Tasmania Legal Aid

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Our Ref: 22R000085
Reply to: Hobart Office

Mr Simon Scott
Committee Secretary
Legislative Council Government Administration Committee 'B'
Parliament House
HOBART TAS 7000
Email: csjs@parliament.tas.gov.au

Dear Sir,

Inquiry into Tasmanian Adult Imprisonment and Youth Detention Matters

Tasmania Legal Aid (TLA) welcomes the opportunity to comment on this important inquiry. TLA works toward a Tasmania where everyone is safe, respected and has their voice heard.

Our purpose is to:

- Provide legal services to help Tasmanians understand their rights, navigate the system to resolve their legal issues, and get the assistance they need
- Support and advocate for vulnerable and marginalised Tasmanians
- Work with our clients, staff, legal partners and community to improve the legal system.

As the primary provider of criminal law legal services to adults and children in Tasmania's justice system, TLA is uniquely placed to contribute to this inquiry.

Factors influencing increasing prison population and costs

There are a range of factors which have combined to contribute to Tasmania's increasing prison population. The most important of these factors can be summarised as follows:

1. The increasing use of imprisonment as a sentencing option;
2. The increasing length of average sentences;
3. The sharp rise in unsentenced prisoners;
4. A trend towards more serious offending as a proportion of all offending;
5. Systemic delays.

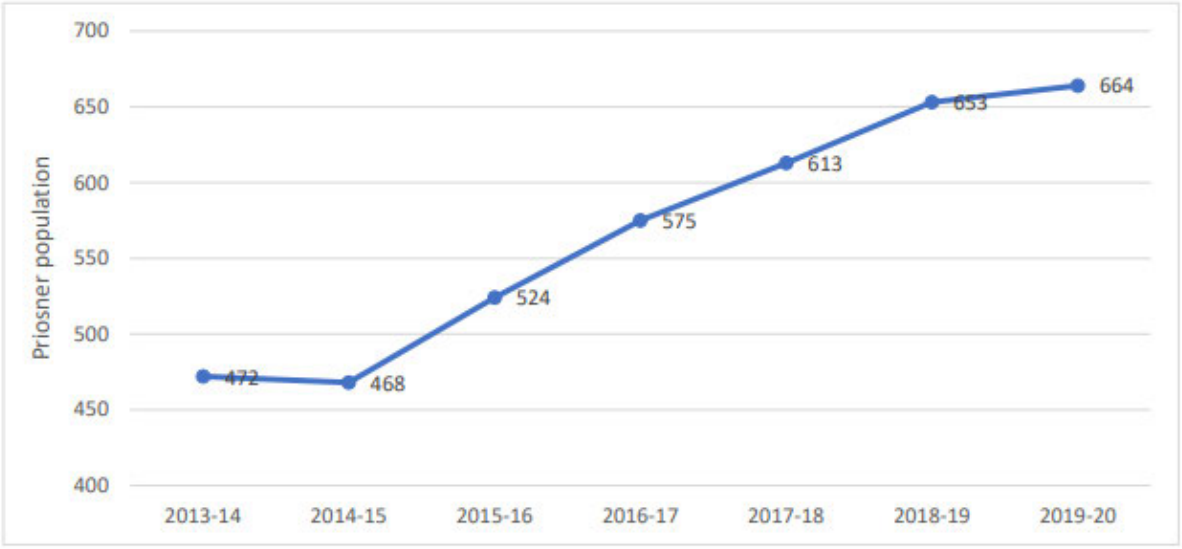
Many of these factors are common across other Australian jurisdictions. In some Australian States, high conviction rates contribute to the increasing number of

people in prison. However, in Tasmania, conviction rates in the Magistrates Court are very low by national standards and have continued to decease.

Increasing use of imprisonment

Between 2014 and 2020 there has been a 41.8% increase in prison population in Tasmania, as illustrated in the following chart.

Figure 2.2: Prisoner population (average daily number), Tasmania, 2013–14 to 2019–20[48]



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Across the same time period, there has been a 110.9% increase in the number of Aboriginal people in prison.

