unsentenced (10.3) compared to sentenced (6).[561] The number of unsentenced young people aged 10–17 received into detention in Tasmania during the year 2019–20 was 51.[562]

In its consideration of sentencing of children on remand, VSAC observed that there has been an increase in the proportion of all children in detention who are unsentenced.[563]

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553 VSAC, *Children held on remand in Victoria: A Report on Sentencing Outcomes* (Report, 2020) 22.

554 Ibid.

555 AIHW (n 545) Table S74b. In terms of young people aged 10–13, there were zero or rounded to zero. In terms of young people aged 14, the number was not published due to small numbers, confidentiality, and/or reliability concerns. Age is calculated as at start of financial year if first period in the relevant year began before the start of the financial year, otherwise age calculated as at start of first period of detention in the relevant year.

556 Ibid Table S95. Age is calculated as at the start of the first supervision period.

557 Ibid Table S75a. It is noted that for 2019–20, young people in detention aged 18 and over in detention during the year have been excluded due to small numbers: see note to Table S75. It is noted that number of young people on an average day may not sum to total due to rounding.

558 Ibid Table S77a.

559 AIHW (n 59) 18.

560 Ibid.

561 AIHW (n 545) Table S110a. It is noted that the number of sentenced and unsentenced young people on an average day may not sum to total number of young people as young people may have changed legal status during the same day or been on both types of orders at the same time: at note 1. Also, the data should be interpreted with caution due to potential issues with recording and updating custodial order details in Tasmania: at note 4.

562 Ibid Table S110b. It is noted that the number of sentenced and unsentenced young people on an average day may not sum to total number of young people as young people may have changed legal status during the same day or been on both types of orders at the same time: at note 1. Also, the data should be interpreted with caution due to potential issues with recording and updating custodial order details in Tasmania: at note 4.

563 VSAC (n 553) 3.

Concerns about the proportion of young people on remand have been raised in recent Australian reviews and inquiries into the youth justice system, which have highlighted the disruptive consequences of short periods of remand with little rehabilitative benefit.[564]

Concerns about the rates of remand of youth in Tasmania were raised as long ago as 2005 by the Commissioner for Children.[565] In 2013, the evaluation of the operation of the Youth Justice Pilot identified concerns about the high numbers of youth detainees on remand and explanations provided included a lack of suitable accommodation for young offenders and bail support programs to maintain young people in the community.[566] Similar observations were made in 2016 by Noetic: '[a]cecdotally, young people are often refused bail because they do not have access to safe accommodation and need to be remanded for their protection'.[567] This is inconsistent with the principle that detention should be a matter of last resort.[568] Other concerns in relation to the consequences of remand on young people include: separation from family and community, disruption to education and employment, association with sentenced young offenders, not being able to access programs, being more likely to receive a remand period following a future court appearance and more likely to be given a sentence of incarceration than young people who received bail.[569]

In consultations with stakeholders, concern about appropriate housing was frequently identified as a factor in the high level of young people on remand. In its research, TLA also identified a lack of suitable accommodation as a reason why young people are refused bail.[570] TLA recommended that there be a funded bail support program for children that includes bail support officers who have access to funds for accommodation and who are able to coordinate appropriate support services.[571] In consultations, the view was expressed that some young people were being remanded to allow for their welfare needs to be met. The Council also heard of some young people who were choosing not to apply for bail given the stable structure and security offered at AYDC. Some stakeholders queried whether there was a different approach to the granting of bail from out of hours justices compared to dedicated magistrates sitting in the Youth Division, with the sense being that bail was more difficult to obtain out of hours.

Other possible explanations provided in stakeholder consultations included the high rates of offending for some young people meaning that bail was denied or revoked as the young person offended while on bail. Curfew conditions attached to bail orders, while providing a measure of community protection, were said to be problematic for some young people, particularly those with instable living arrangements, and this led to breaches of bail. TLA identified the difficulties created where a child is released on bail by police with onerous conditions, even in cases of minor offending. This 'can lead to more serious charges of breaching bail conditions, which not only lead to further punishment, but have an adverse effect on future bail applications'.[572] As found by the Council, breach of bail and breach of

564 Clancey, Wang and Lin (n 7) 9.

565 See AIC, *Review of Data on Juvenile Remandees in Tasmania* (Final Report, 2005).

566 Stojcevski (n 351) 54.

567 Noetic Solutions (n 199) 14.

568 Ibid; Commissioner for Children, *Submission Age of Criminal Responsibility Review*, 28 February 2020, 7 <https://www.childcomm.tas.gov.au/publications/>.

