

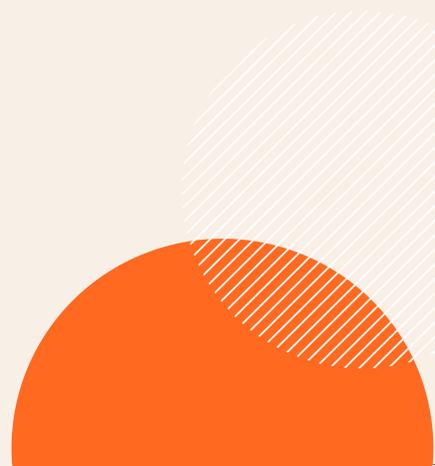
# Legal Aid For Tasmanians



TASMANIA LEGAL AID

# CHILDREN FIRST

CHILDREN IN THE CHILD SAFETY AND  
YOUTH JUSTICE SYSTEM



# Legal Aid

Children First: Children in the Child Safety and Youth Justice System

The paper was written by Tasmania Legal Aid.

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Tasmania Legal Aid acknowledges and pays respect to the palawa (Tasmanian Aboriginal people) as the traditional and original owners, and continuing custodians of the land and waters of this island, Lutruwita (Tasmania), where we live and work.

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## EXECUTIVE SUMMARY

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As a community we are more aware of the need to nurture children to help them grow into healthy adults. We are also more aware of the impacts of trauma, neglect and abuse on childhood development.

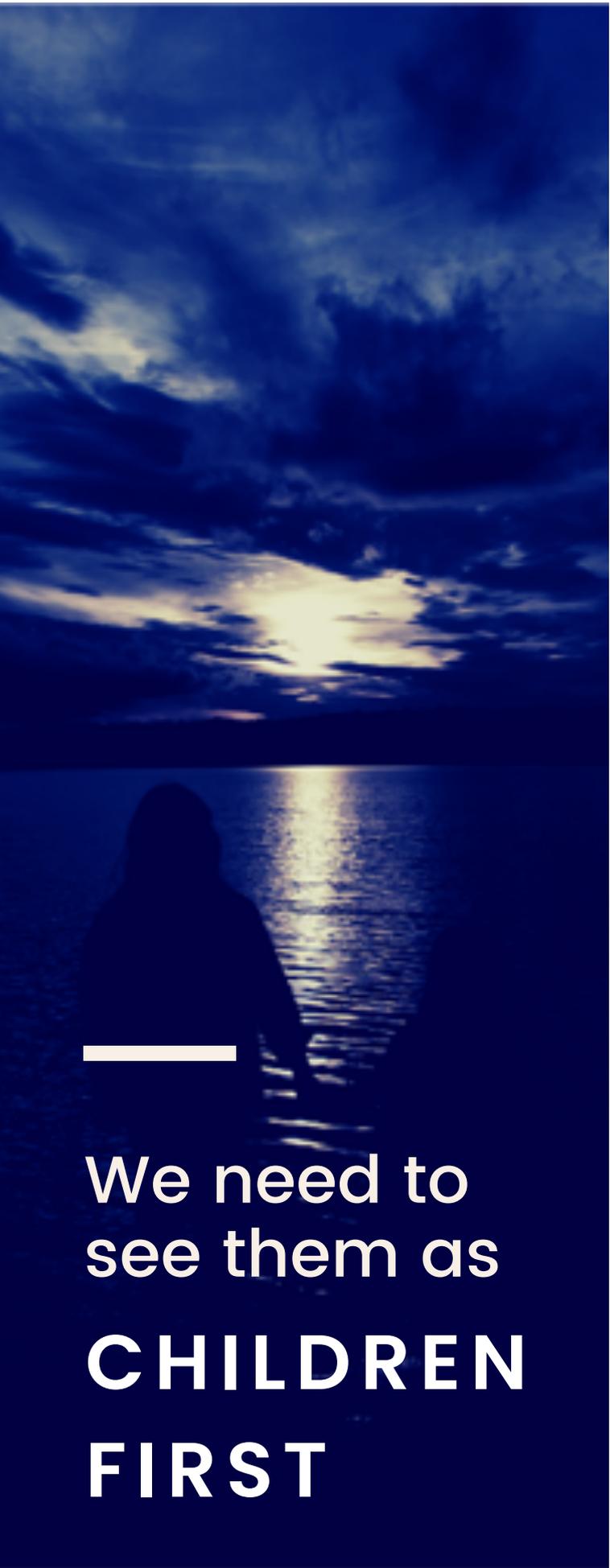
The human brain does not fully develop until people are well into their 20s, meaning that children have less capacity to understand the consequences of their actions and control their emotions. It also means that they can change their behaviour.

Children are also more susceptible to peer influence, manipulation and exploitation. They are more likely to engage in risk taking behaviour. These are some of the reasons why children involved with the youth justice system should be treated differently from adults. We need to see them as children first.

Youth offending in Tasmania has been reducing steadily over the last decade.

Most children do not become involved with the youth justice system. Those who do generally have a limited involvement.

However, a small group of children are over-represented in the youth justice system. There are



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some common themes that emerge when looking at this cohort of children. The earlier that children are involved in the system the more entrenched they become. Children who also have involvement with child safety services (referred to as 'crossover children') are over-represented in this group, particularly Aboriginal and Torres Strait Islander children and girls.

The TLA Strategic Plan 2020-23 identifies children as a focus for the organisation, with a commitment to put children at the centre of service delivery. TLA aims to be a leading voice for legislative and social reforms that support improved outcomes for our clients.