Between 2014 and 2020 the use of imprisonment in Supreme Court sentences fell from 89.8% to 78.8% of all sentences. However, this trend has been driven by the decreased use of suspended sentences rather than terms involving actual imprisonment. In the same time period, the use of actual imprisonment increased from 31.9% to 39.7% of sentences. The use of fully suspended sentences decreased markedly from 38.1% of sentences to 23.4%. Similarly, partly suspended sentences have decreased across the same period by 5%. The use of immediate terms of imprisonment have increased sharply in the Magistrates Court from 3.5% of sentences in 2014 to 8.2% of sentences in 2020.[2]

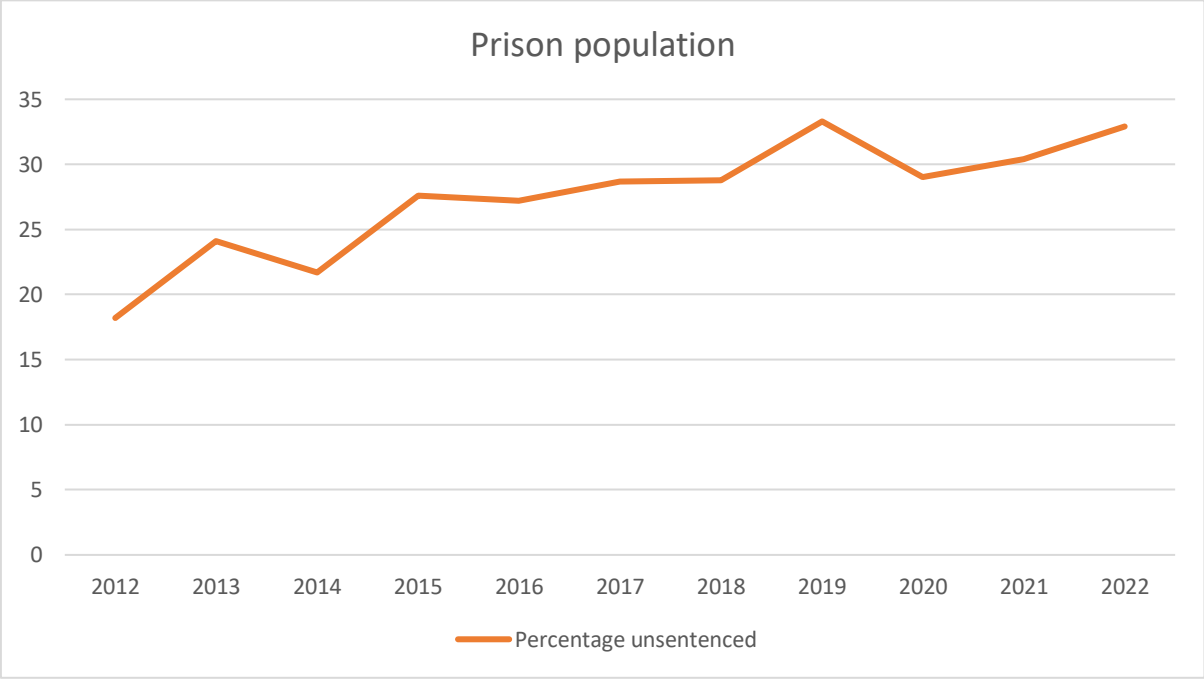
It is difficult to untangle the possible causes of this increased reliance on actual terms of imprisonment, and there are a complex range of factors which contribute. Some of the important factors include:

- A legislative focus on punitive punishments in sentencing;
- The creation of new indictable family violence offences;
- Increasing judicial recognition of the seriousness of some offending types (dangerous driving, family violence, sex offences in particular);

- Increasing rates of unsentenced prisoners leading to 'time served' sentences of imprisonment[1];
- High and increasing rates of recidivism – prisoners with known prior imprisonment rose from 60% to 67% between 2012 and 2022, significantly higher than the national average;
- Social causes including the lack of support services which make non-custodial sentences more difficult to justify – Courts often look to engagement with support services as evidence of rehabilitation or reduced future risk. Unless those services are available to address the drivers of offending, rates of imprisonment are likely to increase

Increasing rate of unsentenced prisoners

Between 2012 and 2022 there was an 80% increase in the number of unsentenced prisoners in Tasmania, as illustrated below:



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Between 2018 – 22, children detained in Tasmania on an average night are unsentenced 72% of the time.[4]

The increasing and high rate of unsentenced prisoners will only contribute to an increasing prison population where unsentenced prisoners are later found not guilty, have their charges dismissed, or do not receive a term of imprisonment. If unsentenced prisoners end up with a sentence of imprisonment greater than the

[1] Where a person who has been refused bail is later given a sentence that is only for the period they spent waiting for their case to be resolved.

length of their period on remand, then there can be no influence on total prison population – it simply shifts the period of imprisonment to the period prior to sentence. The quality of data that exists in this area could be improved to see what affect this phenomenon is causing to prison population increase.