569 Cunneen, White and Richards (n 5) 282–83.

570 TLA (n 23) 18.

571 Ibid 19.

572 Ibid 18.

police bail accounted for 9.7% of guilty finalisations the Youth Division in the period 2014–15 to 2019–20.[573]

Time on remand is linked with sentencing outcomes. VSAC has observed that 'there is a strong link between remand and sentencing' given that a court may 'consider imposing a custodial sentence, where they may not otherwise, if the child has already been exposed to the custodial environment' or the court may consider that 'it would be "unduly punitive" to impose a non-custodial order with condition if the child has already been in custody for a period of time'.[574] Further, VSAC writes that '[c]ontact with the justice system, both as a child and as an adult, is not only a predictor of ongoing contact with the system but also an indirect contributor to it'.[575]

In terms of sentencing outcomes for young people held on remand, VSAC found that 'two-thirds of children held on remand did not ultimately receive a custodial sentence'.[576] VSAC also found that 31 of the 195 (16%) of sentences imposed on children in the Children's Court were time served sentences, and in two cases the sentenced imposed was less than the time in remand.[577] VSAC has observed that this is a concern because '[m]ost notably, some people who receive [a] custodial sentence may not have received such a disposition had they not be held on remand'.[578] It was not possible within the scope of this research paper to examine sentencing of youths held on remand at the same level of detail as in Victoria. However, an examination of sentencing comments from the Tasmanian Supreme Court for the period 2016–17 to 2019–20 shows that five out of 11 youths (45.5%) sentenced to a custodial sentence under the *Youth Justice Act 1997* (Tas) were sentenced to a period of actual detention equivalent to time served.[579] This was confirmed by TLA, who observed that '[i]t is commonly the case that once the case is heard the child is released without serving any further time in custody'.[580] Further, for some youth offenders who have spent time on remand, the material effect of remand may be worse than the final sentence disposition.

11.3 Sentenced detention

11.3.1 Use of detention as a sentencing order

As discussed, there were 273 young people sentenced to detention by the Youth Division in the period 2014–15 to 2019–20. There were four young people sentenced to full-time detention and seven sentenced to a partly suspended detention order by the Supreme Court in the period 2016–17 to 2019–20. There were 170 youths sentenced to full-time detention (including partly suspended detention orders) and 103 sentenced to a fully suspended detention order by the Youth Division in the period 2014–15 to 2019–20. This accounted for 9.1% of youths sentenced in the Youth Division and 28.9% of youths sentenced in the Supreme Court. In addition, it is noted that the Supreme Court sentenced 13 (34%) young people to imprisonment (either full-time imprisonment or a partly suspended sentence).[581]

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[573] See [8.2].

[574] VSAC (n 553) 5.

[575] Ibid.

[576] Ibid 42.

[577] Ibid 45. In the final case, the relationship between remand period and sentence was unclear.

[578] Ibid.

[579] This includes detention and partly suspended sentences of detention.

[580] TLA (n 23) 18.

[581] Detained at Ashley Youth Detention Centre until 18.

There were 26 (0.8%) of youths sentenced in the Youth Division to imprisonment (either full-time imprisonment or a partly suspended sentence).

As discussed, research has shown the damaging and criminogenic effect of detention. In addition, a feature of youth justice in Tasmania is the principle that detention is a matter of last resort. This would appear to be reflected in the operation of the youth justice system, particularly in the Youth Division, given the low numbers of youth offenders sentenced to detention (either full-time or partly suspended). However, there are some young people for whom detention is the appropriate sanction and recent inquiries into youth justice have recommended that 'detention should adopt a therapeutic rather than punitive approach for the purposes of reducing reoffending.'[582] This is an action item set out in Tasmanian government's Youth at Risk Strategy.[583]

