Making Queensland Safer Bill 2024

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2 December 2024

Justice, Integrity and Community Safety Committee
Parliament House
George Street
BRISBANE QLD 2000

By Email: JICSC@parliament.qld.gov.au

Dear Committee,

Re: Making Queensland Safer Bill

Please find below a brief response to the request for submissions regarding the proposed Bill.

I wish to express my disappointment that the call for submissions was made on Friday 29 November 2024 with an expectation that responses be received by Tuesday 3 December 2024. This cannot be considered an effective consultation process. Given the gravity of these issues, and the significant ramifications for vulnerable children, this should be considered unacceptable.

In view of the tight time frame, this submission is necessarily brief. I ask that it be read alongside the substantial report I wrote, which was funded by the Queensland Government, entitled ***Safety Through Support: Building Safer Communities by Supporting Vulnerable Children in Queensland's Youth Justice System*** **(attached).**

I have some brief remarks to make in relation to a limited number of provisions of the Bill.

1. Clause 4 – Who may be present at proceedings

This clause proposes to allow representatives of victims and persons with media accreditation to be present at Childrens Court proceedings.

Some unintended adverse consequences of this provision could include:

- Unruly behaviour in the courtroom due to high levels of emotion displayed by victims' representatives – contempt of court charges could result, which would add to their distress and compound their victimisation.
- Accused children may be reluctant to disclose personal information that is relevant to the offence – including evidence of their own past victimisation, particularly experiences of child abuse or neglect – because they are concerned about the potential for significant breaches of their privacy to occur. Courts may therefore lack the information they require to fairly consider the case and impose an appropriate sentence.

2. Clauses that concern the disclosure of children's criminal history information

Some unintended adverse consequences of these provisions could include:

- Increased alienation from society for those who have committed offences as children – It is universally accepted that effective punishment of children is that which is swift and allows children to move forward with their lives. Children's mistakes should not affect the rest of their lives, and the creation of a 'criminal identity' should be avoided if we truly want them to desist from offending.
- Additional barriers to rehabilitation and reintegration – Adults with an irrelevant criminal record are often discriminated against by potential employers, and may be unable to obtain a Blue Card. This limits their capacity to live as productive citizens and desist from offending.
- Criminal history information may be taken out of context – Many children obtain a criminal record whilst they are under the care of the state. Individuals may be effectively punished for their own victimisation if criminal history information is considered in the absence of child safety information.

3. Clause 15 – Sentencing principles

Restricting courts' discretion in sentencing in this way may amount to an impermissible encroachment on judicial power. Dictating to the courts what they must and must not have regard to in sentencing may undermine public confidence in the independence of the courts and may be incompatible with the institutional integrity of the judiciary.

It is inappropriate and arbitrary for the primary consideration in sentencing a child to be the impact of the offence on any victim, to the exclusion of traditional considerations related to the sentencing of children, including that detention should be a last resort and their rehabilitation should be the focus of any penalty imposed. The sentencing principles that currently apply to children are the product of years of common law development – dispensing with them is a grave matter.

Furthermore, the 'impact' of an offence on a victim cannot be measured or independently assessed. As a result, these laws may be practically impossible for the judiciary to comply with.

Importantly, this is not the basis upon which adults are sentenced. This clause therefore exceeds any election mandate that can be claimed by the Government in relation to sentencing children 'as adults'. Application of section 9 of the *Penalties and Sentences Act 1992* (Qld) to children, whilst not advisable, would be preferable, and more consistent with the Government's 'adult crime, adult time' slogan.

4. Clause 19 – Offences to which adult penalties apply

The list of offences to which adult penalties apply is arbitrary, and has bears no reference to crime statistics, research or any other evidence base.

If the intent is to apply adult penalties to very serious crimes, then this list is overbroad. In particular, offences such as dangerous operation of a motor vehicle, unlawful use or possession of a motor vehicle, entering premises with intent to commit indictable offences and unlawful entry of a vehicle are well-known to be offences that children commonly commit. There is no objective reason they should be referred to as 'adult crimes'.

Legislators who are also parents should be mindful that *all children* will be subject to these laws, and a proportion of children who commit these offences come from middle and upper socioeconomic households.

Legislators who are parents of children with disabilities, such as ADHD and autism, should be very concerned about these proposed laws. Evidence suggests that these children are significantly over-represented amongst children who commit several of the crimes in this list.

An unintended consequence of these laws will certainly be that children with disabilities – from all walks of life – will be subjected to lengthy periods in detention facilities that are ill-equipped to address their special needs.

All Queensland parents have reason to be concerned about these proposed laws.

5. Clause 37 – Charter of youth justice principles

As noted above, giving primacy in sentencing to any impacts of children's offending on victims, over and above the importance of their rehabilitation and protection as children, goes against centuries of common law development. It is not consistent with the principles of sentencing that apply to adults. It is not consistent with international research. It also ignores the fact that the vast majority of children who commit offences were first victims themselves.

The international evidence overwhelmingly shows that punitive responses to children's offending will not improve community safety. Children will not desist from offending unless they have a pathway out of crime. They need to be safe, housed and nurtured. Many of them require mental health treatment and disability support services. These should be the priorities of a government that truly wishes to address 'youth crime'.

Please do not hesitate to contact me with any questions. I am committed to working with the Government to develop evidence-based strategies to address these issues.

Yours sincerely,

Professor Tamara Walsh

April 2023

THE UNIVERSITY OF QUEENSLAND
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SAFETY THROUGH SUPPORT:

Building safer communities by supporting vulnerable children in Queensland's Youth Justice System

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This research was commissioned by the Queensland Department of Justice and Attorney-General and the Queensland Department of Children, Youth Justice and Multicultural Affairs in December 2021. I am grateful to Nicole Drew and Leisa Barnes for their support and assistance throughout the life of the project.

To inform this research, I undertook 39 interviews with 46 stakeholders in February/March 2022. All of the participants worked with children in the youth justice system, mostly in Queensland. Some worked for Youth Justice, some worked in other public service roles, others worked in non-government organisations. Nine of these individuals were First Nations people. I am grateful to every one of these people, who generously offered their time to provide me with their insights into the system and how it could be improved. I am particularly thankful to the First Nations people who participated, from whom I learned so much. I valued my discussions with them immensely, not just as a researcher, but as a woman, and as a mother.

Most of the participants in the consultations expressed a deep love for the children they work with in the youth justice system. They were at pains to emphasise that these children are not dangerous or rude or evil. They are children who have been let down by all of the adults in their lives who were supposed to care about them. They have not been protected or provided with the necessities of life. Their human rights have been constantly violated. And yet, they demonstrate a resilience that is as admirable as it is surprising.

It is their voices that are lost in the ongoing debates about youth justice 'reform'. I attempted to obtain ethical clearance to interview young adults who had exited the youth justice system, but after a year of trying, I gave up. Apparently, I was unable to demonstrate that this research was sufficiently ethical or culturally safe. To me, this presents a bitter irony: surely talking to people with lived experience is at the heart of truly ethical research; and surely obtaining the perspectives of First Nations young people is necessary to ensure our research is culturally safe.

Many thanks to my research assistants, who gave up much of their summer to assist me with this project. These remarkable young women have been a pleasure to work with, and I wish them every success and happiness as they embark on their careers in law.

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EXECUTIVE SUMMARY

1. Queensland's youth justice system today

Queensland has the highest number of children in youth detention of any state or territory in Australia.[1] Around 5 per 10,000 Queensland children are in detention compared with around 3 per 10,000 Australia-wide.[2]

The number of children in detention in Queensland is increasing, even though the number of children coming before the courts on charges is decreasing.[3] In 2021/22, there were around 275 children in custody in Queensland on an average day, which was an increase of 20% since the year before.[4] Queensland children spend an average of 209 days in detention, compared to an Australian average of 190 days.[5]

Queensland has the highest proportion of children in custody on remand in the country.[6] Only 14% of children in detention in Queensland have been sentenced by a court.[7] A large proportion of children held on remand will be acquitted of their crimes, and many more will be released immediately by the court once their case has been heard.[8] Only 55 children were sentenced to a period of detention (in addition to time already served) in 2021/22.[9]

Aboriginal and/or Torres Strait Islander children are substantially over-represented in Queensland's youth justice system: **50% of children who appear before a court are Indigenous and around 70% of children in detention are Indigenous,** yet they comprise only 4% of the youth population.[10] Indigenous children are 21 times more likely to be in detention than non-Indigenous children, 19 times more likely to be under youth justice supervision and 11.5 times more likely to appear in court on criminal charges.[11]

Youth detention costs the taxpayer $1901 per child per day.[12] Yet 80% of children who spend time in detention will return to the youth justice system within 12 months.[13]

Most of the offences that children are charged with are property-related.[14] Only around 6% of children's proven offences are violent in nature.[15] Punitive responses to youth crime are often justified as being necessary to ensure community safety. Public safety is an important goal of the youth justice system, however, harsh criminal law responses do not make the community safer. Instead, they seem to have a 'crime-causing' effect. If the goal of community safety is to be met, we need to find a way to stop children from offending and re-offending.

2. Queensland's 'offending' children: Who are they? What is happening to them?

The vast majority of children who commit crimes will 'age out' of offending once they reach adulthood.[16] Research suggests that by bringing children into the youth justice system and before the courts, we increase the chance that they will reoffend.[17] The further through the system they go, the more likely they are to offend again. Research from all over the world has found that children are **less likely to reoffend if we take a 'minimal intervention, maximum diversion' approach**.[18]

Almost half of all offences that come before the Childrens Court in Queensland have been committed by just 10% of child defendants.[19] This means that there is a small group of children, around 350 of them, who are 'chronic' repeat offenders.[20] This is less than an average high school enrolment. Changing the way we respond to this 10% of children who commit offences could dramatically reduce 'youth crime' in Queensland.

Children who commit offences, especially those who commit serious offences, or several offences over time, are amongst the most vulnerable children in Queensland. Children in custody have particularly high and complex needs, for example:[21]

- 26% are the subject of a current child protection order;
- 44% were in unstable or unsuitable accommodation before their arrest;
- 18% have a cognitive or intellectual impairment;
- 17% have been diagnosed with post-traumatic stress disorder; and
- 5% have autism.

This explains why children **continue to offend, even after they receive harsh sentences from a court**. We need to ask: why are the basic needs of these children not being met in the community?

3. Children's rights in the youth justice system

The *Human Rights Act 2019* (Qld) requires public entities to act in a manner that is compatible with human rights, and to take individuals' human rights into account when making decisions.[22] If they do not do this, they may become the subject of a complaint to the Queensland Human Rights Commission, or litigation if there is a collateral cause of action.[23]

Police officers, youth justice officers, child safety officers, public school teachers and principals are all 'public entities'[24] so they must comply with the *Human Rights Act 2019* (Qld). Human rights that must be considered by public entities when they make decisions about children in the youth justice system include:[25]

- the child's right to the protection that they need because they are a child, and that is in their best interests;
- the child's right not to have their home or family unlawfully or arbitrarily interfered with;
- Aboriginal and/or Torres Strait Islander children's right to enjoy and maintain their identity, cultural heritage, kinship ties and connection to lands;
- the child's right to be treated with humanity and respect for human dignity when they are detained;
- the child's right to rehabilitation;
- the child's right to a speedy trial; and
- the child's right to be treated in a way that is appropriate to their age.

International human rights law can be considered when we are determining the content and scope of these rights.[26] International human rights law emphasises that the best interests of the child should be a primary consideration in all decisions that affect them.[27] The United Nations Committee on the Rights of the Child has said that 'crime committed by children tends to decrease after the adoption of systems [that promote] the child's sense of dignity and worth.'[28] Based on the most recent international research, the Committee has concluded that **'**[d]iversion should be the preferred manner of dealing with children in the majority of cases.'[29]

This is reflected in the Youth Justice Principles that underlie the operation of the *Youth Justice Act 1992* (Qld).[30] These Principles recognise the need to protect children's wellbeing, divert them from the courts wherever possible, respect their cultural rights, and focus our interventions on their reintegration into society. They also state that children should be detained only as a last resort and for the least time that is justified in the circumstances.

Protecting children's rights is not inconsistent with the goal of community safety, nor does it mean that children should not be held accountable for their actions. We must ask why children offend in the first place, and recognise that children who commit offences have high and complex needs. If we want them to stop offending, we need to meet their basic needs and address the underlying causes of their offending behaviour.

4. Early intervention and prevention: A multiagency approach

The best way to reduce children's offending is to provide support to vulnerable children in the community and take preventative measures so they do not engage in offending in the first place.

To do this, we need to look beyond the youth justice system. Youth Justice is where children end up after they have experienced a breakdown in the systems and supports around them. For the best outcomes, we need to act protectively before the child commits offences. This can occur through the education system, the child protection system, and diversionary approaches to policing.

(a) Education

Staying in school prevents offending – **education is one of the most important protective factors a child can have against youth justice system involvement**.[31] Children who are not in school are not occupied, and offending can be a means of alleviating boredom. Without basic literacy and numeracy skills, it will be difficult for children to build a life for themselves as productive citizens. Remaining in school also ensures that other adults are watching out for them – this is important for children who are homeless or unsafe at home.