It has been TLA's experience that many of our clients have been remanded because of a lack of access to housing and social support. This cohort often receive terms of imprisonment equal to their time in prison prior to sentencing which may have been avoided if they were not remanded in custody. Court backlogs and systemic delays contribute to an increase in the number of unsentenced prisoners because of the time it can take to reach their case.

Cost

The average operating expense per prisoner per day in Tasmania is $352.70.[5]

The average operating expense per person under community corrections supervision is $17.94.[6]

The cost of supervision has risen more quickly than the cost of imprisonment, however it remains obvious that imprisonment is very costly relative to the cost of supervision.

Alternatives to imprisonment can have a significant cost savings for the taxpayer. A 1% shift in the number of people from prison to community corrections supervision would save approximately $45 million per year nationwide.[7]

The use of evidence-based strategies to reduce contact with the justice system and recidivism

Many of the same strategies for reducing contact with the justice system and recidivism apply equally to adults and children. However, for the purposes of these submissions we have split the considerations into those most applicable to adults and those most applicable to children.

Adults:

The following evidence-based strategies would help reduce recidivism and contact with the justice system:

1. Retaining suspended sentences as a sentencing option;
2. Expanding rehabilitative sentencing options
3. Increasing rehabilitation programs for people in custody
4. Introducing meaningful bail support programs
5. Increasing funding for basic social services which contribute to a safer and healthier society
6. An investigation into the causes of, and solutions for, the disproportionate number of aboriginal people in Tasmanian prisons.

Suspended sentences help keep the community safe

Suspended sentences are planned to be phased out in Tasmania. A range of new sentencing options have been introduced in anticipation of the phase out which is a needed and positive development. Home detention, for example, allows for significant penalty to be imposed resulting in the almost complete loss of freedom of movement, without the detrimental and unintended consequences of that occurring in a prison environment. TLA supports the retention of suspended sentences so that judicial officers have flexibility in setting the most appropriate penalty for a given case.

The sentencing process is complex and requires weighing many competing factors. It must reflect the community's concern for the offending and the impact on any victims. Sentences may be a deterrent to further offending. For the benefit of the person committing the offence and the community, sentences should also promote rehabilitation.

The circumstances of offending and people who commit offences vary from case to case. The offending may be planned or impulsive, repeated or once off. The person may have experienced poor mental health, been substance addicted or live with a cognitive disability. They may have taken steps to address underlying contributors to their offending behaviour.

The myriad of factors that surround an offence need to be carefully considered when a court is dealing with the sentencing challenge. The greater the sentencing options, the more a sentence can be tailored to the unique circumstances of a case, the greater the capacity to address the challenge. Accordingly, TLA strongly supports courts having a range of tools that supports this difficult task.

Suspended sentences play an important function in meeting the sentencing challenge. They acknowledge the gravity of the offending by imposing a term of imprisonment. Whole or partial suspension allows for the other factors to be reflected in the sentence and to foster rehabilitation.

Suspended sentences allow for instances such as where a first time offender commits a serious offence but has since engaged positively in rehabilitation and expressed their remorse. This is particularly the case for young people who often commit offences in company of others but are able to make changes to their lives that reduce the prospect of reoffending. Suspended sentences help keep protective relationships intact. This includes relationships such as employment, family relationships or treatment for substance abuse or poor mental health which would be broken by immediate imprisonment, thereby increasing the risk of reoffending. In this way a suspended sentence can promote community safety.

Suspended sentences provide a substantial incentive to avoid future offending and foster rehabilitation while allowing for the most severe penalty to be imposed where this fails. They can avoid the criminogenic impact of prison. This is particularly desirable when dealing with young and first time offenders[8].

For the reasons set out above the phasing out of suspended sentences would make the Tasmanian community less safe.

Drug Treatment Orders (DTO)

TLA supports broad eligibility for drug treatment orders. DTO are a therapeutic sentencing option that aims to address the underlying cause of offending - the cycle of offending caused by problematic illicit drug use. DTO have been shown to be effective at reducing recidivism[9]. There is therefore a strong argument that community safety is promoted by the use of, and expansion of, DTOs in Tasmania.

A number of current limitations on DTO inhibit their effectiveness in reducing imprisonment and recidivism, These restrictions include:

1) The sentence must be a term of imprisonment with none suspended before being eligible for a DTO[10];

The prohibition on eligibility for an offence that would have otherwise attracted a partially suspended sentence does not withstand an examination of the sentencing framework. Assessing an offender's eligibility for a DTO involves assessing whether, but for a DTO, the offence would have warranted an actual term of imprisonment with none suspended.[11] This necessarily excludes cases that warrant a sentence of imprisonment, but because of steps taken toward rehabilitation justify the partial or total suspension of that sentence.