Earlier reviews of AYDC were critical of the approach and services available for young people in detention.[584] In 2016, a report for the Tasmanian Government on custodial youth justice prepared by Noetic Solutions recommended the construction of two purpose-built secure detention facilities to replace AYDC to allow for a redefinition of the custodial service delivery model 'based on a clearly understood philosophy and vision, underpinned by trauma-informed practice and a true therapeutic approach'.[585] More recently, AYDC developed the 'AYDC Practice Framework' which is based on trauma-informed best-practice.[586] Based on the literature review, the framework is informed by the common elements of trauma-informed models for working with young people. Further, in consultations with stakeholders, the Council heard that the services and supports that are available to young people at AYDC are not available or accessible for young people in the community, such as stable accommodation, access to drug and alcohol services and mental health support. However, other feedback received in the consultation process highlighted concerns about the appropriateness of AYDC as a place for 'rehabilitation' given its track record for recidivism and the existence of numerous and recurrent allegations of staff misconduct.[587] Further, it was stated that it was necessary to dispel the myth that because it is not called 'imprisonment' that AYDC is anything other than a prison.[588] Concerns about the appropriateness of AYDC as a facility to address the needs of young people has led the Tasmanian Government to announce its closure and future replacement with two smaller facilities that will be based on 'a service delivery model focused on early intervention, diversion and detention as a last resort measure.'[589]

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582 Clancey, Wang and Lin (n 7) 10.

583 Tasmanian Government, *Youth at Risk Strategy Paper* (2017) <https://www.dhhs.tas.gov.au/youth/youth_justice/youth_at_risk> 20.

584 See Custodial Inspector, *Inspection of Ashley Youth Detention Centre in Tasmania, 2017 Health and Wellbeing Inspection Report* (2018) 22, 27; Leanne McLean, Commission for Children and Young People, Letter to Hon Roger Jaensch, 18 October 2019.

585 Noetic Solutions (n 199) 4.

586 See Kingston (n 231).

587 White (n 136). See further, Office of the Custodial Inspector Tasmania, *Resources and Systems Inspection Report: Inspection of Youth Custodial Services in Tasmania, 2019* (Tabled in Tasmanian Parliament 2021); Noetic Solutions (n 199) 11–12.

588 White (n 136). See also ABC News, 'Former Premier Labels Ashley a 'Mini Risdon Prison', Urges its Closure', 15 December 2020 <https://www.abc.net.au/news/2020-12-15/former-premier-giddings-urges-ashley-youth-detention-closure/12985954>.

589 Peter Gutwein and Sarah Courtney, 'Ashley Youth Detention Centre to Close' (Press Release, 9 September 2021) <https://www.premier.tas.gov.au/>.

11.3.2 Detention length imposed at sentencing

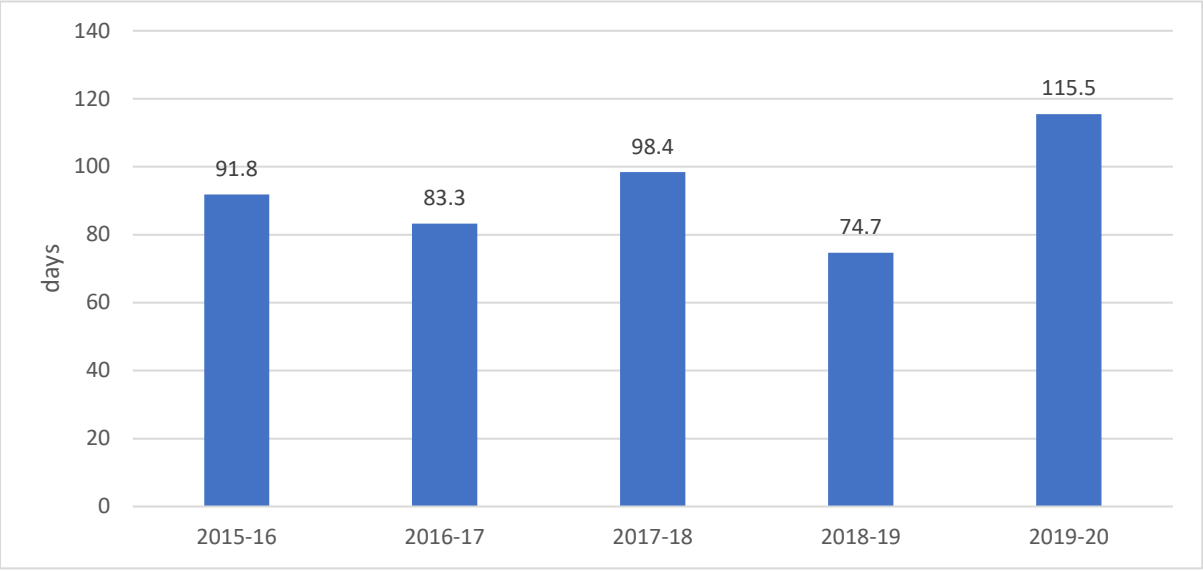
As noted at [10.3.2], there were only four youths sentenced to full-time detention by the Supreme Court in the period 2016–17 to 2019–20 with the longest sentence being 20 months detention with an 18-month probation order on release (aggravated robbery and stealing). There were two youths sentenced to 12 months detention (one case involving aggravated armed robbery and the other armed robbery). In both cases, the offender was also sentenced to a probation order on release (12 months and 18 months respectively). The other sentences of detention were three months with an 18-month probation order on release (receiving stolen goods).