As the main provider of legal services to Tasmanian children, Tasmania Legal Aid has significant experience in dealing with children involved with the youth justice system.

## A review of our files from 2007 to 2020 reveals that:

- Only about 10% of children with a child safety file also had a youth justice file (crossover children).
- Two thirds of crossover children first had involvement with child safety and then with youth justice.
- Crossover children made up 15% of children with a youth justice file and accounted for 24% of all TLA youth justice files.

- Crossover children had almost twice as many files as other children in the youth justice system
- Crossover children made up 41% of children under 14 charged with offending, and accounted for 46% of files for this group.
- Crossover children first charged when under 14 had an average of 6 files each, compared with 3 files for under 14-year-olds without a child safety background.
- While around 10% of Tasmanian children identify as Aboriginal or Torres Strait Islander, 12% of all TLA youth justice clients and 15% of crossover children identify as Aboriginal or Torres Strait Islander.
- Almost half the Aboriginal children who were under 14 when first charged with a criminal offence were crossover children.
- While 25% of all TLA youth justice clients were female, this jumps to 37% of crossover children. Over half of the girls under 14 (52%) when first charged were crossover children (compared with 38% of boys under 14) and accounted for 59% of youth justice files for girls under 14.
- Girls who crossover had an average of three files compared with two files for other girls.
- The most common primary offence for children under 14 when first charged was stealing.

**Girls who crossover had an average of three files compared with two files for other girls.**

# Children First OVERVIEW



Many children are successfully diverted from the justice system, supported by those working within the system - police, child safety, the Court and support services. However, the data shows that more needs to be done for some of the most vulnerable and marginalised children in our community.

Reducing the involvement of a young person in the justice system not only benefits the child, it also reduces the number of victims of crime and is a more cost-effective response.

It is important that these young people are recognised as children first. Children in need of support and protection in order to improve their chances of fulfilling their potential.





# MEASURES TO REDUCE THE OVER REPRESENTATION OF THESE GROUPS INCLUDES:

## **1. Raising the minimum age of criminal responsibility to 14 years**

This would bring Tasmania into line with 86 other countries. The ACT has committed to raising the age to 14 years. While the total number of children under 14 who are charged is small, this change would have a significant overall long term benefit. The focus should be on putting appropriate supports in place to address underlying issues affecting these children.

## **2. Increased diversion options**

While many children are successfully diverted from the justice system there needs to be more options available to police and Courts.

## **3. Police as a last option for children in out of home care**

Children in out of home care are entitled to be treated as a child would be treated by their parents. Issues that arise in the home are usually addressed by parents without calling the police. There is a need for clearer processes for dealing with issues so that police are only involved as a last resort.

## **4. Adopting a trauma informed approach to reduce involvement in the criminal justice system**

The law needs to acknowledge the impact of trauma for many young people who become involved in the youth justice system, particularly crossover children. Legislative recognition of this would focus the response on addressing the challenges faced by the child.

## **5. Bail support**

Bail laws need to more clearly recognise the circumstances of children. This must be underpinned by greater bail support.

## **6. Establish a lawyer in school program**

School lawyer programs are an effective early intervention to support children dealing with a range of issues including family violence and involvement in the justice system.

# TASMANIA LEGAL AID

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Tasmania Legal Aid (TLA) is the largest provider of government funded legal services to the Tasmanian community. TLA provides a wide range of services: from community legal education, online information, advice and referral, through to ongoing legal representation.

Legal representation is the most intense and costly service provided. Most legal representation is for criminal, family law and child safety cases.

TLA is the primary provider of legal services for Tasmanian children.<sup>1</sup> We represent children charged with criminal offences, as well as representing the interests of children in Child Safety and Family Law cases. This experience provides a unique insight into the interaction of children with the justice system.

The TLA Strategic Plan 2020-23 identifies children as a focus for the organisation, with a commitment to putting children at the centre of service delivery. TLA also aims to be a leading voice for legislative and social reforms that support improved outcomes for clients.

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# CHILDREN AND THE JUSTICE SYSTEM

Children are individuals with rights recognised by law. They are entitled to express their thoughts, engage in religious or cultural practices and to receive a high standard of health care.

The human brain does not fully develop until people are well into their 20s, meaning that children have less capacity to understand the consequences of their actions and control their emotions. It also means that they can change their behaviour.

The law also recognises that children are potentially vulnerable and that steps must be taken to protect them for abuse, neglect and harm.<sup>2</sup> They are more susceptible to peer influence, manipulation and exploitation.

This is why youth justice systems tend to adopt a different approach to children who break the law than the response to adults.

In Tasmania children as young as 10 years old can be charged with a criminal offence. The law recognises that children under 14 years may not have the necessary understanding to be held responsible (referred to as *doli incapax*). However, a child under 14 years may still be found responsible if the Court is satisfied that the child knew what they did was wrong. This can require expert assessments of the child and usually a number of court attendances.

This is time consuming, costly and stressful. It can also divert the focus from the other needs in the child's life which may be leading to the offending. Children in the youth justice system have often experienced trauma and disadvantage, live with a disability or engaged in substance misuse.

The rate of youth offenders in Tasmania, and the total number of youth offenders, has fallen steadily

since 2008-09 (see Fig. 1).<sup>3</sup> In 2019-20 there were 856 children prosecuted, compared with 2,603 in 2008-09. The offender rate (number of children charged per 100 children) over that period fell from 4.8 to 1.6.<sup>4</sup> This is a welcome outcome that reflects changes in the law and practice, which has placed more emphasis on diversion and early intervention.