DTO are a rehabilitative option, usually imposed where an offender has a long history of illicit drug addiction and who has indicated a desire for rehabilitation. If an offender has started their rehabilitation enough to warrant a partial suspension of their term of imprisonment, they become ineligible for a DTO. This creates a perverse incentive against engaging in rehabilitation prior to sentencing, and for defence to advocate for harsher penalties in the form of actual imprisonment, so that the person is eligible for a DTO.

Removing the prohibition on eligibility where a partial or wholly suspended sentence is the otherwise appropriate penalty would be consistent with rehabilitative focus of such an order.

2. A person is not eligible for a DTO if they receive a custodial term exceeding two years[12];

Increasing the total allowable custodial term to three or four years would allow it to be used in a wider variety of circumstances, particularly in the Supreme Court. This could be achieved by suspending the final years of the sentence of imprisonment if the offender successfully completed the drug treatment order, as is the case in Queensland.

3) A DTO is not available where the offence involved the infliction of bodily harm that was not minor harm;

Expanding the eligibility of offences that include the infliction of actual bodily harm would assist in filling the gap created by phasing out suspended sentences. Bodily harm is a broad term and includes psychological harm[13] and "any hurt or injury calculated to interfere with health or comfort. It need not be permanent and must be more than transient or trifling."[14] Many offences are excluded from eligibility because of this limitation, such as assaults causing injury, wounding and other violent offending that would otherwise attract a sentence of imprisonment of less than two years.

4) a DTO is only available where there is a connection between offending and illicit drug use.

DTOs are currently limited only to offences that are linked to illicit drug use[15]. It excludes the misuse of alcohol or medication prescribed to the person. This is despite the prevalence of alcohol use in the Tasmanian community, and the drug being linked closely with a significant proportion of offending behaviour[16].

The logic of a DTO is that by addressing the addiction at the root of a person's offending, it is possible to reduce their risk of committing offences in the future. Thus, if their rehabilitation can be demonstrated while on a DTO, this warrants the leniency of not requiring them to go to prison despite it being warranty by their offending. This logic has proven to be successful and should be applied to other offending categories where addiction and personal problems can be overcome by supervision, counselling, the provision of basic health needs, housing, and other social supports. This would require significant investment, but the framework of a DTO could be expanded to other such offending related problems such as:

- Alcohol addiction
- Gambling addiction
- Mental health disabilities and illnesses

Improving rehabilitation in a custodial setting

One of the justifications of imprisonment is that it allows for prisoners to be rehabilitated while in custody. High rates of recidivism, very low out of cell hours, and a dearth of programs available would suggest that imprisonment is currently not working as intended.

67% of Tasmanian prisoners in 2022 have previously been to prison, up from 60% in 2012.[17] Tasmania ranks last in Australia for the average number of hours per day that prisoners are able to be outside their cell, with our numbers getting steadily worse. In 2013 prisoners had on average 9 hours out of their cell per day, down to 7.7 hours per day in 2021. Tasmania is failing at the basic challenge of staffing and running a prison so that prisoners are able to be out of their cell to a humane degree[18]. This first must be addressed prior to any real rehabilitation being possible. It is only if prisoners have access to and the ability to attend quality programs that can address the causes of their offending that we have any hope of achieving meaningful rehabilitation.

Review into increasing rate of aboriginal prison population

As highlighted, the aboriginal prison population is growing twice as fast as the general population. This calls for a specific inquiry into the drivers of this phenomenon so that it can be addressed. Culturally appropriate social and justice responses are needed to undo the incredibly disproportionate burden that is felt by indigenous communities.

Children

Fortunately, for most children their contact with the youth justice system will be limited. However, a small number of children become entrenched in the youth justice system, reinforcing disadvantage, and leading to poor long-term life outcomes. The youth justice system must treat all children as children and recognise and respond to their individual circumstances. It must recognise the impacts of trauma and neglect on children's development. It must be therapeutically focused. It must help stop the cycle of disadvantage experienced by those at risk of long-term engagement. Rehabilitation, education and support should be the focus, with punishment serving a secondary and more limited function.