In relation to youths sentenced in the Youth Division, there were 116 youths sentenced to a full-time detention order. The minimum term was seven days' detention and the longest sentence was 15 months' detention. The median term was four months' detention. In relation to youths sentenced to full-time detention for offences against the person (n = 48), the minimum term was seven days' detention and the longest sentence was 15 months' detention. The median term was five months' detention. In relation to youths sentenced to full-time detention for property offences (n = 37), the minimum term was 14 days' detention and the longest sentence was 12 months' detention. The median term was two months' detention.

11.3.3 Length of time spent in detention

As shown in Figure 11.4, AIHW data show the average length of time spent in sentenced detention for youth offenders in the period 2015–16 to 2019–20.

Figure 11.3: Average length of time spent in sentenced detention by year 2015–16 to 2019–20 (days), Tasmania



Source: AIHW Table S126

Appendix A: Consultations

The Council consulted with key youth justice stakeholders to discuss the project and its findings. The Council held a number of individual and group consultation meetings. The Council also provided an opportunity to provide written comments.

Stakeholders consulted included:

- The Chief Justice of the Supreme Court
- The Chief Magistrate
- The Commissioner for Children and Young People
- Representative of the Office of the Director of Public Prosecutions
- Representatives of Communities Tasmania
- Tasmania Legal Aid
- The Law Society of Tasmania
- Community Legal Centre (Hobart)
- Representatives of the Department of Education
- Representatives of the Department of Health
- Representatives of Tasmania Police

Written feedback was received from the Link Youth Health Service and Rob White, Distinguished Professor, Criminology.

Appendix B: Use of pre-court diversion in Tasmania

Data provided by Tasmania Police: Extraction date 30 October 2020. Data source: Prosecution System, Information Bureau, Drug Offence Reporting and Fines and Infringement Notices Database.

Table B.1: Count of youth offender files with an informal caution by financial year by offence category (for incidents that occurred between 1 July 2010 and 30 Jun 2019)[590]

Offence Category	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
Crime	439	409	379	311	275	236	271	248	176
Drugs	55	183	164	158	164	147	130	157	125
Marine	24	17	5	10	16	5	5	8	3
Other	25	30	20	18	31	27	20	23	11
Public Order	699	783	431	297	274	267	202	153	136
Traffic	190	206	187	158	108	95	89	81	51
Total	**1432**	**1628**	**1186**	**952**	**868**	**777**	**717**	**670**	**502**

Table B.2: Count of youth offender files with an informal caution in 2018–19 by offence category and offence subcategory, 10 most common subcategories[591]

Crime	2018–19
Injure/Destroy Property	53
Stealing	74
Trespass	37
Drugs	
Not Serious Drug	123
Public Order	
Liquor-Related	60
Street	57
Tobacco	20
Traffic	
Cyclist/Animal Rider	16
Driver's Licence	17
Seatbelt / Safety	13

[590] Department of Police, Fire and Emergency Management, unpublished data from: The Information Bureau. Extraction date: 30 October 2020.

[591] Department of Police, Fire and Emergency Management, unpublished data from: The Information Bureau. Extraction date: 30 October 2020.

Figure B.1: Count of youth offender files with an informal caution in 2018–19 by offence crime category and offence subcategory