Figure 1: Youth Offenders in Tasmania

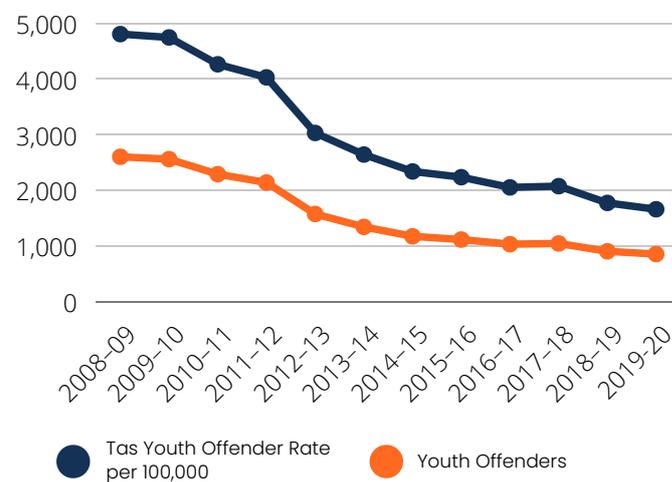
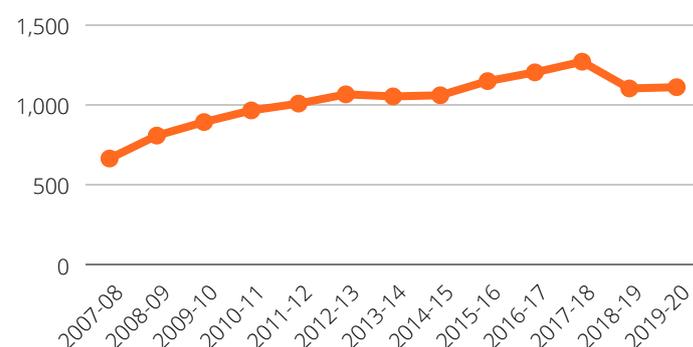


Figure 2: Children in OOHC at 30 June 2020



Unfortunately, in some instances children are at risk of harm within the family home. The Child Safety Service of the Department of Communities Tasmania (Child Safety) is responsible for investigating and responding to allegations of children being at risk of harm.

Child Safety adopts a number of strategies to respond to the complex situations that arise. This

can include applications to Court for children to be placed in out of home care (OOHC). OOHC includes placement with a family member, foster care or in residential care.

The number of Tasmanian children in OOHC has been increasing steadily, although there was a slight drop in 2018-19 (Fig.2).

Children involved in the child safety system, particularly those in OOHC, often have a range of complex needs, including cognitive delay or impairment, poor mental health, insecure housing and trauma. The Tasmanian Youth at Risk Strategy notes that:

*Young people in OOHC are known to be a highly vulnerable group who often experience traumatic life events; these young people have increased physical, mental and social health needs and often have limited access to resources.*

It is important to note that most children involved in the child safety system do not become involved in the youth justice system. A small proportion of children involved with child safety also become involved in the youth justice system and are often referred to as 'crossover children'.<sup>5</sup>

Research shows that crossover children are disproportionately represented in the youth justice system.<sup>6</sup> In addition, the research also indicates that diverting children from the justice system and that addressing trauma is an effective way to improve outcomes for children and the community.<sup>7</sup>

## The Tasmanian experience

A review of TLA records between July 2007 and June 2020 (the review period) indicates that the Tasmanian experience is similar to that found elsewhere.

The review identified children who had child safety files and/or youth justice files with TLA. This does

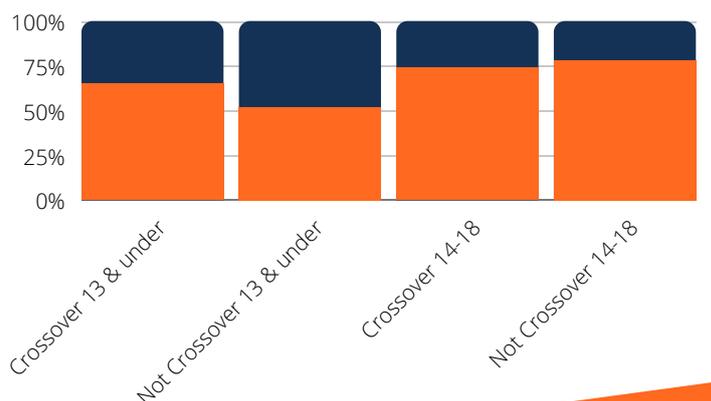
not include children who had child safety involvement that did not result in an application to the court. On the youth justice side, it only includes those cases that needed a youth justice file.

Of the almost 3,600 individual child safety clients helped during the review period, only about 10% (388) also had a youth justice file (Fig. 3). Two thirds (65.7%) of these crossover children first had involvement with child safety and then with youth justice. Crossover children made up 15% of all youth justice clients with a grant of legal aid during the review period. Despite this, they accounted for 24% of all youth justice files. Put another way, each crossover child had about twice as many files as other children in the youth justice system – an average of 3.9 compared with 2.1. Crossover

**Figure 3.1: Percentage of TLA Youth Justice Clients by age and Aboriginality**



**Figure 3.2: Percentage of TLA Youth Justice files by age and Aboriginality**



children also needed help with more legal problems, with an average of 6.2 files compared with only 2.5 files for all other child clients.