(b) Child Safety

Too often, children are removed from their home only to bounce from placement to placement, and ultimately end up in residential care. This is traumatic for children, and trauma is a predictor of offending.[32] By the time they get to court, many children are homeless, often because an appropriate placement has not been found for them. Children come to view Child Safety as 'the enemy', yet Child Safety is their statutory parent and is responsible for their care and protection. **Three quarters of children in detention are known to Child Safety;**[33] **protecting these children includes preventing their criminalisation.**

(c) Policing

Police are required under the *Youth Justice Act 1992* (Qld) to consider alternatives before arresting a child. When police are deciding what action to take in response to a child's offending, they should consider the child's personal characteristics, including whether they have any disabilities or have been exposed to trauma. Police should divert children away from the criminal law system wherever possible. Research suggests that if children are diverted by police, rather than being arrested and processed by a court, they are less likely to reoffend.[34]

Police can caution children or refer them for restorative justice, but only if the child admits the offence. **Children should not have to admit an offence to be diverted**. Instead, police should take a 'community policing' approach to children's offending, by counselling them, making referrals, and engaging in restorative practices in the moment, for example, by asking a child to apologise immediately, or by contacting their parents or carers so they can pick them up. These interactions between

children and police should not be recorded. **There should be no limit to the number of cautions or other diversions children can receive.** Children make mistakes and those mistakes should not be held against them or compromise their chances of exiting the criminal law system as they mature.

Some offences should never be the subject of a criminal charge for children. Survival-related offences, such as stealing food, fare evasion and trespass, should be decriminalised for children. Offences committed in residential care that would not be the subject of criminal charges if they occurred in a private home should never result in criminal charges.

For Aboriginal and/or Torres Strait Islander children, diversion should involve their family and communities. The fractious relationship between Indigenous children and the police is a legacy of colonisation and the Stolen Generations. **Aboriginal and/or Torres Strait Islander young people should be dealt with within their communities using culturally safe approaches**.[35] Community patrols and Family-Led Decision Making are examples of successful initiatives.[36]

5. The impact that bail laws have on custody rates

Over the last two years in Queensland, bail laws have been amended several times in response to individual incidents that have received extensive media attention. Drastic changes to laws made in such circumstances can have unintended consequences. Recent changes to Queensland's bail laws as they apply to children provide an example of this.

The purpose of bail is to ensure that a defendant attends court when required and does not interfere with evidence or witnesses. However, in 2021, a provision was added to the *Youth Justice Act 1992* (Qld) which reversed the presumption in favour of bail for children who are charged with prescribed indictable offences while they are on bail or have proceedings pending.[37] Children can wait long periods of time to have their matter finalised through no fault of their own – on average, it takes 84 days for the Childrens Court (Magistrates) to finalise a matter, and 286 days for the Childrens Court of Queensland.[38] Court delays can mean the difference between being remanded in custody and not. As a result, there is a perverse incentive for children to plead guilty to offences they may not have committed, so they can get the matter over and done with and avoid being remanded on other charges.

Joyriding is almost a rite of passage amongst certain groups of young men. This has long been the case, but technological advances mean that cars cannot be hotwired anymore, so children break into and enter houses for the purpose of obtaining keys.[39] Unsafe driving practices can result in tragic accidents amongst all age groups. **Bail laws are a blunt instrument to avoid such tragedies**. Crime prevention methods are likely to be much more effective for this type of offending, and programs that provide children with opportunities to learn how to drive safely and lawfully are reportedly effective in reducing vehicle-related offending.

The consequences of tighter bail laws are more children on remand and more children in watchhouses.[40] In 2021/22, around 460 young people in Queensland spent time in a watchhouse each month.[41] The UN Committee on the Rights of the Child has said that children should spend no longer than 24 hours in a watchhouse, and the *Youth Justice Act 1992* (Qld) states that children should be brought before a court 'as soon as practicable and within 24 hours after the arrest.'[42] However, **only 80% of children's stays in the watchhouse last one day or less.** In 2021/22, 305 young people spent five to seven days in a watchhouse, and 167 young people were in a watchhouse for eight days or more.[43] Watchhouses are inappropriate for children – there is no privacy, education, access to services, or segregation from adult offenders. Girls are at particular risk of sexual harassment and abuse in watchhouses.

Some children spend time in watchhouses, or in detention, because they do not have suitable accommodation to be released to, even though the *Youth Justice Act 1992* (Qld) states that this should not occur.[44] If children cannot be safely released because of a lack of accommodation or support, this is a child protection issue. Child Safety services should be responsible for finding accommodation and held accountable if this does not occur. Magistrates could ensure accommodation is found as quickly as possible by relisting a child's matter, perhaps even daily, until appropriate accommodation is secured.[45]

6. Creating a child-friendly, culturally safe Childrens Court

In Queensland, half of all child defendants are Aboriginal and/or Torres Strait Islander.[46] Cultural safety requires practitioners, and law and policy makers, to first recognise how their own cultural identity influences the way in which they practise, and then to work towards creating a safe environment for those of different cultures, based on shared respect, shared knowledge and 'truly listening.'[47]

The *Youth Justice Act 1992* (Qld) includes several provisions that seek to promote cultural appropriateness and cultural participation for Indigenous people.[48] Some of these provisions assume that representatives of a community justice group will undertake certain tasks such as making submissions to the court on bail and sentencing.[49] However, not every community has a community justice group, and not every community justice group is sufficiently resourced to undertake these tasks.

Elders and respected persons should be invited to assume a greater role in the youth justice system, and should be adequately funded to fulfil their statutory responsibilities. In courts that include elders in proceedings (such as the Youth Murri Courts), the contribution of the elders is highly valued by all stakeholders. Elders provide pre- and post-court support to children and families, emotional support to children and families at court, and cultural information and advice to the court. Many are volunteers. Elders and respected persons should be appropriately remunerated for their time, and community justice groups should be funded at the same level as equivalent non-government organisations.

Local court innovations, including Youth Murri Courts, should be supported and sufficiently resourced, however it is not realistic or appropriate to suggest that all Childrens Courts adopt an adjournment model approach. Adjournment model courts involve close monitoring of defendants over extended periods of time. They are time and resource intensive, and they are not suitable for all children. Instead, **all Childrens Courts should be modified so they are culturally safe for all children who appear before them.** This could involve:

- having **First Nations Court Liaison Officers** who attend every Childrens Court on every sitting day to support Indigenous children and families and provide cultural advice to the court;
- incorporating **Aboriginal and/or Torres Strait Islander artwork and artifacts** into every courtroom;
- inviting **elders, respected persons, and community justice group representatives** to attend all Childrens Court sitting days;
- taking submissions of elders, respected persons and community justice group representatives into account in bail decisions and sentencing; and
- offering an **Acknowledgment of Country,** and paying respect to elders, in court at the start of every sitting day.

Family-Led Decision Making could play a central role in responding to the offending behaviour of Indigenous children. Families and communities should be empowered to draw on their own strengths to address the causes of children's offending, and appropriately resourced to do so.

Innovations in court design could benefit all children. Most children struggle to understand proceedings and find it difficult to participate, regardless of their cultural background. Recent research has indicated that most children who are known to the youth justice system have significant deficits in comprehension and language skills, and do not understand court processes or the effect of orders imposed on them.[50] Support staff can assist with some of this, for example:

- Court liaison officers in areas like education, mental health, disability and child safety.
- Cultural liaison officers and elders.
- Communication assistants, who can support children with speech and language impairments.
- Lay advocates, who can provide non-legal advocacy support for children who are particularly vulnerable within the system, particularly those who are homeless.[51]
- Specialist youth lawyers, who play an important role in advocating for children and explaining legal concepts to them.[52]

It is important that legal jargon is minimised or eliminated from proceedings involving children, and magistrates and judges should ensure that their reasons and orders are explained to children in a manner they and their parents understand.[53]

Many children who appear before the Childrens Court – Indigenous and non-Indigenous – have active child protection orders in place. The Childrens Court deals with both child protection and youth justice matters in Queensland, but in different proceedings and on different days. However, a child's child protection and youth justice matters could reasonably be dealt with at the same time.[54] 'Cross-over lists' exist in some New Zealand Youth Courts, for example.

7. Sentencing: Dismissals, discharges and diversion

Community safety and protecting children are not competing goals. Rather, promoting the child's welfare will help them to stop offending, and thereby ensure the safety of the community.

Children's brains are immature, which affects their decision-making capacity. Yet, they have a long future ahead of them.[55] Dismissing children's charges will often be the most appropriate response to their 'offending' behaviour, considering their age, trauma history, health and disability status, and the importance of maintaining their relationships and engagement with education. This is particularly true of children with mental illness, cognitive impairment and other disabilities such as autism spectrum disorder.[56]

Whilst restorative justice conferencing can be effective in addressing children's offending by helping them to understand the consequences of their actions, it is not appropriate for every child in every case. Children with disabilities, and speech and language impairments, may not be able to articulate their emotions, or construct a narrative to explain the context of or reasons behind their offending.[57] Restorative justice conferencing is not appropriate where there is no identifiable victim, or where the offence was committed for survival-related reasons.[58] Similarly, community service and graffiti removal work is not appropriate (or even possible) for all children. It is important that children are assessed before restorative justice or community service is ordered, to determine whether the child will be able to comply with the order.

In many cases concerning children, dismissing the charge will be the most appropriate course of action. However, if it is determined that further action is required, other programs may be more appropriate than restorative justice, such as:

- a family group conference, or Family-Led Decision Making for Indigenous children;
- community work, including graffiti removal;
- vehicle programs;
- on country programs;
- mentoring programs;
- therapy, including speech pathology;
- education programs, such as T2S; and
- drug diversion programs.

Activities should be tailored to the child's circumstances and the nature of the offence.

Specialist courts (such as the High-Risk Youth Court in Townsville) may have a role to play. However, they involve a substantial time commitment, and extensive surveillance and monitoring of the young person, which may make them appropriate only as an alternative to detention or custodial remand.

If children are detained, small-scale 'secure schools' or 'supervised residences' should be preferred over detention centres. Smaller, low- to no-security facilities should be located near to the child's home. They should focus on education and be staffed by specialist teachers, not corrections officers.

8. Conclusions

The focus of a youth justice system should be on ensuring children are housed and nurtured in the community, to give them a hope for the future.

More important than the court process is what is being done outside the courtroom to assist these children to obtain housing, support, treatment and, ideally, love.

If fewer children are arrested, and fewer children appear before the courts, more court time and resources can be dedicated to the children who remain in the system. These children are likely to be the most vulnerable and have the most complex needs of them all. Our efforts should be directed towards their rehabilitation, not their punishment, if community safety is to be assured.

Executive summary endnotes

1 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2021*, 2021, 34.

2 Ibid 16.

3 Childrens Court of Queensland, *Annual Report 2021/22*, 1, 5.

4 Ibid 7.

5 Childrens Court of Queensland, *Annual Report 2020/21*, 28.

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13 Australian Institute of Health and Welfare, *Young People Returning to Sentenced Youth Justice Supervision 2018-19*, 2020, 10.

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23 *Human Rights Act 2019* (Qld) s 59(1).

24 *Human Rights Act 2019* (Qld) s 9(1).

25 *Human Rights Act 2019* (Qld) ss 26, 25, 28, 30, 31, 32, 33.

26 *Human Rights Act 2019* (Qld) s 48(3).

27 UN Convention on the Rights of the Child, art 3.

28 United Nations Committee on the Rights of the Child, *General Comment No. 24 on children's rights in the child justice system*, CRC/C/G/24 (18 September 2019) [3].

29 Ibid para 16.

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32 See particularly T E Moffitt, 'Adolescence-limited and life-course persistent antisocial behaviour: A developmental taxonomy' (1993) 100(4) *Psychological Review* 674; B Fox et al, 'Trauma changes everything: Examining the relationship between adverse childhood experiences and serious, violent and chronic juvenile offenders' (2015) 46 *Child Abuse and Neglect* 163.

33 T Carmody, *Taking Responsibility: A Roadmap for Queensland Child Protection: Report of the Queensland Child Protection Commission of Inquiry*, 2013, 36. See also K McMillan and M Davis, *Independent Review of Youth Detention Report,* 2017, 214.

34 See for example H Wilson and R Hoge, 'Diverting Our Attention to What Works: Evaluating the Effectiveness of a Youth Diversion Program' (2014) 11(4) *Youth Violence and Juvenile Justice* 320

35 See generally C Cunneen, 'Youth justice and racialization: Comparative reflections' (2020) 24(3) *Theoretical Criminology* 521.

36 H Blagg and G Valuri, 'Self-policing and community safety: The work of Aboriginal community patrols in Australia' (2004) 15(3) *Current Issues in Criminal Justice* 205.

37 *Youth Justice Act 1992* (Qld) s 48AF.