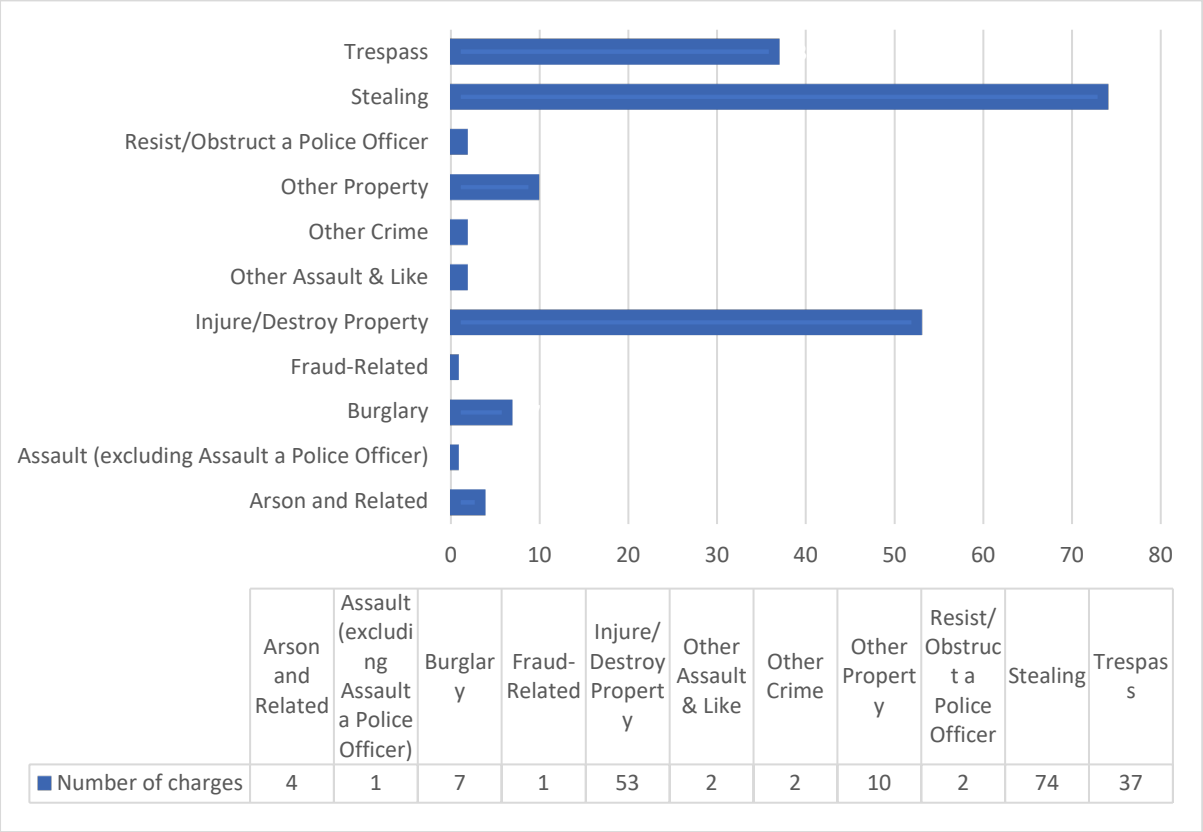


Table B.3: Count of youth offender files with a formal caution by financial year by offence category (for incidents that occurred between 1 July 2010 and 30 Jun 2019) [592]