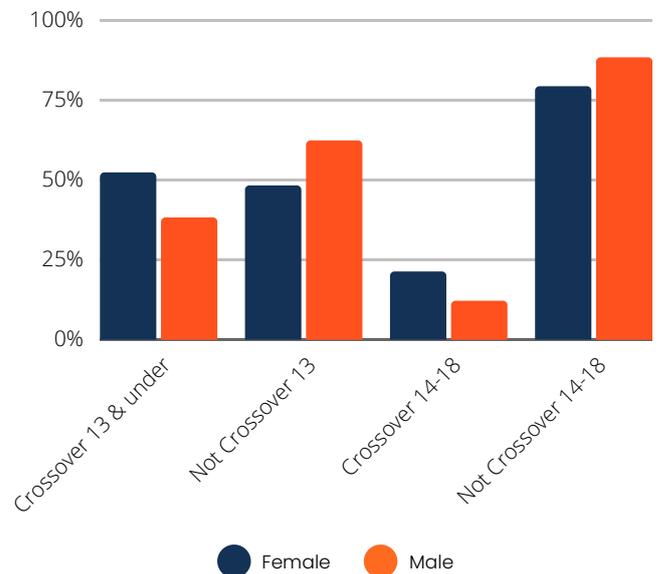
The results are more stark when we consider particular groups of children. Looking at children first charged with a crime before turning 14 years, crossover children made up 41% of this group and accounted for 46% of files. They had an average of 6 youth justice files each, compared with an average 3 files for under 14-year-olds who did not have a child safety background.

While around 10% of Tasmanian children identify as Aboriginal and/or Torres Strait Islander, 12% of all TLA youth justice clients and 15% of crossover children identify as Aboriginal and/or Torres Strait Islander (see Fig. 3.1 and 3.2). Of concern is that almost half of Aboriginal children were under 14 when first charged with a criminal offence were crossover children.

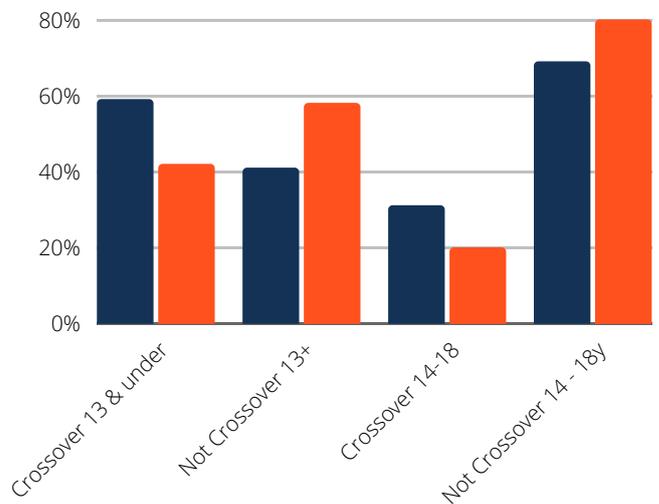
Females have a much lower rate of involvement in the criminal justice system across all age groups. This is true also for the number of girls in the youth justice system. However, girls who crossover have a disproportionate level of involvement in the youth justice system. While 25% of all TLA youth justice clients were female, this jumps to 37% of crossover children. Over half of the girls under 14 when first charged (52%) were crossover children (compared with 38% of boys under 14), accounting for 59% of youth justice files for girls under 14 (see Fig. 4.1 and 4.2). Girls who crossover had an average of three files compared with two files for other girls.

The over-representation of girls, particularly those with child safety experience, suggests that current measures are failing to keep these vulnerable children safe and out of the youth justice system.

**Figure 4.1: Percentage of TLA Youth Justice Clients by age and gender**



**Figure 4.2: Percentage of TLA Youth Justice files by age and gender**



## The broader experience

These results are similar to those seen elsewhere. Research from around Australia and the United Kingdom indicates that the overwhelming majority of children in OOHC do not commit crime, but "placement in OOHC is associated with increased contact with the criminal justice system".<sup>8</sup>

A recent Australian Institute of Health and Welfare (AIHW) study found that children in the child safety system were 12 times more likely than the general population to be under youth justice supervision, and Aboriginal children were more likely to be in the child safety and youth justice systems.<sup>9</sup>

Australian and British research indicates that while "boys are more likely to offend overall, girls who offend are more likely to have experienced child protection interventions than their male counterparts".<sup>10</sup>

Research also indicates that children who become involved with the youth justice system before the age of 14 are significantly more likely to become 'chronic adult offenders'.<sup>11</sup> A 2019 report by the Victorian Sentencing Advisory Council found:

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

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

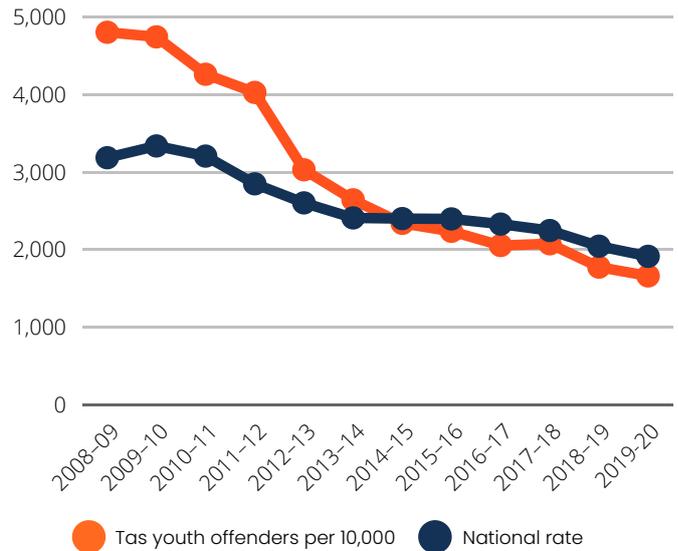
*These findings are particularly concerning when considered alongside the findings of the Council's 2016 youth reoffending study that the younger children are at their first sentence, the more likely they are to reoffend generally, reoffend violently and receive a sentence of adult imprisonment before their 22nd birthday.*<sup>12</sup>