38 Childrens Court of Queensland, *Annual Report 2021/22*, 25.

39 See further G Dawes 'Figure Eights, Spin Outs and Power Slides: Aboriginal and Torres Strait Islander Youth and the Culture of Joyriding' (2002) 5(2) *Journal of Youth Studies* 195; S Kellett and H Gross 'Addicted to joyriding? An exploration of young offenders' accounts of their car crime' (2006) 12(1) *Psychology, Crime & Law* 39.

40 The President of the Childrens Court has remarked that the increased number of children on remand is 'unsurprising given the changes to the Act in relation to bail for young people and the show cause provision.': Childrens Court of Queensland, *Annual Report 2021/22*, 7.

41 Childrens Court of Queensland, *Annual Report 2021/22,* 8, 43.

42 *Youth Justice Act 1992* (Qld) s 49(2)(a). Children are supposed to be transferred to detention centres rather than remaining in watchhouses: *Youth Justice Act 1992* (Qld) s 54(2).

43 Childrens Court of Queensland, *Annual Report 2021/22,* 8, 43.

44 *Youth Justice Act 1992* (Qld) s 48AA(6).

45 See for example *Commissioner of Police v Jane Dean (a pseudonym)* [2022] QChCM 3.

46 Childrens Court of Queensland, *Annual Report 2021/22,* 20.

47 R Williams, 'Cultural Safety—What Does It Mean for Our Work Practice?' (1999) 23(2) *Australian and New Zealand Journal of Public Health* 213.

48 See for example *Youth Justice Act 1992* (Qld) ss 17 (respected person can issue a caution), 34(1)(h) respected person can participate in a restorative justice conference.

49 *Youth Justice Act 1992* (Qld) ss 48AA(4)(a)(vii), 150(1)(i).

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CHAPTER 1

Queensland's Youth Justice System today

1.1 Queensland's youth justice system: Statistical overview

Queensland has the highest number of children in youth detention in Australia.

On any given night, around **275 children are in Queensland's youth detention centres**.[1] The number of children in detention in Queensland is continuing to increase, even though the numbers are falling in most other Australian states and territories.[2]

Queensland has the second highest rate of children in detention in the country. In fact, one quarter of all Australian children in youth detention are in Queensland detention centres:[3]

4.7 per 10,000 children aged 10-17 are in detention in Queensland, compared with 2.7 per 10,000 Australia-wide.[4]

On average, Queensland children spend more days in detention than children elsewhere in Australia. In 2019/20, children in Queensland spent an average of 209 days in detention compared with an Australian average of 190 days.[5]

86% of children who are in detention in Queensland are unsentenced, which is the highest proportion in the country.[6] Queensland has the same rate of sentenced children in detention as the other states and territories – what sets Queensland apart from the other states and territories is the high number of children in detention who are un-sentenced: 4.2 per 10,000 children in Queensland are in unsentenced detention, compared with 2.2 per 10,000 children Australia-wide.[7]

Key statistics:

- Queensland has the highest number of children in youth detention in Australia.
- Queensland has the second highest rate of youth detention in Australia: 4.7 per 10,000 children in Queensland are in youth detention, compared with 2.7 per 10,000 Australia-wide.
- Around 70% of children in detention are Aboriginal and/or Torres Strait Islander.
- 86% of children in youth detention are un-sentenced. This is the highest rate in the country.
- Children in Queensland spend more days in youth detention, on average, than anywhere else in Australia. In Queensland, children spend an average of 209 days in detention compared with 190 days Australia-wide.
- Around 20% of children who stay in a watchhouse will be there for more than one day. 7% are there for more than 5 days.
- Queensland has the second highest rate of children under community-based youth justice supervision in the country, after the Northern Territory.
- Queensland's Indigenous children are 21 times more likely to be in youth detention and 19 times more likely to be under youth justice supervision.
- 80% of children in detention will return to the youth justice system within 12 months.
- Around 3500 children in Queensland have at least one proven offence each year. 10% of these children receive around 50% of the charges.
- The cost of keeping a child in detention is $1901 per child per day.

Only 15% of young people who are held in detention on remand are ultimately sentenced to a period of detention by the court, and around 70% receive a community-based sentence.[8] This means that the vast majority of children held in custody on remand do not ultimately receive a custodial sentence from the court. This may be because they have already spent such a long time in detention and this is being taken into account by the judicial officer in sentencing. Regardless, this tends to suggest that in the courts' view, most children on remand can be managed in the community.[9]

In addition to the children held in detention centres, around 460 children are held in police watchhouses each month.[10] Watchhouses are very confronting environments for children. In watchhouses, children are housed alongside adult prisoners, they have limited privacy and few amenities. Children may be held in a watchhouse while they wait to appear before a court, or while they wait to be transferred to a detention centre. The *Youth Justice Act 1992* (Qld) (section 49(2)) states that a child should be brought before a court within 24 hours of their arrest. This means that children should not ordinarily spend more than one day in a watchhouse. However, in 2021/22, only 80% of children's stays in a watchhouse lasted a day or less.[11] Of the remaining 20%, 305 spent between 5 and 7 days in a watchhouse and 167 spent between 8 and 15 days in a watchhouse.[12]

Queensland has more children on community-based orders than other states and territories. In fact, Queensland has the second highest rate of children under community-based supervision in the country, after the Northern Territory. In 2019/20, 20.6 per 10,000 children in Queensland were subject to youth justice supervision in the community compared with 13.8 per 10,000 Australia-wide.[13] One third of all children under youth justice supervision in Australia are in Queensland.[14] It costs $223 per day per child for community-based supervision, compared with $1,901 per day to keep a child in youth detention.[15]

Children in detention in Queensland are more likely to be aged between 10 and 13 years when compared with the national average, and Queensland has a higher number of children aged 10 to 13 years under youth justice supervision. In Queensland, around 5% of young people under youth justice supervision are aged 10-13 years compared with around 3% Australia-wide.[16]

1.2 Indigenous children in the youth justice system

Queensland has one of the highest rates of Indigenous children in detention in Australia.[17] **Around 70% of children in youth detention in Queensland are Aboriginal and/or Torres Strait Islander**.[18] In Queensland, 33 per 10,000 Indigenous children are in youth detention on any given night, compared with 23 per 10,000 Indigenous children Australia-wide.[19] The rate for non-Indigenous Australian children is only 1 per 10,000.

In Queensland, the number of Indigenous children under community-based supervision is rising, whereas in most other states and territories, the numbers are falling. 161 per 10,000 Indigenous children are subject to community-based youth justice supervision in Queensland, compared with a rate of 115 per 10,000 Australia-wide.[20]

In 2019/20, there were 42,530 Indigenous children in Queensland – 1,932 of them were subject to supervised youth justice orders and 1,058 were subject to unsupervised orders.[21]

Aboriginal and/or Torres Strait Islander children make up 50% of child defendants in Queensland.[22] The younger the defendant, the more likely they are to be Indigenous. In fact, 86% of 10-11 year-old child defendants are Aboriginal and/or Torres Strait Islander.[23] 38.7 per 1000 Indigenous children were convicted by a court in 2021/22, compared with 3.4 in 1000 non-Indigenous children. [24]

Indigenous children in Queensland are:[25]

- 21 times more likely to be in youth detention than non-Indigenous children;
- 19 times more likely than non-Indigenous children to be subject to youth justice supervision;
- 11.5 times more likely than non-Indigenous children to be the subject of a finalised charge.

1.3 Recidivism rates for sentenced children

Australia-wide, around half of the children who receive a sentence of detention as their first supervised sentence will not return to youth justice supervision. Children who are sentenced to community-based youth justice supervision as their first supervised sentence have a slightly higher non-return rate of around 60%.[26]

When we look at how many children return to youth justice supervision within 12 months of release, **Queensland has the highest rate of return in Australia**: 66% of children who are sentenced to youth justice supervision will return to youth justice supervision within 12 months, compared with an Australian average of 57%.[27]

Children who are sentenced to detention are even more likely to return to youth justice supervision within 12 months. **80% of children who are sentenced detention will return to youth justice supervision within 12 months.**[28] The rate of return for Indigenous children is higher still – 83% will return to youth justice supervision within 12 months.[29]

Children are more likely to return to the youth justice system if they are young and male.[30] The younger a child is when they are first sentenced, the more likely they will return to youth justice supervision at some time before they turn 18. This makes sense because, obviously, a younger child will have more years ahead of them until their 18th birthday.[31] However, the numbers are startling: **of those aged 10 to 12 years that receive a supervised sentence, 94% will return to youth justice supervision at some point**.[32]

When compared with other states and territories, a higher proportion of children in Queensland receive more than one supervised sentence during their childhood: 45% of children who have been sentenced to youth justice supervision in Queensland have received more than one supervised sentence, compared with 38% in New South Wales, for example.[33]

1.4 Offences committed by children

Around 3,500 Queensland children have at least one proven offence each year: this represents around 0.6% of all Queensland children. [34]

Most children who appear before the Childrens Courts in Queensland are 16 (21%) or 17 years of age (28%). Less than 1% are aged 10 or 11 years; 9% are aged 12 or 13 years, and 31% are aged 14 or 15 years of age.[35]

Males are more likely to appear before the Childrens Courts than females, although girls' appearances are increasing.[36] Males comprise 72% of finalised child defendants, 80% of children under youth justice supervision, and 90% of children in detention.[37]

The crime that Queensland children are most commonly prosecuted for is 'theft and related offences'. When combined, theft offences, unlawful entry with intent and public order offences account for around two thirds all finalised charges in the Childrens Court (Magistrates).[38] Most children's charges are property-related: **only around 6% of children's proven offences are violent in nature.**[39]

The most common offence committed by girls is shoplifting or stealing. Indeed, 38% of offences committed by girls are shoplifting or stealing, compared with 27% of offences committed by boys.[40]

Table 1.1 Most common finalised charges against children (all courts) 2021/22[41]

Theft and related offences	31.6%
Motor vehicle theft and related offences	*12.9%*
Unlawful entry with intent	17.3%
Public order offences	5.7%
Road traffic offences	5.1%
Property damage	5.0%
Illicit drug offences	5.0%
Acts intended to cause injury	4.8%
Offences against justice procedures*	3.3%

* Offences against justice procedures include breach of orders and failure to appear in court

The rate of 'unlawful use of a motor vehicle' offences has increased substantially in recent years: the Queensland Sentencing Advisory Council found there was a 168% increase between 2005/06 and 2018/19.[42] 'Unlawful entry' also accounts for a significant proportion of cases, but it should be noted that three quarters of these involve entry into places other than private dwellings, most often schools and shops.[43]

The most common offences children return to youth justice supervision on are trespass, unlawful entry with intent and wilful damage.[44] If children are found guilty of the same offence more than once, it will most commonly be stealing, unlawful use of a motor vehicle, or wilful damage.[45]

1.5 Penalties imposed on children by the courts

In 2021/22, only 68% of finalised charges were proven.[46]

When children are found guilty, the most common penalties imposed are reprimands (30%) and probation (32%).

Table 1.2 Most serious penalty imposed by finalised appearance (all courts) 2021/22[47]

Penalty	%	No.
Probation	31.9%	1483
Reprimand	29.9%	1389
Good behaviour order	11.3%	527
Community service order	9.7%	452
Detention	6.5%	309
Conditional release	6.4%	299
Disqualification of driver's license	2.3%	110
Fine	1.1%	50
Treatment order	0.5%	22
Compensation	0.2%	9
Total	100%	4650

The average length of probation orders is 7 to 8 months in the Childrens Court (Magistrates) and 17 months in the Childrens Court of Queensland.[48] An average of 50 hours community services is ordered by the Childrens Court (Magistrates), compared with 90 hours in the Childrens Court of Queensland.[49] The average length of a detention order is four months in the Childrens Court (Magistrates) and 17 months in the Childrens Court of Queensland.[50]

The number of children receiving a detention order increased substantially in 2021/22, to more than 6% of all finalised appearances.[51] Around half of all these children have been charged with violent offences, and around one third have been charged with property offences.[52]

In addition to the penalties listed in Table 1.2, many children are referred for restorative justice. In these cases, Youth Justice will convene a restorative justice conference, which is a form of victim-offender mediation. In 2021/22, 2249 young people were referred for a restorative justice process, 42% of whom were Aboriginal and/or Torres Strait Islander children.[53] Many of these children were conferenced for theft and related offences or unlawful entry with intent (46%).[54] The Childrens Court of Queensland reports that 77% of children who participate in restorative justice conferences subsequently reduce or cease offending, and that 89% of victims are satisfied with the outcome of the conference.[55]

Whilst more than half of all community-based supervision orders are successfully completed, a high proportion of community-based orders are breached: 33% of children on conditional release orders, 26% of children on community services orders and 20% of children on probation orders were subject to breach action in 2021/22.[56] By comparison, only 16% of children on restorative justice orders were subjected to breach action during the same period: 82% of restorative justice orders were successfully completed, compared with around two thirds of conditional release, community service and probation orders.[57]

Chapter 1 endnotes

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2 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2021*, 15; AIHW, *Youth Justice in Australia 2019/20*, 34.