Key recommendations to support reduced exposure to the Youth Justice System

1. Raise the minimum age of criminal responsibility from 10 to 14 and the minimum age of detention to 16.
2. Establish a specialist Children's Court in Tasmania to promote a consistent State-wide therapeutic approach.
3. Greater resourcing of preventative, early intervention and diversionary services to address the complex needs of young people and the underlying causes of offending.
4. Amend bail laws to prevent high rates of unsentenced children being remanded in custody waiting for their matters to be resolved.
5. Establish holistic bail support programs available across Tasmania.
6. Amend the Youth Justice Act to reflect our contemporary understanding of child brain development, and adopted a trauma-informed, child focused approach.

Raise the minimum age of criminal responsibility to 14

Key points

1. Children under 14 are too young to be involved in the criminal justice system.
2. Punishing young children disproportionately affects Aboriginal and Torres Strait Islander people and children experiencing disadvantage.
3. Tasmania's minimum age is out of step with the international community, UN recommendations, and extensive neurodevelopmental research.
4. The age of detention should be raised to 16

TLA's Children First Report[19] demonstrated that Tasmanian children with complex needs can become entrenched in the youth justice system which compounds disadvantage. This risk is increased the earlier a child comes into contact with the youth justice system. A substantial body of evidence suggests that dealing with young children in the criminal justice system is unfair, ineffective, and harmful.[20]

Increasing the age of criminal responsibility to 14 would help to decriminalise the social need of the most disadvantaged children in Tasmania.[21] Neuroscience evidence indicates that, at 14, the reasoning function of a child's brain is underdeveloped, while the risk-taking part is more developed. This results in children engaging in spontaneous acts, without reflecting on the consequences. This indicates that children younger than 14 do not have the cognitive maturity necessary for criminal responsibility.

It is important to remember that the number of children under 14 charged with an offence is small. Further, it is mostly low-level offending, with TLA's data showing that most charged offence was stealing.[22] The majority of children who are charged with criminal offences are from disadvantaged backgrounds and have multiple and complex needs that would be better addressed outside the criminal justice system.[23]

Tasmania's age of criminal responsibility is out of step with international standards, where a median age of 90 countries is 14.[24] The UN has expressed concern that Australia has a "very low age of criminal responsibility" and recommended that it be raised to 14.[25]

Aboriginal children in Tasmania are significantly overrepresented in the youth justice system. Despite making up about 10% of the population, they account for 57% of children in detention over the last five years and are incarcerated at about five times the rate of non-aboriginal children.[26] Almost half of Aboriginal Children who were under 14 when first charged with a criminal offence were also in the child protection system.[27]

Raising the age would provide an opportunity to address the intergenerational disadvantage inflicted upon aboriginal people and children.

An Aboriginal Youth Justice Strategy should be developed to address the needs of Aboriginal children and promote self-determination. The recently released *Wirkara Kulpa*[28], provides an example of such an approach.

Raising the age to 14 must be accompanied by an alternative approach that brings together a wraparound service response that addresses the underlying factors contributing to the child's actions. This was explored at length report by Emeritus Professor Morag McArthur and others, when looking at how the ACT can support their commitment to raise the age to 14:

> Raising the age of criminal responsibility provides a real opportunity to build the capacity of the formal and informal systems (of family and community) to focus on 'promoting secure, safe, and stable human relations, education, and housing, as well as offering appropriate and timely individual, family, and systemic support across an integrated policy and service framework.' Intervening early can not only change the trajectories away from the criminal justice system but can improve the key domains of a child's life, leading to individual and community benefits. The ultimate outcome of raising the age of criminal responsibility is to identify and respond to the individual context of children with complex needs, to reduce and avoid harmful behaviour and to support them on positive pathways.[29]

Professor Morag's report provides a sensible framework that should be adopted as part of the move to increase the age to 14 in Tasmania.

Age of detention

As previously noted, there is strong evidence to demonstrate the negative impacts of incarceration, which has a criminogenic effect on children[30]. The number of children sentenced to a term of detention is very low. The more likely scenario is that a child will be remanded in custody awaiting the outcome of their case, with factors such as homelessness often contributing to this detention. Around two thirds of children in custody are on remand and unsentenced.[31]

Overwhelmingly, when their case is finalised children are not sentenced to a period of detention with only 8% of Tasmanian supervised sentences involving detention.[32]

Over half of Tasmania's young offenders are sentenced for new offences to a supervised sentence within 12 months of release from custody.[33] The high rate of recidivism indicates that detention is not having any positive long-term effects. Nationally, 61% of children aged 10-16 who were released from sentenced detention returned to sentenced supervision within 6 months, and 80% returned within 12 months.[34]

The age of detention should be raised to 16, in recognition of the criminogenic impact of detention.[35] The allows an emphasis on addressing the underlying causes of behaviour and fostering rehabilitation.