The report also found that children known to child safety were significantly over-represented in the youth justice system, noting that children with experience of OOHC and girls being particularly over-represented.<sup>13</sup>

These results occur against a backdrop of falling youth crime. Youth offending has fallen across most

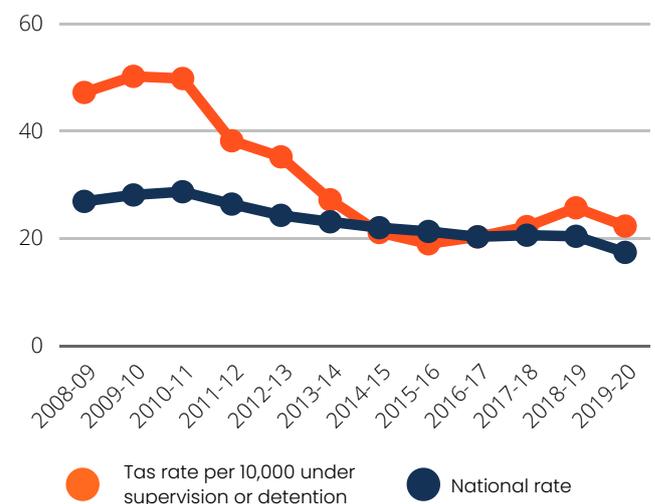
Australian jurisdictions in the last decade. As noted above, Tasmania has experienced a significant reduction in youth offending since 2008-09, with rate being lower than the national average rate since 2016 (Fig. 5).<sup>14</sup>

Figure 5: Rate of Youth Offending



Despite this reduction in offending, the rate of Tasmanian children under Youth Justice supervision or detention has increased in recent years and is higher than the national average (Fig. 6).<sup>15</sup> This suggests that Tasmanian children in the youth justice system are more likely to be under some form of supervision than their counterparts in the rest of Australia.

Figure 6: Rate of children under supervision or in detention



## The link between child safety and youth justice

While involvement in the child safety system does not mean that children will commit offences, those who do are over-represented in the youth justice system.

The connection for children in child safety and offending is complex and involves many factors. The most significant factors appear to be the detrimental impact of abuse and neglect.<sup>16</sup> The experience of trauma suffered as a child, including exposure to family violence, influences development and the ability to regulate behaviour.<sup>17</sup> Children in OOHC commonly have experienced significant trauma. This can be exacerbated by their experience in OOHC, including:

- grouping children with high levels of trauma;
- multiple care placements hampering therapeutic treatment;
- the development of stable relationships, and;
- the response to behaviour by care givers.<sup>18</sup>

An Australian Institute of Criminology (AIC) 2020 review of recent inquiries into Australia's youth justice systems identified a number of common themes that may explain this link.<sup>19</sup>

This group of young people were found to be particularly vulnerable and having complex needs. It was noted that many experienced dysfunctional family environments, exposure to family violence, insecure housing and poverty. The children often engage in substance misuse, have poor mental health, cognitive disabilities, have experienced abuse and suffered disrupted education.<sup>20</sup>

Another feature the AIC report identified is the adverse impact of detention. It noted that "young people on remand are likely to be exposed to the detrimental effects of detention but are not there long enough to gain substantial therapeutic or rehabilitative benefit".<sup>21</sup>

An independent review of Ashley Youth Detention Centre found:

*The residential experience for young people in their living units left a lot to be desired. The units were spartan and unwelcoming, with little opportunity for young people to spend their time productively outside of the Monday to Friday school/program hours. Extreme boredom was expressed by many of the young people with the potential for behavioural issues to lead to more confrontation between youth workers and detainees.*

*The facilities for family visits were wholly unacceptable, taking place in a tiny bare room, directly observed by two youth workers. It is one of the most unwelcoming and degrading visits experience that the reviewer has seen, and is certainly not conducive to the visit being a family-friendly experience.<sup>22</sup>*

The 2016 Tasmanian Government Youth at Risk Strategy report noted that "the current custodial model does not effectively divert young people away from the custodial system" with 74% returning to custody within 12 months.<sup>23</sup> It noted that while the number of children in detention had fallen, the costs had risen, resulting in what was then the second highest daily cost per child.<sup>24</sup> While the numbers have remained largely the same, the amount spent has continued to rise.<sup>25</sup>

**While involvement in the child safety system does not mean that children will commit offences, those who do are over-represented in the youth justice system**

The third theme identified by the AIC is the over-representation of Aboriginal children in the youth justice system. The report notes that the "historical and ongoing effect of colonisation, broken connection to country and community, and the ensuing cycle of intergenerational trauma and exclusion from mainstream culture cannot be understated".<sup>26</sup>

## What can be done?

The central aims of the youth justice system include reducing reoffending and protecting the community from further offending. It is apparent from the preceding discussion that this is not being achieved as well as might be expected.

The following actions are directed toward improving the outcome for young people and the community.