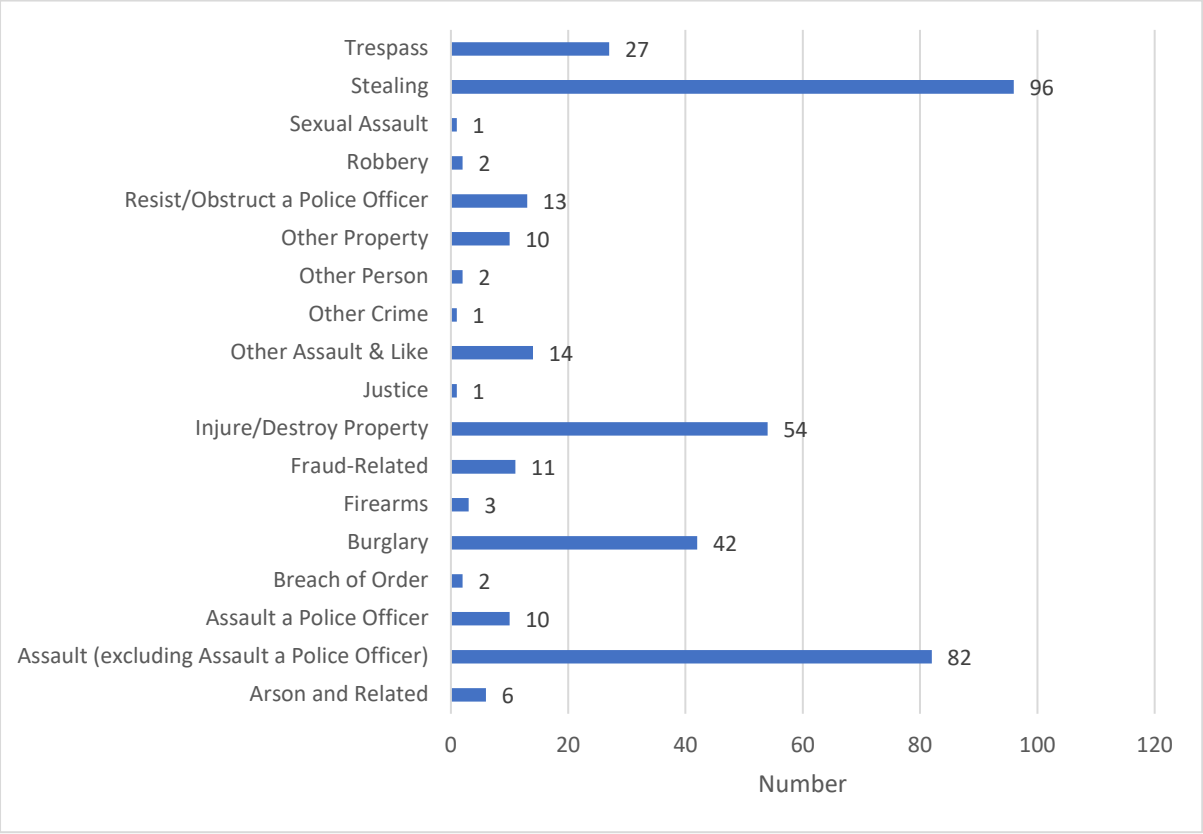
Offence Category	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
Crime	538	358	323	305	329	287	292	265	288
Drugs	25	44	24	30	33	42	52	31	30
Marine	7	2	0	0	0	0	1	0	0
Other	18	24	10	15	13	15	18	10	12
Public Order	108	126	67	48	46	39	56	44	35
Traffic	63	55	53	44	43	39	51	20	18
Total	**759**	**609**	**477**	**442**	**464**	**422**	**470**	**370**	**383**

[592] Department of Police, Fire and Emergency Management, unpublished data from: Information Bureau. Extraction date: 30 October 2020.

Table B.4: Count of youth offender files with a formal caution in 2018–19 by offence category and offence subcategory, 10 most common subcategories[593]

Offence Category + Subcategory	2018–19
Crime	
Assault (excluding Assault a Police Officer)	82
Burglary	42
Injure/Destroy Property	54
Other Assault & Like	14
Resist/Obstruct a Police Officer	13
Stealing	96
Trespass	27
Drugs	
Not Serious Drug	28
Public Order	
Street	30
Traffic	
Driver's Licence	16

Figure B.2: Count of youth offender files with a formal caution in 2018–19 by offence crime category and offence subcategory



[593] Department of Police, Fire and Emergency Management, unpublished data from: Information Bureau. Extraction date: 30 October 2020.

Table B.5: Count of youth offender files where caution type was 'Community Conference' by offence category by financial year (for incidents that occurred between 1 July 2010 and 30 June 2019)[594]

Offence Category	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19
Crime	314	281	263	255	148	122	113	102	106
Drugs	9	17	11	13	8	6	3	8	4
Marine	1	0	0	0	1	0	0	0	0
Other	2	9	4	7	4	3	3	3	0
Public Order	14	26	28	20	9	7	8	13	9
Traffic	8	18	17	9	9	7	4	7	1
Total	**348**	**351**	**323**	**304**	**179**	**145**	**131**	**133**	**120**