3 Australian Institute of Health and Welfare, *Youth Justice in Australia 2019/20*, 7.

4 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2021*, 16-17.

5 Australian Institute of Health and Welfare, *Youth Justice in Australia 2019/20*, 28. Ironically, the length of time spent in sentenced detention is lower in Queensland than any other state. This is probably because the amount of time they have already served in detention is being taken into account in their sentencing.

6 Australian Institute of Health and Welfare, *Youth Justice in Australia 2019/20*, 18-19; Childrens Court of Queensland, *Annual Report 2021/22*, 42.

7 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2019/20,* 17.

8 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2019/20,* 21. See also Childrens Court of Queensland, *Annual Report 2021/22*, 42.

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10 Childrens Court of Queensland, *Annual Report 2021/22,* 8, 43.

11 Ibid.

12 Ibid.

13 Australian Institute of Health and Welfare, *Youth Justice in Australia 2019/20,* 6.

14 Ibid 7.

15 Productivity Commission, *Report on Government Services: Youth Justice Services*, 2021, 17.24, 17.26.

16 Australian Institute of Health and Welfare, *Youth Justice in Australia 2019/20,* 10-11.

17 Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2021,* 19. Western Australia consistently has the highest rate of detention of Indigenous children, followed by Queensland and South Australia.

18 Childrens Court of Queensland, *Annual Report 2021/22*, 40; Department of Children, Youth Justice and Multicultural Affairs ('DCYJMA'), *Youth Justice Annual Summary Statistics: 2015/16 to 2019/20*, 1. 70% of children on remand are Aboriginal and/or Torres Strait Islander.

19 Australian Institute of Health and Welfare, *Youth Justice in Australia 2020/21*, Table S83.

20 Australian Institute of Health and Welfare, *Youth Justice in Australia 2019/20,* 11 (rounded to the nearest 0.5). See also Childrens Court of Queensland, *Annual Report 2021/22*, 34.

21 DCYJMA, *Youth Justice Annual Summary Statistics: 2015/16 to 2019/20,* 1, 3.

22 Childrens Court of Queensland, *Annual Report 2021/22*, 4.

23 Ibid 5. See also Queensland Sentencing Advisory Council ('QSAC'), *Kids in Court: The Sentencing of Children in Queensland*, 2021, 23.

24 Childrens Court of Queensland, *Annual Report 2021/22*, 21.

25 Australian Institute of Health and Welfare, *Youth Justice in Australia 2019/20,* 11; Childrens Court of Queensland, *Annual Report 2021/22*, 21, 35 40.

26 Australian Institute of Health and Welfare, *Young People Returning to Sentenced Youth Justice Supervision 2018/19*, iv, 10.

27 Ibid 21. See also QSAC, *Kids in Court: The Sentencing of Children in Queensland*, 2021, 33.

28 Australian Institute of Health and Welfare, *Young People Returning to Sentenced Youth Justice Supervision 2018/19,* iv.

29 Ibid 16.

30 Ibid 20.

31 Ibid 6.

32 Ibid 7.

33 Ibid 12.

34 In 2021/22, there were 3341 individuals charged: Childrens Court of Queensland, *Annual Report 2021/22*, 1.

35 Childrens Court of Queensland, *Annual Report 2021/22,* 19.

36 QSAC, *Kids in Court: The Sentencing of Children in Queensland*, 2021, 24. Further research is required to explain this, but one possibility is that changes to definitions of domestic and family violence are catching more young women within their wider net: see E F Molina and R B Gutierrez, 'Juvenile crime drop: What is happening with youth in Spain and why?' (2020) 17(3) *European Journal of Criminology* 306, 310, 326; H Douglas and T Walsh, 'Adolescent dating violence and the criminal law response' (2022) *Journal of Family Violence* (forthcoming).

37 Australian Institute of Health and Welfare, *Youth Justice in Australia 2019/20,* 9; Childrens Court of Queensland, *Annual Report 2020/21*, 50.

38 Childrens Court of Queensland, *Annual Report 2021/22,* 21.

39 DCYJMA, *Youth Justice Annual Summary Statistics: 2015/16 to 2019/20*.

40 Ibid 33.

41 Childrens Court of Queensland, *Annual Report 2021/22,* 47; QSAC, *Kids in Court: The Sentencing of Children in Queensland*, 2021, 26. These amounts do not add up to 100% because only the most common offences are listed.

42 QSAC, *Kids in Court: The Sentencing of Children in Queensland*, 2021, 29.

43 QSAC, *Kids in Court: The Sentencing of Children in Queensland*, 2021, 26.

44 Ibid 26.

45 Ibid 36.

46 Childrens Court of Queensland, *Annual Report 2021/22*, 6, 22. Not also that 21% of finalised charges were either not adjudicated or not convicted.

47 Ibid 27, 31.

48 QSAC, *Kids in Court: The Sentencing of Children in Queensland*, 2021, 40-42.

49 Ibid.

50 Ibid 39.

51 Childrens Court of Queensland, *Annual Report 2021/22*, 27, 31.

52 DCYJMA, *Youth Justice Annual Summary Statistics: 2015/16 to 2019/20 – Detention*.

53 Childrens Court of Queensland, *Annual Report 2021/22,* 24.

54 Ibid 24.

55 Childrens Court of Queensland, *Annual Report 2019/20,* 6-7.

56 Childrens Court of Queensland, *Annual Report 2021/22,* 37.

57 Ibid 37.

CHAPTER 2

Queensland's 'offending' children: Who are they? What is happening to them?

2.1 Children in the youth justice system

Children in the youth justice system have generally experienced multiple forms of social, economic and health disadvantage.[1] Many have been in out of home care, have mental health problems, cognitive impairments or behavioural disorders, and have experienced poverty and family instability.[2]

In particular, conduct disorders in childhood, coupled with speech and language deficits, seem to be accurate predictors of persistent offending across the life course.[3]

Children in the youth justice system experience multiple layers of disadvantage:[4]

- 60% have experienced or been impacted by domestic and family violence.
- 15% have a current child protection order.
- 46% have a mental health or behavioural disorder.
- 80% have used at least one substance.
- 21% have used ice or other methamphetamines.
- 55% are completely disengaged from education, training or employment.
- 30% have at least one parent who has spent time in custody.
- 29% are in unstable or unsuitable accommodation.
- 10% are expectant parents.
- 64% live outside south-east Queensland.

Children in custody are particularly vulnerable:[5]

- 26% have a current child protection order in place.
- 44% were living in unstable or unsuitable accommodation.
- 28% have been diagnosed with ADHD.
- 18% have a cognitive or intellectual disability.
- 17% have post-traumatic stress disorder.
- 5% have been diagnosed with autism spectrum disorder.
- 4% have a psychotic disorder.

In 2019/20, **20.5% of children who appeared before the Childrens Court of Queensland 'had prior protection orders' and most of those children were in residential care**.[6]

The Department of Child Safety is the statutory parent of children in care. If children in the care of the department are charged with committing offences, clearly their care and protection needs are not being adequately met by the state.

Children who are charged with offences have often been **excluded from school**, or have had their school hours reduced due to their 'challenging behaviours'.[7] School is an important protective factor for children – if children are in school during the day, they are occupied and safe. It is also critical for children to acquire literacy and numeracy skills if they are to maximise their prospects of obtaining employment as adults.[8]

Children who **live in remote areas** are more likely to be subject to youth justice supervision, and children from the lowest socioeconomic areas are five times more likely to be under youth justice supervision than children from the highest socioeconomic areas.[9] **Finding safe housing for children has been described as the greatest challenge** facing service providers working in youth justice in Queensland.[10]

Research has consistently found **high rates of mental illness** amongst children in the youth justice system.[11] Rates of 80 to 90% amongst children in detention have been reported across multiple studies and meta-analyses.[12] The most common illnesses reported are depression, anxiety and post-traumatic stress disorder, and children's distress often manifests in self-harm.[13] It is also common for children with mental illness to self-medicate with illicit drugs, indeed as many as 80% of children in youth detention use substances.[14] One Australian study found that alcohol and drug use are strong predictors of incarceration and re-incarceration amongst children.[15]

Most young people convicted of offences are boys (72%).[16] Aboriginal and/or Torres Strait Islander girls are more likely to be convicted of offences than non-Indigenous girls: Indigenous girls comprise almost 16% of children convicted of offences in Queensland, even though they comprise only 2% of the youth population.[17] Whilst fewer girls than boys commit serious offences, girls that do have more severe mental health issues.[18] This may be due to **high rates of trauma amongst criminalised girls**.[19] In a study by Abram and colleagues, 84% of detained adolescent females reported at least one traumatic event in their past, and overall, they had experienced an average of 14.6 traumatic events each.[20] A study conducted by Krabbendam and colleagues found that 95% of detained girls had had at least one traumatic experience.[21] Research has also shown that girls are more likely to have internalised mental health problems (such as anxiety and mood disorders) compared with boys, who are more likely to have externalised mental health problems.[22]

Cognitive impairment is often conflated with mental illness, yet the two are distinct.[23] While people with cognitive disabilities can, and frequently do suffer from mental health issues, cognitive disabilities are permanent, and cannot be 'treated' in the same way as mental illnesses. This is important because judgements about someone's 'fitness for trial' are often made based on the person's mental health status, rather than the existence of any cognitive or neurological impairment. A cognitive disability may seriously compromise a child's capacity to participate in legal proceedings, provide instructions to a lawyer, or understand that their actions were criminally wrong.

Children who commit offences have **high rates of cognitive impairment, ADHD, autism spectrum disorder, traumatic brain injury, and learning disorders**.[24] They may display symptoms such as impulsivity and

hyperactivity, which impairs their judgement and decision-making processes.[25] They may be more likely to engage in risk-taking behaviour, and less able to self-regulate if they are angry or distressed. Some of these children may suffer from undiagnosed **neurological conditions**.[26]

Australian research has confirmed the high prevalence of young people with cognitive disabilities in the criminal justice system.[27] Indig and colleagues' study of young people in custody in New South Wales found that 14% were known to have an intellectual disability, and a further 32% had borderline intellectual disability.[28] There was also a high rate of co-morbidity amongst this group: 68% of those with intellectual disability also had a mental health or substance use disorder.[29] McCausland and Baldry suggest that people with cognitive disabilities are more likely to be caught up in the criminal justice system as a result of difficulties with comprehension, communication and problem solving.[30] They are more likely to be susceptible to peer influence, or exploited by others, and may lack protective factors such as family support, employment and stable accommodation.[31]

Children with neurological conditions also have **high rates of speech and language impairment.** In 2021, the President of the Childrens Court of Queensland said that children with language disorders are being 'identified at higher rates' in custodial environments.[32] Speech and language disorders can affect children's receptive language, verbal communication and short-term memory.[33] This can have implications for children's capacity to learn, respond to social cues and understand instructions which may in turn limit their ability to behave in a socially appropriate manner in structured environments.[34]

The international literature suggests that between 60 and 90% of young people in detention have a speech and language impairment, compared with around 10% of the general youth population.[35] Winstanley and colleagues found that developmental language disorder was a 'key predictor of recidivism' amongst children.[36] In their sample of 145 young offenders in England, those with a developmental language disorder reoffended at a rate 2.5 times higher than those without a developmental language disorder.[37] Kippen and colleagues found high rates of language disorders amongst Western Australian children in youth detention – around half of their sample were found to have a language disorder and many more had language skills below the expected standard for their age.[38] Sadly, children who were known to child protection services were more likely to have a language disorder than those who were not.[39]

It is becoming apparent that many children within the youth justice system also suffer from **foetal alcohol spectrum disorder** (FASD).[40] FASD is an umbrella term used to describe the effects of foetal exposure to alcohol during pregnancy. Children with FASD can experience cognitive, social, emotional, behavioural and psychological problems, and have difficulties with independent living. In particular, FASD causes impairment in executive function, impulse control, memory and learning, which can contribute to poor decision-making.[41] FASD is also associated with language disorders.