### 1 Raising the age of criminal responsibility to 14

Extensive research has found that detention is damaging and criminogenic, and results in young people being further entrenched in disadvantage.<sup>27</sup> As noted above, the earlier that children become involved in the youth justice system, the greater their longer term exposure.<sup>28</sup>

The current age of responsibility across Australia, 10 years, is out of step with world standards, where the median age in 86 countries is 14 years.<sup>29</sup> In January 2021 almost 30 countries called on Australia to raise the minimum age. It is noted that the ACT has committed to raising the age to 14 years, while other states and territories are still considering the position. Raising the age to 14 would bring Australia into line with many countries in Europe (including Germany, Italy, Austria, and Croatia) and Asia (including Japan, China, and North and South Korea). It is noted that the age is higher in some countries, such as Argentina (16 years) and Luxembourg (18 years).

A concern that is sometimes expressed about raising the age of criminal responsibility to 14 is that serious conduct will not be punished. The TLA data review looked at the most serious charge in the first file for children under 14 years. Stealing, followed by assault and damage to property

property were the top three, accounting for 55% of matters. For two children, their first file was for breach of bail. This pattern is repeated when looking at the primary charge for all youth justice clients under 14 years. While these offences can encompass a range of behaviours, experience and sentencing outcomes suggest that they are generally at the low end of seriousness and could be dealt with in other ways.

## Matthew

Matthew and his siblings were living with their mother, who was arrested. Arrangements were made for the care of the younger children, but not Matthew who was 12 years old.

Homeless and without any money, Matthew had to steal food and basic essentials.

Matthew was arrested and charged with a range of offences that largely involved stealing food from supermarkets and service stations.

This was the first of many court appearances over the next four years.

The number of children under 14 prosecuted is relatively small. The Commissioner for Children and Young People reports that in 2018-19 there were 197 children under 14 with a police file, resulting in 168 prosecutions or 15% of youth justice prosecution files.<sup>30</sup>

The Productivity Commission found that the minimum age of criminal responsibility is a systemic

and structural factor contributing to Aboriginal children being involved in the youth justice system, and that raising the age would reduce the number of children involved.<sup>31</sup> Despite only making up around 10% of the Tasmanian population aged 10-17 years, Aboriginal children account for around 30% of children under supervision and 40% of children in detention and are incarcerated at five times the rate of their peers.<sup>32</sup> Of the group conferences where the cultural heritage of the child was known, only 21% were Aboriginal children.<sup>33</sup>

Raising the age of criminal responsibility would have positive results for children and the community, not only reducing offending but also cost.

Where children under the age of 14 are identified as engaging in anti-social behaviour there is an opportunity to provide targeted interventions designed to address the factors leading to that behaviour. The Sentencing Advisory Council (Vic) Crossover Kids report identifies options for a trauma informed response.<sup>34</sup>

## 2 Increased use of diversion

The Productivity Commission recently found that diversion can fundamentally change the life trajectory of young people.<sup>35</sup> It found that diversion can lead to lower rates of reoffending, save money and lead to better community outcomes.<sup>36</sup>

While a significant number of cases are diverted from court, there is scope for the greater use of pre and post-court diversion. As noted above, despite fewer children being taken to court the rate of children under some form of detention or supervision has been increasing, and is higher than the national rate.

An expansion of diversion from the justice system should focus on the needs of the child and aim to reduce the risk of reoffending. The Custodial Youth Justice Options Paper (Noetic) identified a lack of

prevention, early intervention and diversionary services for children at risk across Tasmania.<sup>37</sup> The authors observing that:

*Tasmania does not have the breadth or depth of prevention, early intervention and diversionary services required to address the complex needs of young people. Investment in these services can address the risk factors that lead to offending behaviour, which is a far more cost-effective approach to rehabilitating young people than detention.*<sup>38</sup>

The Convention on the Rights of the Child (The Convention), which Australia has signed, requires that children in the criminal justice system be treated in a way that promotes their sense of dignity and worth (Article 40). The United Nations Committee on the Rights of the Child says that diversion from the criminal justice system should be the preferred approach in the majority of cases.<sup>39</sup>

In addition to diversion being a better long-term outcome for the child it promotes public safety and is cost-effective.<sup>40</sup>

It costs \$162 a day to supervise a child in the community and \$2,744 a day for a child in custody while a group conference is a one-off cost of \$724.<sup>41</sup>

While spending on detention and community supervision has increased in recent years (up 32% and 62% respectively between 2015-16 and 2019-20) expenditure on group conferencing has fallen (47% over the same period). Diverting children from the system will result in significant savings which could be reinvested toward preventative services.

The benefits of a child focused approach, rather than a punitive approach, have been widely recognised. The United Nations notes:

*Research 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 relations) that contribute to the serious behavioural difficulties of children reduce the risk of children coming into child justice*

## Trevor

Trevor was 12 years old when he was charged with a low-level shop stealing offence. Trevor wanted to take the opportunity to engage in a caution process offered by Police.

Trevor was dependent on his parents for transport and could not make appointments with police for the caution. The police accepted that Trevor's parents had not transported him and that he was too young to make his own way there.

Police decided to file charges in court. When Trevor did not attend Court, a warrant was issued for his arrest.

Police arrested Trevor and took him to the police station. He was released on bail and provided with a new court date. He was later sentenced to be of good behaviour.

This is a fairly common occurrence where children under 14 lose the opportunity of a caution or community conference due to their parents' attitudes or inability to get them to appointments. This results in the child's case being referred to the court and, too often, arrest warrants.