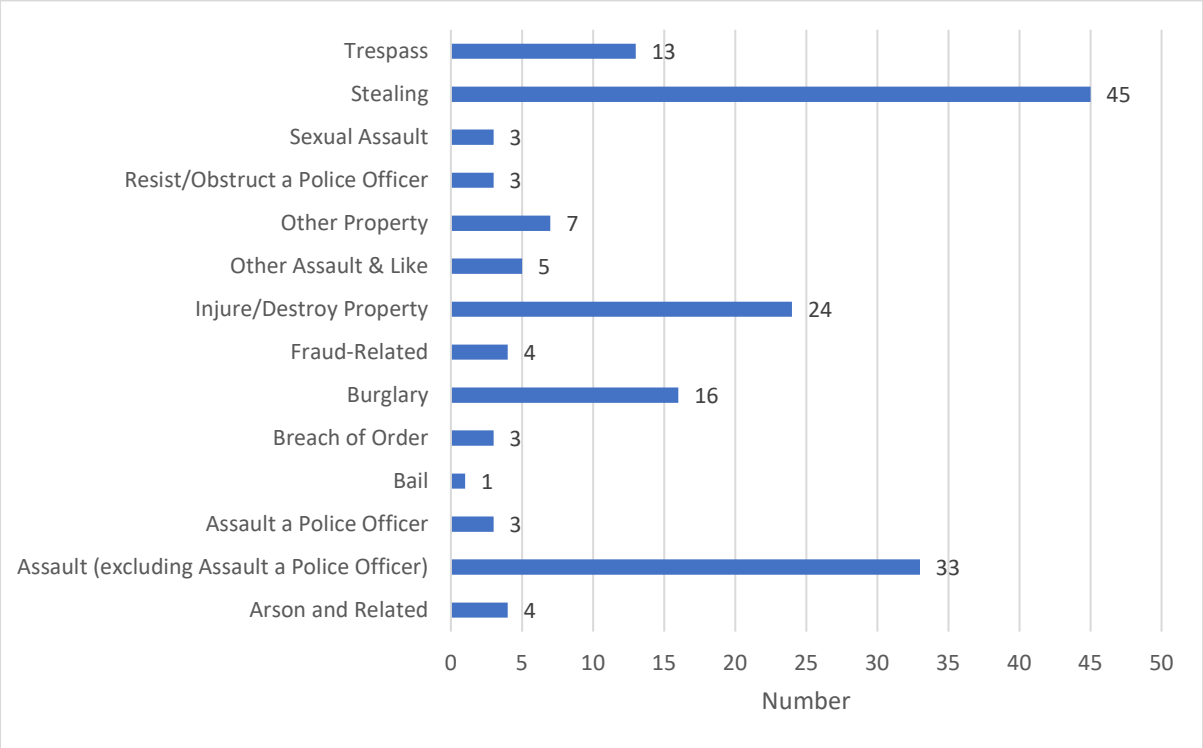
Table B.6: Count of youth offender files where caution type was 'Community Conference' in 2018–19 by offence category and offence subcategory, 10 most common sub-category[595]

Offence Category + Subcategory	2018–19
Crime	
Arson and Related	4
Assault (excluding Assault a Police Officer)	33
Burglary	16
Fraud-Related	4
Injure/Destroy Property	24
Other Assault & Like	5
Other Property	7
Stealing	45
Trespass	13
Drugs	
Not Serious Drug	4
Public Order	
Street	9

[594] Department of Police, Fire and Emergency Management, unpublished data from: Information Bureau. Extraction date: 30 October 2020.

[595] Department of Police, Fire and Emergency Management, unpublished data from: The Information Bureau. Extraction date: 30 October 2020.

Figure B.3: Count of youth offender files where caution type was 'Community Conference' in 2018–19 by offence crime category and offence subcategory



Appendix C: Magistrates Court (Youth Justice Division), guilty finalisations

Table C.1: Cases with guilty finalisation, 10 most common offences, 2014–15 to 2019–20 (n = 3115)

Act and section	Total
Police Offences Act 1935 (Tas) s 35(1) – Common assault	444
Criminal Code (Tas) s 234 – Stealing	308
Criminal Code (Tas) s 244 – Burglary	251
Bail Act 1994 (Tas) s 9 – Breach of bail	193
Vehicle and Traffic Act 1999 (Tas) s 8(1) – Drive whilst not the holder of a driver licence or exemption	125
Road Safety (Alcohol and Drugs) Act 1970 (Tas) s 6A(1) – Drive with prescribed illicit drug in blood	111
Bail Act 1994 (Tas) s 5(4) – Fail to appear	109
Criminal Code (Tas) s 245(a)(iii) and 255(a)(vi) – Aggravated burglary	100
Police Offences Act 1935 (Tas) s 37B(1) – Motor vehicle stealing	94
Police Offences Act 1935 (Tas) s 34B(1)(a)(i) – Assault a police officer	88

Source: Department of Justice, unpublished data, 2021

Table C.2: Ten most frequent principal proven offences against the person sentenced in the Youth Justice Division, 2014–15 to 2019–20