Introduction of a specialist Children's Court

Key points

1. Tasmania should adopt a specialist Children's Court to deal with all matters where children are at the centre of the proceedings
2. The Court should be child focused
3. The Court should be multi-disciplinary, collaborative and aimed at problem solving
4. The Court should be supported by a specialist workforce
5. The Court should be culturally responsive
6. TLA should be funded to provide a comprehensive young person's legal service
7. Child focused and trauma informed processes should be adopted for children appearing the in Supreme Court of Tasmania

Tasmania does not have a specialist children's court. The two jurisdictions relating to children both operate as divisions of the Magistrates Court. The Youth Justice Division of the Magistrates Court is established by the Youth Justice Act 1997, deals with criminal proceedings against children. The Magistrates Court (Children's Division) Act 1998 deals with child safety matters and some adoption cases. Consequently, children enter the same building as adults and have their cases heard by non-specialist Magistrates. It is common for children to be waiting for their case in the same area with adults charged with criminal offences. No physical alterations are made to Court waiting areas, or the court itself, to accommodate children. Tasmanian courts are imposing, adult environments that sit during school hours.

A unified Children's Court that deals with youth justice matters, child protection cases, and other legal proceedings focused on children should be heard in a court that is child focused and trauma informed. This means that court processes and environments would be tailored to children to make the proceedings less formal and intimidating. This recognises the differences between children and adults in their development, and the importance of separating adults charged with criminal offences from children. Court proceedings would be modified so that they are easier to follow and understand for children. These changes would allow children to participate in proceedings more meaningfully and for the focus to be on rehabilitation and reintegration rather than punishment.

The first purpose-built Children's Court in Los Angeles was designed with input from children, parents, court staff, lawyers, judges and child advocates. Each area of the court was designed with children in mind and included

- Family visiting areas for children removed from their homes, set up as small living rooms with couches, chairs, art and plants
- Scaled down entrances to court rooms to be more child-friendly

- Waiting areas with small tables, and art supplies including videos playing explaining the court process
- Modified judicial bench with a u-shaped layout
- Large interior and exterior play spaces for children in protective custody

The design was aimed at creating a more informal and relaxed environment for children attending court to lower anxiety for children and their families. It recognised that children require age-appropriate entertainment, spaces and architecture to allow for more meaningful participation.[36]

A specific Children's Court dealing with youth justice matters should be focused on identifying key areas of need for children and their families. The court should be supported by multi-disciplinary teams in recognition of the complex needs and trauma experienced by most youth justice participants. This collaborative approach would be focused on finding solutions to the underlying causes of child offending, and making sure families have adequate support and education. While this type of response would be expensive, particularly in a small jurisdiction like Tasmania, it

has the best chance at reducing children being trapped in the judicial system as they enter adulthood.

The benefit of specialist magistrates has been widely recognised. This allows Magistrates to develop a deeper understanding of the drivers of youth offending and of the service framework available to address these issues.[37]

TLA receives non-recurrent funding to provide legal services to children facing charges. The funding does not meet the full cost of the service. Recently, funding was provided to establish an afterhours bail service in the North and Northwest. Arrangements to implement this are being put in place. However, this will potentially leave children in the South without legal representation if they are brought before the afterhours court from Monday to Thursday night.

A wraparound young person's legal service, providing both legal and social support services, would enable TLA to better support children, particularly those at risk of long-term engagement. TLA lawyers are trusted by the children they work with, providing the best opportunity to engage children and address factors contributing to their engagement with the justice system. TLA has considerable experience in delivering multi-disciplinary and holistic services, such as the Family Advocacy and Support Service and Senior Assist which both integrate legal and social support services.

The young person's legal service would utilise the expertise of TLAs Community Legal Education and Information team to develop materials targeted to children in the youth justice system and their families. These would be co-produced with children, consistent with TLAs client engagement strategy. TLA is currently undertaking a similar exercise the develop community legal information for people involved in the child protection system.

A very small number of children are charged with offences heard in the Supreme Court of Tasmania. There is no structure to adjust the proceedings or the setting

to ensure that the child can understand and participate in the case. The need for such changes was recognised in a protocol adopted by the Supreme Court of Victoria which "is guided by the general principle that it should take reasonable and necessary steps to ensure that children are not exposed to avoidable intimidation, humiliation and distress and that they are assisted to effectively participate in proceedings before the court. The Court acknowledges that particularised in-court procedures may be needed to make the age appropriate and possible adjustments will be considered by the Court in each case."[38] A similar protocol should be adopted in Tasmania.