*systems. Prevention and early intervention programmes should be focused on support for families, in particular those in vulnerable situations or where violence occurs. Support should be provided to children at risk, particularly children who stop attending school, are excluded or otherwise do not complete their education. Peer group support and a strong involvement of parents are recommended. State parties should also develop community-based services and programmes that respond to the specific needs, problems, concerns and interests of children, and that provide appropriate counselling and guidance to their families.<sup>42</sup>*

The Tasmanian Youth at Risk Strategy acknowledges many of these issues and some steps have been taken to improve outcomes. However, the options are still limited. This is particularly the case for children in more remote parts of Tasmania.

More diversionary programs are needed 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.

## 3 Police called as a last resort

Children in OOHC have complex and multiple needs. This can lead to behaviour that would not ordinarily result in a parent calling the police. For example most parents would not call the police if their child became upset and punched a wall, causing damage.

It costs \$162 a day to supervise a child in the community, \$2,744 a day for a child in custody while a group conference is a one-off cost of \$724.



**A child in OOHC should be treated in the same way as a child living with their family.**

Research shows that police are often called to address the behaviour of children in OOHC.<sup>43</sup> This may be due to the lack of resources, existing procedures and insurance processes.

Protocols between police and care providers setting out when police should be called have been successful in reducing the involvement of children with police in the United Kingdom.<sup>44</sup> Similar arrangements have been introduced in New South Wales and more recently in Victoria.<sup>45</sup>

The Victorian Framework acknowledges the circumstances of children in care and the increased risk of criminalisation. It proceeds to set out trauma informed principles and a decision-making guide for care workers. The principles include:

1. The safety and wellbeing of all young people and staff being paramount.
2. Understanding the underlying causes of a young person's behaviour is critical.
3. The need for a multi-agency commitment to divert children from contact with the criminal justice system.
4. Not pursuing criminal charges where viable alternatives exist, and exercising discretion regarding police intervention.

The introduction of a similar framework in Tasmania would assist in reducing the involvement of children with the criminal justice system. It would see children in OOHC treated the same as children living with their family.

## Nicholas

Nicholas was under a Care and Protection Order until he turned 18. He lived with an intellectual disability and ADHD.

When he was 12 years old Nicholas was charged with a common assault by making a threat. There was no physical contact. He was also charged with trespass for being on school grounds.

He was required to attend court on a number of occasions. His understanding of the process was very limited and he was unable to participate in the court case, including giving instructions to his lawyer.

After ten months of bail conditions, legal appointments, court appearances, stress and disruption the charges were withdrawn.

## 4 Legislative recognition of a trauma informed approach that aims to reduce involvement in the criminal justice system

The Tasmanian Youth Justice Act (the YJA), which sets out the approach to children within the justice system, commenced over 20 years ago. There have been significant changes in our understanding of what is effective in reducing youth crime since that time.

As detailed earlier we have a greater understanding of brain development. "Neurocognitive functioning is further compromised for children exposed to traumatic incidents, chronic abuse, or neglect."<sup>46</sup> This has an impact on cognitive processing and self-regulation.<sup>47</sup>

While there are positive aspects to the YJA it does not reflect a contemporary understanding of what works. The principles do not recognise the need for a different approach that is focused on a trauma informed approach and diverting children from the system.

The 10 general principles of the YJA start with a focus on encouraging children to accept responsibility for their behaviour.<sup>48</sup> It does not say that children should be treated differently from adult offenders, merely that they should not be treated more severely than an adult.<sup>49</sup> The need to protect the community from illegal behaviour is the third principle. The need for the punishment to be appropriate to the age, maturity and cultural identity of the child is the ninth of ten principles.

### Brooke

Brooke was less than 14 years old and living in out of home care when she first became involved in the youth justice system. She lived with an intellectual disability and had a very low IQ. This severely limited her ability to understand the cause and effect of her actions.

Brooke committed an offence that resulted in her being arrested, interviewed without a lawyer and remanded in custody.

Brooke spent two months at the Ashley Youth Detention Centre. She didn't understand why she was there or why she could not leave.

The charges were ultimately dropped as Brooke did not have the capacity to understand her offending.

The whole experience was traumatic for Brooke. Although her development was already significantly delayed she regressed and at the end of her time in detention she was spending 23 hours alone in her cell. She would not have had involvement with the justice system had she been living with her family at the time of the incident.

Many of the frameworks for dealing with children in the youth justice system around Australia have been reviewed in recent years. This includes the review

into the Don Dale Youth Detention Centre in the Northern Territory<sup>50</sup> and the Victorian Armytage Ogloff review.<sup>51</sup> The latter resulted in the recently released Victorian Youth Justice Strategic Plan 2020-2030. The first two principles of the Strategic Plan are that Youth Justice:

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.<sup>52</sup>

The Strategic Plan includes a focus on effective diversion of young people from contact with police and courts, and supporting a whole of government approach to early intervention with young people at risk of offending.

The YJA should be amended 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.<sup>53</sup> 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.

While the YJA principles include references to Aboriginal children being dealt with in a manner that involves their cultural community there is no formal mechanism for this. The introduction of an Aboriginal Youth Justice Court would be a positive step toward reducing the number of Aboriginal children in the system. The involvement of Elders in the sentencing process in other jurisdictions has been effective in reducing and delaying reoffending.<sup>54</sup>

## 5 Bail support

A person charged with a criminal offence may be released with or without bail conditions. Various factors influence this, including the seriousness of the alleged offending. In the first instance police may release a person on bail with or without conditions. If police oppose the release of a person, the question of bail is decided by a court.