In one study of children with a language disorder at the Banksia Hill Detention Centre (Western Australia), 56% met the diagnostic requirements for FASD.[42]

The fact that a young child displays antisocial behaviour, or speech and language deficits, does not make their criminalisation inevitable.[43] Several factors have been found to mediate the association between early behavioural concerns and later offending. Early therapy and interventions to address behaviour and speech and language problems, supportive family environments, parental warmth and special education support have all been found to predict better outcomes amongst at-risk children.[44] However, if children do not acquire and practise social skills, and are not supported to develop skills in literacy and numeracy, their life chances are necessarily diminished.[45]

2.2 Aboriginal and/or Torres Strait Islander children in the youth justice system

Indigenous children are more likely to interact with the youth justice system than non-Indigenous children, and at an earlier age.[46] There are several complex reasons for this, including structural and institutional bias and racism, child protection involvement, lack of access to services and adequate infrastructure, as well as unequal power dynamics between police and Indigenous communities.[47]

The fractious relationship between Indigenous young people and police is well-established.[48] It manifests in more adversarial interactions with police, and more arrests, but it also seems to result in lower levels of diversion.[49] Allard and colleagues found that Indigenous children were 4.5 times more likely to have contact with the criminal law system, but were almost three times less likely to be cautioned than non-Indigenous children.[50] Papalia and colleagues found that Indigenous children were twice as likely as non-Indigenous children to be given a court summons as opposed to being diverted.[51] A review of the Western Australian Children's Courts found that Indigenous children are subjected to impractical and onerous bail conditions and high rates of arrest.[52]

In rural and remote areas, police may be the only service that works out of hours and can intervene when incidents occur. This can contribute to Indigenous children's criminalisation. Remote areas have the highest rate of sentenced children (36 per 1000), followed by regional areas (10 per 1000), followed by metropolitan areas (8 per 1000).[53] For Indigenous children who live in remote areas, receiving a detention order means they are sent far away from home, away from everything that is familiar to them, and away from family who may be unable to visit often.[54]

Indigenous people often have an understandable mistrust of formal institutions. The legacy of the Stolen Generations is that many Indigenous people are reluctant to seek help from medical and other services because they are fearful that their children will be removed from their care. This may explain why some Indigenous children have illnesses and impairments

that remain undiagnosed until they enter detention.[55] Not receiving a diagnosis can mean that appropriate educational supports are not put in place at school, and children may disengage early or be excluded from school due to their 'challenging' behaviours.[56]

There are very high rates of mental illness and distress amongst Indigenous children in the youth justice system. Ogilvie and colleagues compared hospital records with court records for young people (aged 10 to 24 years) to determine how often criminalised young people presented at hospitals with mental illness.[57] They found that Indigenous young people were more likely than non-Indigenous young people to have both a diagnosed psychiatric illness and a proven offence. They also found that Indigenous children were younger when they started offending, committed more serious offences and experienced harsher sanctions.

There are high rates of victimisation amongst Indigenous people. Aboriginal and/or Torres Strait Islander people who interact with the criminal law system are more likely to be identified as victims than non-Indigenous people.[58] This suggests that protective services may not be available or accessed by Indigenous people when they need them. Grief, loss and trauma are experienced by Indigenous people at extremely high rates, yet few culturally safe services exist in the community to address these issues.[59]

Cultural safety is interrelated with self-determination. Indigenous communities' ownership of, and involvement in, justice initiatives is regarded as essential to their success. It is important that Aboriginal and/or Torres Strait Islander children receive services from Aboriginal and/or Torres Strait Islander staff.[60]

2.3 Children who commit serious offences or several offences over time

Research suggests that almost all adolescents engage in some kind of illegal activity. Self-reported criminal activity amongst adolescents is reportedly as high as 85%, so arrest statistics are merely the 'tip of the iceberg'.[61]

Children tend to commit offences in groups and in public places making them more visible, and more likely to be detected. The nature of their offending behaviour reflects what we know from the neuroscientific research about children's cognitive development: their brains are still developing, so they are more likely to engage in risk-taking behaviour, have difficulty controlling emotions such as anger, and lack an appreciation of the long-term consequences of their actions.[62]

Having said this, only a small number of children persistently commit offences.[63] 'Offending' behaviour amongst children steadily increases between the ages of 13 and 17 and steeply declines thereafter,[64] and most criminalised young people stop offending once they reach adulthood. The small group that continues to commit offences tends to engage in a wider range of criminal behaviour, and they account for a significant proportion of offending behaviour overall.[65]

This fact is borne out in the Queensland statistics: in 2020/21, 10% of all young 'offenders' were responsible for 46% of all proven offences.[66]

There are complex social and structural factors that lead children to persistent in their offending.[67]

Moffitt concludes that the best predictor of persistent offending amongst adolescents is early arrest; she found that children who commit offences at an earlier age are more likely to continue to commit offences later on.[68] Moffitt says these children have often been diagnosed with conduct disorders and identified as having speech and language deficits during early childhood.[69]

McAra and McVie found that children who commit their first offences after the age of 13 have generally experienced an adverse life event, such as family breakdown or relocation.[70] They say this is often followed by alcohol and drug use, disengagement from school and peer group offending.[71]

For all children who commit offences, **truancy, exclusion and subsequent disengagement from school is the factor most closely associated with criminal behaviour**.[72] **Child protection involvement also correlates highly with criminal charges** amongst children.[73]

Emerging research suggests that **the 'offending' of children is mediated by trauma**.[74] Adverse childhood experiences have been found to result physical changes to the brain and interruptions to the brain's normal development.[75] Prolonged significant stress can affect the physiology of the brain, resulting in difficulties with emotional regulation which may be expressed through 'anti-social' and aggressive behaviour.[76] **'Challenging behaviour' is generally a symptom of an underlying problem or unmet need.**[77]

Research suggests that the more adverse childhood experiences a child has, the more likely they are to commit serious offences, or several offences over time, even when controlling for other known risk factors.[78] In particular, experiencing physical abuse and having an incarcerated family member are strongly predictive of children committing more serious offences.[79]

Children who commit violent offences are the most vulnerable and victimised of all children.[80] Trauma influences way children look at the world, and the manner in which they make decisions.[81] Sadly, predictors of self-harm amongst 15-year-olds are the same as those for violent offending.[82] For these children, a punitive approach will be – and has been shown to be – inappropriate and inadequate.[83]

2.4 Meeting children's needs to address the 'risks'

As noted above, around 10% of child defendants are responsible for almost half of all children's offending. But this 10% equates to only 300 to 350 children – less than an average high school. Delivering holistic interventions to every one of these children is not only possible, but realistic.

These children are often described as being 'reluctant to engage' in treatment and programs.[84] In fact, they may be displaying an **understandable lack of trust** towards the adults and systems that have 'failed' them.

We must tread carefully with these children. McAra and McVie explain that repeated contact with the criminal law system serves to label, stigmatise and ultimately criminalise young people.[85] Intensive contact with youth justice agencies is damaging in the long-term because 'welfarist' interventions have the unfortunate characteristics of involving 'lengthy periods of intervention' and 'high levels of discretion.'[86] Increasing the level of monitoring and surveillance over these children might actually entrap them within the system we are wanting them to exit.[87] By focusing agency attention on 'the usual suspects' we can inadvertently widen the net.[88]

Instead, **research suggests that we should minimise children's contact with the youth justice system as much as possible.**

The key finding of longitudinal studies on youth offending is that 'what works' in youth justice is 'minimal intervention and maximum diversion.'[89] The Edinburgh Youth Transitions Study followed a cohort of around 4,300 young people for six years, from the time they entered high school until they finished. They found that, amongst those children who committed offences, there was a 'general pattern of desistence' over time.[90] The most important predictor of offending was prior involvement with the youth justice system, even when controlling for all other variables. **The greater the degree of children's interaction with the youth justice system, the more likely the young person was to offend, and the more likely the young person was to engage in serious offending subsequently.** Children who did not progress through the youth justice system were significantly less likely to offend again. The researchers concluded from this that interacting with a formal criminal justice process is itself criminogenic – and that 'doing less rather than more' is the key to reducing offending.[91]

Petrosino and colleagues came to the same conclusion in their meta-analysis. They concluded that 'juvenile system processing' seems to have 'consistently negative effects on crime measures of prevalence, incidence and severity.'[92] Indeed, they said that 'juvenile system processing has no crime control effect' – rather, 'system processing results in more subsequent delinquency.'[93]

What is needed are 'interventions that are proportionate to need but which also operate on the principle of maximum diversion.'[94] Case work with children who commit offences should be **'focused on welfare needs' and 'educational inclusion'**.[95] Interventions with children on the cusp of adulthood should **focus on increasing their economic opportunities through education, training and employment, particularly for those who are transitioning out of the child protection system.**

In Ireland and New Zealand, the principle of minimal intervention, maximum diversion is reflected in youth justice law. The Irish *Children Act 2001* states that 'any penalty… should cause as little interference as possible with the child's legitimate activities and pursuits, should take the form most likely to maintain and promote the development of the child and should take the least restrictive form that is appropriate in the circumstances'.[96] New Zealand's *Oranga Tamariki Act 1989* similarly states that any sanctions imposed on children should 'take the least restrictive form that is appropriate'[97] and that 'criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter.'[98]

'Doing less rather than more' does not accord with conventional wisdom, and this creates a 'conundrum' for law and policy-makers. As McAra and McVie remark:

> 'Accepting that, in some cases, doing less is better than doing more requires both courage and vision on the part of policy makers. A realisation of this vision in turn requires acceptance that youth justice agencies cannot, *by themselves*, make the wider public feel safer nor can they mend broken families or remake shattered communities.'[99]

International research suggests that we should:

1. intervene only when children's offending is escalating to the point of being 'serious' and 'persistent'; and
2. focus our interventions on improving children's life chances to enable them to successfully exit the youth justice system as soon as possible.

Children who commit serious offences, or several offences over time, report feeling a **pervasive sense of hopelessness**.[100] It is important that we provide these children with an opportunity to build a life for themselves, to provide hope for the future.[101] Research suggests that if children are safe, and can see a pathway forward in their lives that does not involve crime, they will stop offending.[102] Our interventions need to focus not on punishment, but on meeting these children's basic needs.

Chapter 2 endnotes

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CHAPTER 3

Children's rights in the youth justice system

3.1 The *Human Rights Act 2019* (Qld)

Children who are charged with offences retain their fundamental human rights at international law and under our own legislation. The fact that children charged with offences have such high and complex needs requires special consideration of the legal rights that exist to protect them from harm.

The *Human Rights Act 2019* (Qld) includes several rights that pertain to children generally, including:

- The right to the protection that is needed by the child, and is in the child's best interests, because of being a child (section 26(2)).
- The right not to have one's privacy, family, home or correspondence unlawfully or arbitrarily interfered with (section 25(a)).
- The right of Aboriginal and Torres Strait Islander peoples to enjoy, maintain, control, protect and develop their identity, cultural heritage, kinship ties and connection to lands and territories (section 28(2)).
- The right of all persons deprived of liberty to be treated with humanity and respect for the inherent dignity of the human person (section 30).
- The right to a fair hearing (section 31).
- The right to primary and secondary education that is appropriate to the child's needs, and vocational education and training based on their abilities (section 36).

Sections 32 and 33 of the *Human Rights Act 2019* (Qld) specifically relate to children in the criminal process and state that:

- A child charged with a criminal offence has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation.
- An accused child must be brought to trial as quickly as possible.
- A child who has been convicted of an offence must be treated in a way that is appropriate for the child's age.

The Human Rights Act 2019 **(Qld) creates binding obligations on public entities** including teachers, police officers, child safety officers, and youth justice officers,[1] including the following:

1. Public entities must act and make decisions in a way that is compatible with human rights and give proper consideration to relevant human rights in decision-making.[2] This means that when decisions are made about cautions, charges, bail, out of home care placements, school disciplinary measures, programs and other interventions, children's rights must be considered and complied with.[3]
2. Magistrates and judges must interpret all statutory provisions in a way that is compatible with human rights, to the extent that this is possible consistent with their purpose.[4] This means that when making decisions about bail and sentencing, the relevant legislative provisions must be interpreted with the child's human rights in mind.

3.2 International law on children's rights in youth justice

Section 48(3) of the *Human Rights Act 2019* (Qld) states that international law 'relevant to a human right' may be considered when interpreting a statutory provision.

There are a number of international human rights law treaties and other instruments that are relevant to youth justice matters. They include: the United Nations Convention on the Rights of the Child (UNCROC), the Beijing Rules, the Riyadh Guidelines, the Havana Rules, the Vienna Guidelines and General Comment 24 of the UN Committee on the Rights of the Child on children's rights in youth justice. Together, these instruments form a distinct 'unifying framework' for children's rights in youth justice.[5] They should be used as a basis for legislative reform and policy development, and to inform youth justice practices.

UN Convention on the Rights of the Child, r. 1990 (the UNCROC)

The UNCROC is the most ratified of all international human rights treaties and is the most comprehensive legal document concerning the treatment of children.[6] It has been described as a 'powerful moral force' or 'benchmark', that creates a 'common global language' or 'unifying discourse' on internationally agreed upon standards.[7] It was ratified by Australia in 1990 and is legally binding at international law. States parties are required to take legal, administrative and other measures to implement the UNCROC (article 4).

The UN Committee on the Rights of the Child oversees implementation of the UNCROC by state parties and monitors states' compliance. The Committee states that there are four guiding principles in the UNCROC that are deserving of special attention by state parties. They are:

- freedom from discrimination (article 2);
- that the best interests of the child shall be a primary consideration in all actions concerning children (article 3);
- the right to life, survival and development (article 6); and
- the right of the child to be heard in decision-making (article 12).[8]

A criticism commonly made of governments is that there is a 'disjuncture between the *rhetoric* of children's human rights and the *reality* of children's circumstances.'[9] To address this, New Zealand's youth justice legislation, the *Oranga Tamariki Act 1989*, imposes the requirement that 'the well-being of a child or young person must be at the centre of decision making that affects that child or young person, and, in particular, (i) the child's or young person's rights (including those rights set out in UNCROC and the United Nations Convention on the Rights of Persons with Disabilities) must be respected and upheld.'