Act and section	Total
Police Offences Act 1935 (Tas) s 35(1) – Common assault	444
Police Offences Act 1935 (Tas) s 34B(1)(a)(i) – Assault a police officer	88
Traffic Act 1925 (Tas) s 37J(1) – Operate vehicle in public place in an exhibition of speed, acceleration or loss of traction[596]	57
Police Offences Act 1935 (Tas) s 34B(1)(b) – Threaten a police officer	52
Traffic Act 1925 (Tas) s 32(1) – Dangerous driving[597]	34
Criminal Code (Tas) s 172 – Wounding	18
Criminal Code (Tas) s 240(2)(a) – Aggravated robbery (in company with another)	16
Criminal Code (Tas) s 184 – Assault	14
Criminal Code (Tas) s 240(1) – Robbery	12
Traffic Act 1925 (Tas) s 32(2) – Negligent driving	10

Source: Department of Justice, unpublished data, 2021

[596] This offence has been classified as ANZSOC 0412.

[597] This offence has been classified as ANZSOC 0412.

Table C.3: Ten most frequent principal proven property offences sentenced in the Youth Justice Division, 2014–15 to 2019–20

Act and section	Total
Criminal Code (Tas) s 234 – Stealing	308
Criminal Code (Tas) s 244 – Burglary	251
Criminal Code (Tas) s 245(a)(iii) – Aggravated burglary	100
Police Offences Act 1935 (Tas) s 37B(1) – Motor vehicle stealing	94
Police Offences Act 1935 (Tas) s 37(1) – Destroy property	78
Police Offences Act 1935 (Tas) s 37(1) – Injure property	33
Criminal Code (Tas) s 269 – Unlawful setting fire to property	17
Police Offences Act 1935 (Tas) s 39(1) – Possession of stolen property	15
Criminal Code (Tas) s 268 – Arson	13
Police Offences Act 1935 (Tas) s 15CA (1) – Mark graffiti	8

Source: Department of Justice, unpublished data, 2021

Table C.4: Nine most frequent principal proven traffic offences sentenced in the Youth Justice Division, 2014–15 to 2019–20

Act and section	Total
Vehicle and Traffic Act 1999 s 8(1) – Drive whilst not the holder of a driver licence or exemption	125
Road Safety (Alcohol and Drugs) Act 1970 s 6A(1) – Drive with prescribed illicit drug in blood	111
Road Safety (Alcohol and Drugs) Act 1970 s 6(2) – Driver not holding Aust driver lic, foreign drive lic, internat driv permit with alcohol in body	80
Vehicle and Traffic Act 1999 s 13(1) – Drive whilst disqualified	40
Road Safety (Alcohol and Drugs) Act 1970 s 6(1) – Drive a motor vehicle while exceeding prescribed alcohol limit	27
Vehicle and Traffic (Driver Licencing and Vehicle Registration) Regulations 2000 reg 10(11)(a)(i) – Learner driver driving unaccompanied by licenced driver	29
Vehicle and Traffic (Driver Licencing and Vehicle Registration) Regulations 2000 reg 10(9) – Fail to display 'L' plate so as to be clearly visible	15
Road Rules 2019 regs 20 and 21(1) – Exceed speed limit – (speed limit sign)	15
Vehicle and Traffic Act 1999 s 9(1) – Drive whilst driver licence is suspended	7

Source: Department of Justice, unpublished data, 2021

Table C.5: Eleven most frequent principal proven 'other' offences sentenced in the Youth Justice Division, 2014–15 to 2019–20

Act and section	Total
Police Offences Act 1935 s 15C(1) – Unlawfully possess dangerous article in a public place	85
Misuse of Drugs Act 2001 s 27 – Sell or supply controlled plant	51
Police Offences Act 1935 s 14B(1) – Trespass	43
Police Powers (Vehicle Interception) Act 2000 s 11A (1) – Evading police	42
Misuse of Drugs Act 2001 s 25 – Possess or use controlled plant or its products	35
Police Offences Act 1935 s 34B(1)(b) – Use abusive language to police officer	31
Police Offences Act 1935 s 15B(2) – Fail to comply with direction to leave public place and not return within specified time	17

Police Offences Act 1935 s 13(1)(c) – Disorderly conduct	17
Police Offences Act 1935 s 13(2) – Recklessly discharge missile to the danger of another person	15
Police Offences Act 1935 s 43A(c) – Use a computer with intent to defraud	14
Misuse of Drugs Act 2001 s 22 – Cultivate a controlled plant	14