TLA's practice experience identifies situations where police have released children with onerous bail conditions, even for minor offending. This can lead to contraventions of bail conditions, which can result in further punishment and have an adverse effect on future bail applications.

TLA data revealed that the primary charge for 3% of files for crossover children was breach of bail. Breaching Bail was the primary charge for four children under the age of 14.\*

Many young people are held in detention before their case is heard because they have been refused bail. This can be due to a number of factors, including a lack of suitable accommodation. The lack of housing unduly penalises a child for something that is generally out of their control, particularly where the child is in the State's care.

It is commonly the case that once the case is heard the child is released without serving any further time in custody.

The law regarding bail should be amended to expressly note that children should only be kept in custody as a last resort. The lack of accommodation should not be a reason to refuse bail but rather prompt support from child safety services. There also needs to be more support services for children to facilitate their release from custody. There needs to be more suitable accommodation options for

\* Since 2014 children are only charged with a breach of bail offence if they fail to appear at court. However, a failure to comply with other bail conditions can lead to arrest and bail being revoked. It can also be taken into account when considering future applications for bail.

children who do not have stable housing. Child Safety could be engaged to ensure that children at risk of harm are not held in custody. Stable accommodation is a key factor to children's engagement with education, treatment and support services.

There needs to be a funded bail support program for children. This includes bail support officers who have access to brokerage funds for accommodation and who are able to coordinate appropriate support services. Examples of this type of bail support program exist around Australia.

## 6 Lawyer in School

The ability for children to learn about the legal system and have ready access to legal assistance is another strategy to reduce the involvement of young people in the legal system.

Lawyer in School programs involve lawyers working closely with schools to provide both community legal education and specific one to one assistance to students. There are a number of programs around Australia, including NSW, ACT and Victoria.

Common issues that young people raise with school lawyers include family violence, bullying, fines, criminal charges, respectful relationships and employment issues. The school lawyer is able to work with other services to address the needs of the child.

Lawyer in School programs also increase general knowledge of the law and responsibilities, help students feel safe and heard and improve

wellbeing.<sup>55</sup> An evaluation of the program delivered by Westjustice, in the western suburbs of Melbourne, found a series of benefits to students, including:

### Access to legal assistance

#### Students:

- Have legal issues identified and resolved faster
- Are more equipped to deal with emerging legal issues
- Experience fewer preventable legal problems

### Increased knowledge & understanding

#### Students:

- Have an increased understanding of legal rights, responsibilities and the legal system
- Feel more confident engaging with the legal system and seeking help
- Receive increased support for nonlegal issues

### Improved health & wellbeing

#### Students:

- Feel safer
- Feel less stressed and anxious
- Feel more supported

### Improved learning

#### Students:

- Feel more focussed in the classroom
- Experience a more holistic learning experience<sup>56</sup>

Similarly, a review of a program delivered in NSW found a 50% increase in the confidence of students in dealing with legal problems and knowing when to seek expert help.

The introduction of Lawyer in School programs provide benefits to students, the school and the community as a whole.<sup>57</sup>



## Conclusion

The success in reducing the rate of youth offending is a great achievement. However, there is more that can be done for vulnerable children, particularly those who are in the care of the State. Diverting children from the youth justice system – by raising the age of criminal responsibility, limiting criminal justice involvement, more diversion programs and education – will help children fulfill their potential and avoid extensive criminal offending.

Diverting resources from the high cost end of the justice system – courts, police, community supervision – to social supports and diversionary programs is cost effective.

Recognising these young people as children first not only improves the prospects for these children but also makes the community safer.

A silhouette of a child climbing a rope structure against a light sky. The child is positioned on the right side of the frame, reaching up towards the top of the structure. The structure consists of a central vertical pole and several ropes that form a conical shape. The background is a pale, overcast sky with some faint, bare tree branches visible in the upper left and right corners.

**Lawyer in School programs also increase general knowledge of the law and responsibilities, help students feel safe and heard and improve wellbeing.**

# GLOSSARY

**Bail** – when a person charged with a criminal offence is released into the community until their case is finalised by a Court. Police or a Court can require the person to comply with a set of conditions such as where they are to live, when they can be away from their home and who they can associate with.

**Child/children** – children and young people below the age of 18.

**Child safety system** – the framework set up to prevent and respond to violence, abuse, neglect and exploitation of children, including departmental child safety services, the Courts and the out of home care system.

**Crossover children** – children who have had involvement in both the child safety system and the youth justice system.

**Diversion** – alternatives to requiring a person to have a penalty formally imposed by a Court.

**Doli incapax** – a legal rule that says that children between 10 and 14 cannot commit a crime because they do not understand the difference between right and wrong. This requires evidence as to the child's level of understanding.

**Justice reinvestment** – a redirection of money from the criminal justice system to fund resources and services that address the causes of offending.

**Minimum age of criminal responsibility** – the minimum age a child must reach before they can be charged with a criminal offence. Currently 10 years in Australia.

**Out of home care (OOHC)** – where a child is removed from their immediate family and placed into the care of another family member, foster care or institutional care provider.

**TLA child safety or youth justice files** – where a grant of legal aid has been made to represent a child. Some minor youth justice cases are dealt with on the day at court and do not need a file.

**Youth justice system** – the set of processes and practices for managing children and young people who have committed, or allegedly committed, an offence, including courts and the supervision of young people in the community or in detention.

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# Legal Aid

# Legal Aid For Tasmanians

CHILDREN FIRST:  
CHILDREN IN THE CHILD SAFETY AND  
YOUTH JUSTICE SYSTEM

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