UN Committee on the Rights of the Child, General Comment No. 24 (2019) on children's rights in the child justice system

The UN Committee on the Rights of the Child publishes General Comments detailing its interpretation of substantive provisions of the UNCROC and other relevant Rules. Its most recent General Comment on children's rights in youth justice (General Comment 24) is based on the most recent research on children's brain development and what works in youth justice.[10]

Recognition of the known harm that contact with the criminal justice system causes to children underpins General Comment 24. Its focus, therefore, is on strategies for preventing contact with the criminal justice system and diverting children out of the system entirely.[11] Attention is paid to the expansion of non-custodial sanction options, to comply with the principle of detention as a last resort. General Comment 24 also recommends a minimum age of criminal responsibility of 14 years.[12]

UN Standard Minimum Rules for the Administration of Juvenile Justice (1985) (the Beijing Rules)

The Beijing Rules were passed by resolution of the United Nations General Assembly in 1985.[13] The Rules are not legally binding, rather they set out internationally agreed upon standards to which the laws and practices of member states are expected to comply and conform.[14] The principle of promoting the well-being of children, with a view to reducing the need for criminal justice intervention in their lives, underpins the Beijing Rules.[15]

UN Guidelines for the Prevention of Juvenile Delinquency (1990) (the Riyadh Guidelines)

The Riyadh Guidelines were adopted and proclaimed by the United Nations General Assembly in 1990. They are not legally binding. The object of the Riyadh Guidelines is to assist member states in developing preventative, diversionary and non-punitive principles for responding to youth crime. As with the Beijing Rules, the motivation of the Riyadh Guidelines is to ensure the 'well-being of young persons from their early childhood' through the delivery of 'child-centred' social welfare measures and policies, with the ultimate aim of avoiding children's contact with the legal system.[16] It also condemns the use of 'harsh or degrading correction or punishment measures at home, in schools or in any other institutions'.[17]

UN Rules on the Protection of Juveniles Deprived of their Liberty (1990) (the Havana Rules)

The Havana Rules were passed by resolution of the United Nations General Assembly in 1990, with the intent of establishing normative standards relating to the imprisonment of children by member states. It builds on the rule established in the UNCROC that children should only be deprived of their liberty as 'a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases'.[18] Additionally, the Havana Rules establish minimum standards and procedures for the protection of the rights (including those established by the UNCROC) concerning the safety, and physical and mental wellbeing of children in custody, with the aim of 'counteracting the detrimental effects of all types of detention and to fostering integration in society'.[19]

UN Guidelines for Action on Children in the Criminal Justice System (1997) (the Vienna Guidelines)

Following its recommendation by the United Nations Economic and Social Council resolution 1996/13, an expert group developed guidelines in 1997 for the effective implementation of aspects of the UNCROC dealing with the administration of youth justice, as well as the Beijing Rules, Riyadh Guidelines, and the Havana Rules.[20] The Vienna Guidelines are not binding on member states, they are merely intended to provide a broad, instructive framework for the implementation of best-practice youth justice law and policy that is 'child-oriented' and 'guarantees the rights of children, prevents the violation of the rights of children, promotes children's sense of dignity and worth, and fully respects their age, stage of development and their right to participate meaningfully in, and contribute to, society'.[21]

3.3 Queensland's 'Youth Justice Principles'

The *Youth Justice Act 1992* (Qld) contains a Charter of Youth Justice Principles (Schedule 1).

Some of these principles are consistent with Queensland's obligations under the *Human Rights Act 2019* (Qld), and broader human rights obligations under the UNCROC. For example:

- Principle 2: The youth justice system should uphold the rights of children, keep them safe and promote their physical and mental wellbeing.
- Principle 5: If a child commits an offence, the child should be treated in a way that diverts the child from the courts' criminal justice system, unless the nature of the offence and the child's criminal history indicate that a proceeding for the offence should be started.
- Principle 6: A child being dealt with under this Act should have procedures and other matters explained to the child in a way the child understands.
- Principle 7: If a proceeding is started against a child for an offence— (a) the proceeding should be conducted in a fair, just and timely way; (b) the child should be given the opportunity to participate in and understand the proceeding; and (c) the proceeding should be finalised as soon as practicable.
- Principle 9: A child who commits an offence should be – (b) dealt with in a way that will give the child the opportunity to develop in responsible, beneficial and socially acceptable ways; (c) dealt with in a way that strengthens the child's family; and (d) dealt with in a way that recognises the child's need for guidance and assistance because children tend to be dependent and immature.
- Principle 14: If practicable, a child of Aboriginal or Torres Strait Islander background should be dealt with in a way that involves the child's community.
- Principle 17: A child should be dealt with under this Act in a way that allows the child – (a) to be reintegrated into the community; (b) to continue the child's education, training or employment without interruption or disturbance, if practicable; and (c) to continue to reside in the child's home, if practicable.
- Principle 18: A child should be detained in custody for an offence, whether on arrest, remand or sentence, only as a last resort and for the least time that is justified in the circumstances.

Section 3 of the *Youth Justice Act 1992* (Qld) states that the Youth Justice Principles 'underlie the operation' of the Act. Section 150(1)(b) states that the court *must* have regard to the Youth Justice Principles in sentencing.[22]

3.4 Youth Justice Principles and International Human Rights Law – side-by-side comparison

Youth Justice Principle	International Human Rights Article/Rule
PRINCIPLE 1 The community should be protected from offences and, in particular, recidivist high-risk offenders.	
PRINCIPLE 2 The youth justice system should uphold the rights of children, keep them safe and promote their physical and mental wellbeing.	**Article 3(1) of UNCROC:** "In all actions concerning children ... the best interests of the child shall be a primary consideration" **Article 6(2) of UNCROC:** "States Parties shall ensure to the maximum extent possible the survival and development of the child." **Rule 5 of the Beijing Rules:** "The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence."
PRINCIPLE 3 A child being dealt with under this Act should be: a) treated with respect and dignity, including while the child is in custody; and b) encouraged to treat others with respect and dignity, including courts, persons administering this Act and other children being dealt with under this Act.	**Article 37(c) of UNCROC:** "Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person and in a manner that takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so" **Article 40(1) of UNCROC:** "States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society" **Rule 31 of the Havana Rules:** "Juveniles deprived of their liberty have the right to facilities and services that meet all the requirements of health and human dignity. **Rule 66 of the Havana Rules:** "Any disciplinary measures and procedures should maintain the interest of safety and an ordered community life and should be consistent with the upholding of the inherent dignity of the juvenile and the fundamental objective of institutional care, namely, instilling a sense of justice, self-respect and respect for the basic rights of every person." **Rule 87 of the Havana Rules:** "In the performance of their duties, personnel of detention facilities should respect and protect the human dignity and fundamental human rights of all juveniles"
PRINCIPLE 4 Because a child tends to be vulnerable in dealings with a person in authority, a child should be given the special protection allowed by this Act during an investigation or proceeding in relation to an offence committed, or allegedly committed, by the child.	**Article 40(1) of UNCROC:** "States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society" **Rule 14.2 of the Beijing Rules:** "The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely."
PRINCIPLE 5 If a child commits an offence, the child should be treated in a way that diverts the child from the courts' criminal justice system, unless the nature of the offence and the child's criminal history indicate that a proceeding for the offence should be started.	**Article 40(3) of UNCROC:** "States Parties shall seek to promote the establishment of laws, procedures, authorities, and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law and in particular:... (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected" **Rule 11 of the Beijing Rules ('Diversion'):** "Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial... The police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings... In order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims"

Youth Justice Principle	International Human Rights Article/Rule
PRINCIPLE 6 A child being dealt with under this Act should have procedures and other matters explained to the child in a way the child understands.	**Article 12(1) of UNCROC:** "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." **Article 12(2) of UNCROC:** "...the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law." **Rule 14.2 of the Beijing Rules:** The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely.
PRINCIPLE 7 If a proceeding is started against a child for an offence: a) the proceeding should be conducted in a fair, just and timely way; and b) the child should be given the opportunity to participate in and understand the proceeding; and c) the proceeding should be finalised as soon as practicable.	**Article 12(1) of UNCROC:** "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." **Article 12(2) of UNCROC:** "...the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law." **Rule 14.2 of the Beijing Rules:** The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely.
PRINCIPLE 8 The youth justice system should give priority to proceedings for children remanded in custody	**Article 37(b) of UNCROC**: "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention, or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time." **Article 37(d) of UNCROC**: "Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action" **Rule 10.2 of the Beijing Rules:** "A judge or other competent official or body shall, without delay, consider the issue of release."
PRINCIPLE 9 A child who commits an offence should be: a) held accountable and encouraged to accept responsibility for the offending behaviour; and b) dealt with in a way that will give the child the opportunity to develop in responsible, beneficial and socially acceptable ways; and c) dealt with in a way that strengthens the child's family; and d) dealt with in a way that recognises the child's need for guidance and assistance because children tend to be dependent and immature.	**Article 37(c) of UNCROC:** "Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person and in a manner that takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so" **Article 40(1) of UNCROC:** "States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society" **Rule 17.1 of the Beijing Rules**: (a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society

Youth Justice Principle	International Human Rights Article/Rule
PRINCIPLE 10 A victim of an offence committed by a child should be given the opportunity to participate in the process of dealing with the child for the offence in a way allowed by the law.	
PRINCIPLE 11 A parent of a child should be encouraged to fulfil the parent's responsibility for the care and supervision of the child, and supported in the parent's efforts to fulfil this responsibility.	**Article 5 of UNCROC:** "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention." **Rule 15.2 of the Beijing Rules:** "The parents or the guardian shall be entitled to participate in the proceedings and may be required by the competent authority to attend them in the interest of the juvenile. They may, however, be denied participation by the competent authority if there are reasons to assume that such exclusion is necessary in the interest of the juvenile."
PRINCIPLE 12 A decision affecting a child should, if practicable, be made and implemented within a timeframe appropriate to the child's sense of time.	**Article 40(2) of UNCROC:** "States Parties shall, in particular, ensure that...(b) every child alleged as or accused of having infringed the penal law has at least the following guarantees:...(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians." **Rule 20.1 of Beijing Rules:** "Each case shall from the outset be handled expeditiously, without any unnecessary delay."
PRINCIPLE 13 A person making a decision relating to a child under this Act should consider the child's age, maturity and, where appropriate, cultural and religious beliefs and practices.	**Article 40(1) of UNCROC**: "States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society"
PRINCIPLE 14 If practicable, a child of Aboriginal or Torres Strait Islander background should be dealt with in a way that involves the child's community.	**Article 5 of UNCROC:** "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention." **Article 30 of UNCROC:** "In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language."

Youth Justice Principle	International Human Rights Article/Rule
PRINCIPLE 15 Programs and services established under this Act for children should: a) be culturally appropriate; and b) promote their health and self respect; and c) foster their sense of responsibility; and d) encourage attitudes and the development of skills that will help the children to develop their potential as members of society.	**Article 3(3) of UNCROC:** "States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision." **Rule 22.2 of Beijing Rules:** "Juvenile justice personnel shall reflect the diversity of juveniles who come into contact with the juvenile justice system. Efforts shall be made to ensure the fair representation of women and minorities in juvenile justice agencies."
PRINCIPLE 16 A child being dealt with under this Act should have access to legal and other support services, including services concerned with advocacy and interpretation	**Article 37(d) of UNCROC:** "Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action" **Article 40(2) of UNCROC:** "(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:...(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence." **Rule 15.1 of Beijing Rules:** "Throughout the proceedings the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country." **Rule 24.1 of Beijing Rules:** "Efforts shall be made to provide juveniles, at all stages of the proceedings, with necessary assistance such as lodging, education or vocational training, employment or any other assistance, helpful and practical, in order to facilitate the rehabilitative process." **Rule 25.1 of Beijing Rules:** "Volunteers, voluntary organizations, local institutions and other community resources shall be called upon to contribute effectively to the rehabilitation of the juvenile in a community setting and, as far as possible, within the family unit." **Rule 81 of the Havana Rules:** "Personnel should be qualified and include a sufficient number of specialists such as educators, vocational instructors, counsellors, social workers, psychiatrists and psychologists...Detention facilities should make use of all remedial, educational, moral, spiritual, and other resources and forms of assistance that are appropriate and available in the community, according to the individual needs and problems of detained juveniles."