Greater resourcing for youth justice support systems

Key points

1. Early detection and targeted prevention strategies are needed
2. Diverting children away from the youth justice system should be prioritised
3. Social services should be adequately funded
4. Multi-disciplinary wrap-around services would help address the complex needs of children

Tasmania would be well served by increasing funding into services that target key risk areas that can lead to childhood offending. Such areas include mental health services, drug rehabilitation, education, child protection, sexual rehabilitation and education, and housing. As noted in TLA's Children First Report, two thirds of cross-over[39] children first had involvement in the child safety system and then with the youth justice system.[40] Almost half of TLA's clients under 14 charged with offending were cross-over children.

The younger the child, the more pronounced the problem, partly because services are often unavailable for children between 10 and 13, and also because exposure to the justice system at an early age is associated with more significant social problems. For example, the ACT report[41], examined the characteristics of a cohort of 10-13 year old's under youth justice supervision, finding:

- 29% were the subject of child protection orders in the 12 months after their first supervised youth justice order
- 90% had experienced family violence
- 58% had a moderate or significant developmental delay or intellectual disability
- 33% were categorised as having moderate to extreme sexualised behaviour with many the victims of sexual crimes
- Two thirds of the cohort had moderate to significant mental health concerns, with only half of that group attracting a clinical diagnosis prior to youth justice involvement. 38% experienced suicidal ideation or had attempted suicide

- 72% had been expelled from school

These findings are consistent with research elsewhere in Australia.[42] The ACT report also noted that earlier identification and screening of children and families was needed rather than reacting to crises after it has occurred. Many services in the ACT were noted as having very long wait times, making early intervention impossible. It found that proactive and early intervention has is effective in children with trauma, maltreatment, or disabilities as early as pre-school and in early primary school. Further, that services were underfunded, siloed and not culturally appropriate or safe for aboriginal people. These experiences are echoed in Tasmania, and much more could be done to provide more resources to these critical services. In various parts of Tasmania, such as the North-West and West, there is a significant shortage of services for children.

The Productivity Commission found that diverting children away from the youth justice system can avoid them becoming trapped in the judicial system into their adulthood.[43] It noted that helps to lower reoffending rates, saves money and leads to better community outcomes.[44] Diversion should focus on the needs of the child and their family, and be aimed at reducing the risk of reoffending.[45]

As noted by the Custodial Youth Justices Options Paper (Noetic):

> 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.[46]

It is critical that diversionary programs are available in rural and regional areas of Tasmania. Universal programs should be developed to avoid the postcode injustice that flows from a patchwork of options around the State.

Bail laws

Key points

1. Tasmania should introduce child-specific bail laws and principles
2. Bail support programs would help reduce the number of unsentenced children in detention
3. The offence of breach of bail should not be introduced

Approximately two thirds of children in detention in Tasmania are unsentenced.[47]

The driver of this is twofold:

- A lack of adequate support services of children in crisis, particularly a lack of supported accommodation, and
- Antiquated and adult-focus bail laws being applied to children.

Tasmania does not have specific bail laws for children. Rather, the same law that applies to adults is used, with the only modifications for children being that:

- Children should not be arrested unless a police officer believes it is necessary to prevent the continuation of or repetition of a sufficiently serious offence
- Remand in detention should be a last resort

While these protections are useful, similar principles apply to adults and they have little practical impact. The bail law does not meet the needs of children with complex needs.

Neither the *Bail Act 1994* nor the *Youth Justice Act 1997* set out the applicable principles that should be used to determine an application for bail by a child. This means that existing principles developed by the common law in relation to cases about adults, are applied to children. The primary consideration for bail applications for an adult defendant is whether they will appear in court.[48] It is unclear how this interacts with the principle in the *Youth Justice Act* that remand in custody be a last resort.

Tasmania should have child specific bail laws and practices including:

- A legislative presumption in favour of bail for children
- Bail cannot be refused solely on the basis of lack of suitable accommodation
- A requirement to consider all other options before remanding a child in detention
- The need to minimise stigma associated with remanding a child in detention
- Consideration of the likely sentence if the child is found guilty
- That bail conditions be no more onerous than are necessary and do not themselves punish the child
- Where a child is released on bail, police have a duty of care to return the child to their accommodation

These principles are similar to those set out in Victorian legislation and to recommendations made by the Australian Law Reform Commission.[49]

Children in Tasmania are often refused bail because of problems with accommodation that are outside their control. This could include situations where the child is homeless because of family breakdown, is under the care of child safety and without effective supervision, or because of mental health or drug problems. Tasmania should introduce a holistic, legislated bail support program that provides intensive case management of children at risk of being remanded in custody. The supports should include:

- Drug and alcohol treatment
- Crisis and supported accommodation
- Disability and mental health services

- Aboriginal specific services

In Victoria's supported bail program, each child has a case worker with the responsibility of meeting regularly with the child, reviewing progress, making referrals to support services, and providing updates to the Magistrate. While Tasmanian children can be bailed with conditions they comply with the directions of a youth justice worker, the process is ad-hoc, unlegislated and funded from existing youth justice resources.

The offence of breach of bail conditions should not be reintroduced for children. The assertion that children are not accountable and that the 'relevant contraventions' cannot 'be considered by the court when examining propensity to offend for future offences' is incorrect. The *Youth Justice Act* allow relevant contraventions to be taken into account in sentencing[50]. A child may be arrested if it is alleged that they are in breach of their bail conditions, and this is a consideration in determining the continuation of bail or future bail applications. The only change is that children's prior convictions are not cluttered with offences unnecessarily.

Reviewing and reforming the Youth Justice Act

Key points

1. The Youth Justice Act should be reviewed and remade
2. The Act should be child-focused, trauma-informed, and therapeutic in nature
3. The Youth Justice Act principles and objectives should reflect modern understandings of child maturation and neurodevelopment

The Youth Justice Act is 25 years old and needs to be modernised to reflect current scientific understanding about child development. Its principles should articulate the desire to divert children away from formal court-based legal proceedings where possible, to minimise harm, to take a trauma-informed approach, and focus on rehabilitation. It should be evidence-based and help connect children and their families to support services that can help address the root causes of offending behaviour. It would be an opportunity to provide for culturally appropriate and safe proceedings for aboriginal children, as in the case of the Koori Court in Victoria.

The current Youth Justice Act principles focus on punishment, rather than rehabilitation. For example, nine out of ten of the principles in section 5(1) focus on sanctions, taking responsibility and punishment. The principle that children should be treated no more harshly than an adult is a good example of the skewed focus that exists in the current legislative principles. This principle should be positively framed to require that children are to be treated more leniently than adults.

While some of the current principles are important, such as

> (i) any sanctioning of a youth is to be appropriate to the age, maturity and cultural identity of the youth;

there is a heavy emphasis on sanction and punishment, rather than rehabilitation, restoration, and reintegration. Principles that recognise the systemic and multi-faceted failures that have led to children being before the youth justice system, and clearly articulate that the overriding consideration for youth justice is rehabilitation are important. They orientate the system towards rectifying problems and addressing the root causes of offending behaviour, rather than the behaviour alone.

The review of the Act should include a comprehensive examination of sentencing options, including whether home detention should be introduced. Consideration needs to be given to sentence options and programs, both within Tasmania and elsewhere that are shown to work. [51] The Sentencing Advisory Council should undertake a review of Youth Justice sentencing options in Australia and make recommendations about the appropriate range of sentencing options for the Tasmanian context.

The provision of, and participation in, services for people in prison and leaving prison (health housing and legal services);

It stands to reason that the greater the level of services afforded to people in custody, that they stand the best chance of success after their release. The range of supports for people in custody is not adequate to address their complex needs and could be improved in a number of ways, including by ensuring basic necessities, including:

1) They are able to leave their cells regularly so that their mental and physical health is not affected by isolation and confinement;
2) That they be able to have free and easy access to their legal practitioner, or to be able to find one if they are unrepresented;
3) That their health needs are met;
4) That their release from prison is well planned so that the supports they need are available for them in the community
5) Support for the provision of housing and other social and health supports on release.

Yours sincerely

[redacted]

KRISTEN WYLIE
Director

31 March 2023

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[3] *Prisoners in Australia,* Australian Bureau of Statistics, https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release#state-territory
[4] Youth detention population in Australia 2022, Australian Institute of Health and Welfare – Australian Government, https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2022/contents/state-and-territory-trends/numbers
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[7] *Australia's Prison Dilemma,* Productivity Commision, page 47, https://www.pc.gov.au/research/completed/prison-dilemma/prison-dilemma.pdf
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[12] *Tasmania v Joseph [2017]* TASSC 23 (27 April 2017) at 34
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[38] https://www.supremecourt.vic.gov.au/law-and-practice/areas-of-the-court/criminal-division/protocol-principles-for-managing-children-in
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[50] S24C of the *Youth Justice Act* says (b) a court (including the Court) may take the contravention into account in sentencing the youth for the offence in relation to which the bail to which the contravention relates was granted.
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