Youth Justice Principle	International Human Rights Article/Rule
PRINCIPLE 17 A child should be dealt with under this Act in a way that allows the child: a) to be reintegrated into the community; and b) to continue the child's education, training or employment without interruption or disturbance, if practicable; and c) to continue to reside in the child's home, if practicable.	**Article 37(b) of UNCROC:** "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention, or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time." **Article 40(1) of UNCROC:** "States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society" **Article 40(4) of UNCROC:** "A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence." **Rule 18.2 of the Beijing Rules:** "No juvenile shall be removed from parental supervision, whether partly or entirely, unless the circumstances of her or his case make this necessary"
PRINCIPLE 18 A child should be detained in custody for an offence, whether on arrest, remand or sentence, only as a last resort and for the least time that is justified in the circumstances.	**Article 37(b) of UNCROC:** "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention, or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time." **Article 40(4) of UNCROC:** "A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence." **Rule 13.1 and Rule 13.2 of the Beijing Rules:** "Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time...Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home." **Rule 17.1 of the Beijing Rules:** "The disposition of the competent authority shall be guided by the following principles:...(b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum; (c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response..." **Rule 17.1 of the Beijing Rules:** "The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period." **Rule 2 of the Havana Rules**: "...Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release." **Rule 59 of the Havana Rule:** "Every means should be provided to ensure that juveniles have adequate communication with the outside world, which is an integral part of the right to fair and humane treatment and is essential to the preparation of juveniles for their return to society. Juveniles should be allowed to communicate with their families, friends and other persons or representatives of reputable outside organizations, to leave detention facilities for a visit to their home and family and to receive special permission to leave the detention facility for educational, vocational or other important reasons. Should the juvenile be serving a sentence, the time spent outside a detention facility should be counted as part of the period of sentence."

Youth Justice Principle	International Human Rights Article/Rule
PRINCIPLE 19 A child detained in custody should only be held in a facility suitable for children.	**Article 37(c) of UNCROC:** "Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person and in a manner that takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so" **Rule 13.4 of the Beijing Rules:** "Juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults." **Rule 26.3 of the Beijing Rules:** "Juveniles in institutions shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults." **Rule 28 of the Havana Rules:** "The detention of juveniles should only take place under conditions that take full account of their particular needs, status and special requirements according to their age, personality, sex and type of offence, as well as mental and physical health, and which ensure their protection from harmful influences and risk situations. The principal criterion for the separation of different categories of juveniles deprived of their liberty should be the provision of the type of care best suited to the particular needs of the individuals concerned and the protection of their physical, mental and moral integrity and well-being." **Rule 29 of the Havana Rules:** "In all detention facilities juveniles should be separated from adults, unless they are members of the same family"
PRINCIPLE 20 While a child is in detention, contacts should be fostered between the child and the community.	**Article 8 of UNCROC:** "States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference." **Article 16 of UNCROC: "**No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation." **Rule 26.1 of the Beijing Rules:** "The objective of training and treatment of juveniles placed in institutions is to provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society." **Rule 45 of the Havana Rules:** "Wherever possible, juveniles should be provided with the opportunity to perform remunerated labour, if possible within the local community, as a complement to the vocational training provided in order to enhance the possibility of finding suitable employment when they return to their communities."

Youth Justice Principle	International Human Rights Article/Rule
PRINCIPLE 21 A child who is detained in a detention centre under this Act: a) should be provided with a safe and stable living environment; and b) should be helped to maintain relationships with the child's family and community; and c) should be consulted about, and allowed to take part in making, decisions affecting the child's life (having regard to the child's age or ability to understand), particularly decisions about: (i) the child's participation in programs at the detention centre; and (ii) contact with the child's family; and (iii) the child's health; and (iv) the child's schooling; and d) should be given information about decisions and plans about the child's future while in the chief executive's custody (having regard to the child's age or ability to understand and the security and safety of the child, other persons and property); and e) should be given privacy that is appropriate in the circumstances including, for example, privacy in relation to the child's personal information; and f) should have access to dental, medical and therapeutic services necessary to meet the child's needs; and g) should have access o education appropriate to the child's age and development; and h) should receive appropriate help in making the transition from being in detention to independence.	**Article 37(a) of UNCROC:** "No child shall be subjected to torture or other cruel, inhuman, or degrading treatment or punishment…" **Article 37(c) of UNCROC:** "Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person and in a manner that takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so" **Article 12(1) of UNCROC:** "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." **Article 16 of UNCROC: "**No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation." **Article 20 of UNCROC: "**A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State." **Rule 24.1 of Beijing Rules:** "Efforts shall be made to provide juveniles, at all stages of the proceedings, with necessary assistance such as lodging, education or vocational training, employment or any other assistance, helpful and practical, in order to facilitate the rehabilitative process." **Rule 26.2 of Beijing Rules:** "Juveniles in institutions shall receive care, protection and all necessary assistance-social, educational, vocational, psychological, medical and physical-that they may require because of their age, sex, and personality and in the interest of their wholesome development." **Rule 26.5 of the Beijing Rules:** "In the interest and well-being of the institutionalized juvenile, the parents or guardians shall have a right of access." **Rule 29.1 of the Beijing Rules:** "Efforts shall be made to provide semi-institutional arrangements, such as half-way houses, educational homes, day-time training centres and other such appropriate arrangements that may assist juveniles in their proper reintegration into society." **Rule 1 of the Havana Rules:** "The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort." **Rule 31 of the Havana Rules:** "Juveniles deprived of their liberty have the right to facilities and services that meet all the requirements of health and human dignity." **Rule 38 of the Havana Rules:** "Every juvenile of compulsory school age has the right to education suited to his or her needs and abilities and designed to prepare him or her for return to society… Juveniles who are illiterate or have cognitive or learning difficulties should have the right to special education." **Rule 49 of the Havana Rules:** "Every juvenile shall receive adequate medical care, both preventive and remedial, including dental, ophthalmological and mental health care, as well as pharmaceutical products and special diets as medically indicated." **Rule 59 of the Havana Rules:** "Every means should be provided to ensure that juveniles have adequate communication with the outside world, which is an integral part of the right to fair and humane treatment and is essential to the preparation of juveniles for their return to society. Juveniles should be allowed to communicate with their families, friends and other persons or representatives of reputable outside organizations, to leave detention facilities for a visit to their home and family and to receive special permission to leave the detention facility for educational, vocational or other important reasons. Should the juvenile be serving a sentence, the time spent outside a detention facility should be counted as part of the period of sentence."

Youth Justice Principle	International Human Rights Article/Rule
	Rule 60 of the Havana Rules: "Every juvenile should have the right to receive regular and frequent visits, in principle once a week and not less than once a month, in circumstances that respect the need of the juvenile for privacy, contact and unrestricted communication with the family and the defence counsel." **Rule 66 of the Havana Rules:** "Any disciplinary measures and procedures should maintain the interest of safety and an ordered community life and should be consistent with the upholding of the inherent dignity of the juvenile and the fundamental objective of institutional care, namely, instilling a sense of justice, self-respect and respect for the basic rights of every person." **Rule 79 of the Havana Rules:** "All juveniles should benefit from arrangements designed to assist them in returning to society, family life, education or employment after release. Procedures, including early release, and special courses should be devised to this end." **Rule 80 of the Havana Rules:** "Competent authorities should provide or ensure services to assist juveniles in re-establishing themselves in society and to lessen prejudice against such juveniles…"

Unlike other jurisdictions, Queensland's *Youth Justice Act 1992* (Qld) does not include a provision that states that the best interests of the child are a primary consideration in youth justice matters. The right of children to the protection of their well-being is recognised in Principle 2, however the wording of this principle is not consistent with the *Human Rights Act 2019* (Qld) or relevant international human rights instruments.

3.5 Balancing rights in youth justice matters

Section 13(1) of the *Human Rights Act 2019* (Qld) states that human rights may be subject to 'reasonable limits that can be demonstrably justified in a free and democratic society'.

In youth justice, the rights of the child are sometimes pitted against the rights of the community. Changes to youth justice law and policy are made in response to specific events that have been highlighted by the media, fuelling a 'moral panic' about 'problem youth.'[23]

Of course, protecting the safety of the community is a 'legitimate aim of the justice system.'[24] Principle 1 of the Youth Justice Principles states that: 'The community should be protected from offences and, in particular, recidivist high-risk offenders.' Other relevant goals of the youth justice system reflected in the Youth Justice Principles are:

- The importance of holding children accountable for their actions – Principle 9(a) states: A child who commits an offence should be held accountable and encouraged to accept responsibility for the offending behaviour.
- Recognising the interests of victims – Principle 10 states: A victim of an offence committed by a child should be given the opportunity to participate in the process of dealing with the child for the offence in a way allowed by the law.

The Queensland courts have held that none of the Youth Justice Principles have legal precedence over the others.[25] An appropriate and fair balance must be struck between them in each case. The New Zealand approach on this is informative. In New Zealand, there are four primary considerations in youth justice matters: the well-being and best interests of the child; the public interest (including public safety); the interests of any victim; and the accountability of the child for their behaviour.[26] The New Zealand courts have concluded that **the goals of community safety, holding children accountable and protecting victims' interests are not inconsistent with the child's right to protection of their well-being,**[27] and that 'retraumatising' children through youth justice processes will not promote public safety.[28]

The research evidence is consistent with this approach: the best way of achieving community safety is to focus on meeting children's fundamental needs, and to divert them away from the criminal justice system wherever possible.[29] If children's well-being is protected, they will stop offending.[30]

It is often said that the youth justice system should encourage and enable children to 'accept responsibility' or 'be held accountable' for their actions.[31] But holding children accountable need not require a punitive response,[32] and research suggests that the broader public is in agreement with this.[33] When asked, community members are actually optimistic about children's prospects of rehabilitation, and are more likely to suggest that the causes of children's offending behaviour be addressed through family therapy, educational engagement and addressing poverty than through punitive approaches such as detention.[34] Detaining children, either on remand or as a sanction, is often justified as a means of 'getting kids off the streets'.[35] For a time, this will work, but every child will be released. It is important that they are released into something better if they are to desist from offending in the long-term.

Furthermore, children are not the only people who should take responsibility for their offending behaviour; the circle of accountability should be extended to include the adults and institutions responsible for their welfare.[36]

It is a matter of concern that, at time of writing, the Queensland Government has a Bill before Parliament that proposes amendments to the Youth Justice Act 1992 (Qld) that are, by their own admission, inconsistent with the Human Rights Act 2019 (Qld).[37] *If passed, the Act will go down in history as the first time the over-ride power in the Human Rights Act 2019 (Qld) was used in Queensland.*

Chapter 3 endnotes

1 See *Human Rights Act 2019* (Qld) s 9(1)(b), (c).

2 *Human Rights Act 2019* (Qld) s 58(1).

3 *Human Rights Act 2019* (Qld) s 59(1).

4 *Human Rights Act 2019* (Qld) s 48(1).

5 B Goldson and J Muncie, 'Juvenile justice: International law and children's rights' in J D Wright (ed), *International Encyclopedia of Social and Behavioral Sciences*, 2015, 958.

6 U Kilkelly, 'Youth justice and children's rights: Measuring compliance with international standards' (2008) 8(3) *Youth Justice* 187; J Tobin, *The UN Convention on the Rights of the Child: A Commentary*, 2019.

7 D Haydon, 'Children deprived of their liberty on "welfare" grounds: A critical perspective' in E Stanley (ed), *Human Rights and Incarceration: Critical Explorations,* 2018, 27, 29; B Goldson and J Muncie, 'Juvenile justice: International law and children's rights' in J D Wright (ed), *International Encyclopedia of Social and Behavioral Sciences*, 2015, 51, 61; U Kilkelly, 'Youth justice and children's rights: Measuring compliance with international standards' (2008) 8(3) *Youth Justice* 187, 187.

8 Committee on the Rights of the Child, *General Guidelines regarding the Form and Content of Initial Reports to be submitted by States Parties under Article 44, paragraph 1(a), of the Convention*, CRC/C/5 (30 October 1991) [13].

9 B Goldson and J Muncie, 'Juvenile justice: International law and children's rights' in J D Wright (ed), *International Encyclopedia of Social and Behavioral Sciences*, 2015, 59 (their emphasis).

10 United Nations Committee on the Rights of the Child, *General Comment No. 24 on children's rights in the child justice system*, CRC/C/G/24 (18 September 2019).

11 Ibid 2.

12 Ibid 22.

13 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, A/RES/40/33, 1985 ('*The Beijing Rules*').

14 W O'Brien and K Fitz-Gibbon, 'Can Human Rights Standards Counter Australia's Punitive Youth Justice Practices?' (2018) 26 *The International Journal of Children's Rights* 197, 200.

15 *The Beijing Rules*, 1.1, 1.3, 5.1.

16 *United Nations Guidelines for the Prevention of Juvenile Delinquency*, A/RES/45/112, 1990, 1-5 ('*The Riyadh Guidelines*').

17 Ibid 54.

18 *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, A/RES/45/113, 1990, 2 ('*the Havana Rules*').

19 Ibid 1, 3.

20 *United Nations Guidelines for Action on Children in the Criminal Justice System*, Economic and Social Council resolution 1997/30 (21 July 1997) 1-3 ('*the Vienna Guidelines*').

21 Ibid 11.

22 There are other references to the Youth Justice Principles in the *Youth Justice Act 1992* (Qld). Principle 18 of the Youth Justice Principles - that a child should be detained in custody for an offence only as a last resort and for the least time that is justified in the circumstances – is specifically referred to at section 13(1)(a)(iv) (police officer's power of arrest preserved) and section 48AA(4)(b)(i) (bail decisions). Principles 3 (child to be treated with dignity and respect), 16 (child to have access to legal and support services), 20 (contacts should be fostered between the child and the community) and 21 (child should be provided with safe and stable living environment, maintain relationships with family and community, be consulted in decision making, given information, provided with privacy, provided with health services, proved with education services, receive assistance with transition back to the community) are referred to at section 263(5) where it is said that they must be complied with in respect of each child detained in a detention centre 'as far as reasonably practicable.' Also, a child must be informed about their rights and responsibilities under the Youth Justice Principles when they are admitted to a detention centre (section 267(1)(b)) and the chief executive must monitor the operation of programs and services run by Youth Justice to ensure they comply with the Youth Justice Principles (section 302(4)).

23 S Case and R Smith, 'The life course of delinquency: reflections on the meaning of trajectories, transitions and turning points in youth justice' (2021) 45(4) *International Journal of Comparative and Applied Criminal Justice* 391, 398; C Cunneen, R White and K Richards, *Juvenile Justice: Youth and Crime in Australia*, 2015, 267-268, 274.

24 United Nations Committee on the Rights of the Child, *General Comment No. 24 on children's rights in the child justice system* [3].

25 *R v El* [2011] 2 Qd R 237 [4].

26 *Oranga Tamariki Act 1989* (NZ) s 4A(2).

27 A Becroft, 'Children and Young People in Conflict with the Law: Asking the Hard Questions' (2006) 57(4) *Juvenile and Family Court Journal* 1; N Lynch, 'Youth Justice in New Zealand: A Children's Rights Perspective' 2008 8(3) *Youth Justice* 215; L Forde, 'Welfare, Justice, and Diverse Models of Youth Justice: A Children's Rights Analysis' (2021) 29(4) *The International Journal of Children's Rights* 920.

28 *Oranga Tamariki Act 1989* (NZ) s 4A(2); *New Zealand Police/Oranga Tamaraki v L* [2020] NZYC 117 [55].

29 United Nations Committee on the Rights of the Child, *General Comment No. 24 on children's rights in the child justice system* [3].

30 L McAra and S McVie, 'Youth justice? The impact of system contact on patterns of desistance from offending' (2007) 4(3) *European Journal of Criminology* 315; A Petrosino, C Turpin-Petrosino and S Guckenburg, 'Formal system processing of juveniles: Effects on delinquency' (2010) 1 *Campbell Systematic Reviews* 1, 31.

31 K Richards, 'Youth Justice, Restorative Justice and Gendered Violence — Oh My! The Rise and Rise of Offender 'Accountability' in Contemporary Penality' (2017) 29(1) *Current Issues in Criminal Justice* 89, 92.

32 *New Zealand Police/Oranga Tamaraki v SD* [2021] NZYC 360 [97].

33 B Applegate and R K Davis, 'Public views on sentencing juvenile murderers: The impact of offender, offense and perceived maturity' (2006) 4(1) *Youth Violence and Juvenile Justice* 55; C Barretto, S Miers and I Lambie, 'The views of the public on youth offenders and the New Zealand criminal justice system' (2018) 62(1) *International Journal of Offender Therapy and Comparative Criminology* 129, 130.

34 C Barretto, S Miers and I Lambie, 'The views of the public on youth offenders and the New Zealand criminal justice system' (2018) 62(1) *International Journal of Offender Therapy and Comparative Criminology* 129, 135-138; B Applegate and R K Davis, 'Public views on sentencing juvenile murderers: The impact of offender, offense and perceived maturity' (2006) 4(1) *Youth Violence and Juvenile Justice* 55, 68; A Piquero and L Steinberg, 'Public preferences for rehabilitation versus incarceration of juvenile offenders' (2010) 38 *Journal of Criminal Justice* 15; K O'Sullivan et al, 'Measuring offenders' belief in the possibility of desistence' (2018) 62(5) *International Journal of Offender Therapy and Comparative Criminology* 1317; A Freiberg et al, 'Parole, politics and penal policy' (2018) 18(1) *QUT Law Review* 191; A Piquero et al, 'Never too late: Public optimism about juvenile rehabilitation' (2010) 12(2) *Punishment and Society* 187.

35 K Richards and L Renshaw, *Bail and remand for young people in Australia: A national research project*, 2013 (Australian Institute of Criminology); C Cunneen et al, *Penal Culture and Hyperincarceration: The Revival of the Prison,* 2013, 109, 191; D Haydon, 'Children deprived of their liberty on "welfare" grounds: A critical perspective' in E Stanley (ed), *Human Rights and Incarceration: Critical Explorations,* 2018, 25.

36 This is not to suggest that we should 'coerc[e] good parenting' – this can place additional strain on precarious relationships and fails to appreciate that teenaged sons are often physically stronger than their mothers: see K Hollingsworth, 'Responsibility and rights: Children and their parents in the youth justice system' (2007) 21 *International Journal of Law, Policy and the Family* 190.

37 *Strengthening Community Safety Bill 2023* (Qld).

CHAPTER 4

Keeping children out of the courts: Early intervention, diversion and decriminalisation

4.1 Who should intervene, when and how?

In his recent review of the UK youth justice system, Taylor said: 'almost all of the causes of childhood offending lie beyond the reach of the youth justice system'.[1] The key agencies that can intervene effectively are health services, education services and social welfare services, and it is most desirable that these services intervene before a child offends, or before their offending escalates.[2]

Judge Fitzgerald of the New Zealand Youth Court has said that early intervention should involve '**a well-coordinated, robust plan involving various agencies and professionals, providing supports and services'** to help address the causes of the child's charges, and assist their 'whanau [extended family/community], and [their] mother in particular, to care for and support [them] properly in the future and prevent [them] from further offending.'[3]

The two key agencies that are best placed to intervene before a child commits offences, or before their offending escalates, are Education and Child Safety.

4.1.1 Education

There is widespread agreement that **school exclusion contributes to the criminalisation of children**.[4]

There are several ways in which a child can be excluded from school. The most obvious form of exclusion occurs when schools expel young people, or repeatedly suspend them from school to the point where the child (or their parent) sees no point in them returning. Exclusions also occur when a child does not feel accepted or welcome at school or does not 'fit in'. This might be because they do not have enough money to participate in sports, camps and extra-curricular activities, or have the correct uniform. School exclusion often happens slowly – it is a process rather than an event. Children with disabilities are most at risk because their behaviour may be 'challenging' from an early age. They may be labelled as 'at risk' in primary school and treated accordingly as they progress through the system.[5] Some scholars have labelled this the 'school-to-prison pipeline'.[6]

Exclusion from school results in poor performance in key areas such as literacy and numeracy.[7] As a result of missed learning, excluded children are more likely to have poor assessment results when they return to school.[8] They are also more susceptible to becoming disengaged from school altogether.[9]

Data from the Queensland Department of Education shows that, in 2020, there were 1249 exclusions of students from Queensland state schools.[10] Indigenous students, students with disabilities, students from low socioeconomic backgrounds and students in out of home care are overrepresented in school suspension and expulsion figures.[11] Graham and colleagues have reported that 'physical misconduct' is the most common reason for suspensions and exclusions.[12] They also found an acceleration in the suspension of Indigenous students from Queensland schools in the period between 2013 and 2019.[13]

School exclusion is associated with a range of adverse outcomes for children, with criminalisation being one of them.[14] In fact, school exclusion is a key determinant for future involvement in offending.[15] Children who are excluded from school have nothing to do during the day, which makes them vulnerable to offending due to boredom and exposure to negative peer group influences.[16] International research has shown that **having access to leisure activities, apprenticeships or employment, accommodation, and drug treatment in the community prevents offending in boys**; sadly, having access to these things is seen by them as an 'upside' to detention.[17]

Remaining in school is a key protective factor for children who are at risk of criminalisation. It is critical that suspensions and exclusions are minimised, as was recently recommended by a South Australian Inquiry.[18] In the UK, schools remain responsible for the education of all children they exclude.[19] Queensland principals are required to 'take reasonable steps to arrange for the student's access to an educational program that allows the student to continue the student's education' during a suspension from school, but not once they are excluded.[20] **Requiring schools to retain responsibility for excluded children's education could encourage schools to instead work towards children's reintegration.**

4.1.2 Child Safety

Many children who come to the attention of police are known to, or even in the care of, Child Safety. Many of these children have nowhere safe to live. Some will have absconded from their placements because they do not consider themselves to be safe, welcome or 'at home' there.

> Case example (Queensland Childrens Court, 2022): *Commissioner of Police v Jane Dean (a pseudonym)* concerned a 13-year-old girl who had been taken into the care of Child Safety at the age of 12. The placements that had been offered to her by Child Safety were described by the Childrens Court Magistrate as 'shelter type accommodation rather than accommodation that provides a sense of home'.[21] Jane did not want to accept these placements and as a result she moved between the 'unapproved' homes of an aunt, a friend, and her grandmother. The sentencing magistrate said that Jane's offending was 'directly linked to the fact that she does not have somewhere suitable to live and has limited access to helpful adults who can help her develop the life skills she needs.'[22]

Most, if not all, of the children who are in the care of Child Safety will have experienced traumatic events. Removal from their families 'is itself traumatic, and may in fact 'replace one form of abuse with another'.[23] Many children have post-traumatic stress disorder as a result of their removal: the experience of being 'literally pulled apart' from their mothers and siblings is 'the most traumatic experience of [their] life' and children remain 'deeply traumatised by it.'[24] The trauma is so pervasive that these children often have numerous trauma triggers; for example, they can find changes of residence traumatising because they have experienced so many child protection placements over a short period of time.[25] Even the use of unfamiliar legal terminology and unfamiliar acronyms can trigger traumatic memories.[26]

Trauma affects all areas of these children's lives. It impairs their judgement and makes them vulnerable to having a 'fight or flight' response in all kinds of situations that other children do not.[27]

Comprehensive reviews of the Queensland Child Safety system have already been undertaken, and there is significant frustration within the sector that identified problems remain unaddressed. In particular, placement in residential care seems to be a reliable predictor of criminal activity, often because the child is charged with offences within their placement – offences that they would never be charged with in a family home.

Case example (Queensland Childrens Court, 2021): *John (a pseudonym) v R* concerned an 11-year old boy who had been in the care of Child Safety since he was an infant.[28] John had been charged with two offences that occurred within his group home: stealing $75 from a carer, and throwing his phone at a carer when he was told that he could not use the wi-fi in the group home. Richards P noted that John 'comes into conflict with the child safety officers that are appointed to care for him'. Sadly, Her Honour concluded that by staying on probation, John would at least 'have support from another department'.[29]

Case example (Queensland Childrens Court, 2021): In the case of *MEA v Director of Public Prosecutions*,[30] a 14-year-old Aboriginal girl had been charged with committing several offences in her group home. They included wilful damage for breaking cupboards and doors in her placement and pouring lemonade onto a care worker's car seat, and common assault against her care workers arising out of arguments. Two of the wilful damage charges occurred after she was told by care workers that she was not able to speak to her family.[31] Judge Dearden acknowledged that MEA was highly distressed about being disconnected from her family and community against her will and His Honour reviewed her sentence.

It is often observed that most offending by children occurs at night. Children who live in residential care do not always receive adequate supervision during the night-time because the youth workers in the property are asleep. Police should not be the only after-hours service provider that is available to intervene. As the statutory parent, Child Safety has a legal responsibility to protect children in their care at all hours of the day and night.[32]

A home-like environment with adequate supervision all hours of the day and night should be available to all children who lack a family home. If children are deciding to self-place somewhere other than their placement, there may be good reasons for this. It must be remembered that removing a child from their home can cause more harm than good.

4.2 Criminal responsibility

4.2.1 Children aged 10 to 13 years of age

Children under the age of 10 cannot be charged with a criminal offence in Queensland.[33] A child between the ages of 10 and 13 years is presumed not to be criminally responsible, unless it is proved that, at the time of the offence, they 'had the capacity to know that [they] ought not to do the act or make the omission.'[34] This is known as the doli incapax (incapable of evil) presumption. This test is satisfied if the prosecution demonstrates that the child knew their conduct was 'seriously', 'morally' or 'gravely wrong'.[35] It is not enough that the child knew their actions were 'mischievous or naughty', regardless of how 'obviously wrong' the child's acts were.[36]

In practice, however, lawyers and prosecutors do not always raise the possibility that the child may have lacked the capacity to know what they did was 'seriously wrong', and courts often infer that children who offend were aware that what they were doing was 'seriously wrong' even where evidence has not been led to establish this.[37]

The question of whether a child had the capacity to know the moral wrongness of their actions necessarily 'directs attention to the child's education and the environment in which the child has been raised.'[38] The child's individual circumstances, developmental stage and upbringing can all influence their capacity to know that their actions were seriously wrong to the requisite standard.

Case example (High Court of Australia, 2016): In the case of *RP v The Queen*, an 11-year-old boy had been found guilty of sexual offences against his brother by both the District Court and the Court of Appeal. However, the High Court found that the doli incapax presumption had not been rebutted and quashed the convictions. The High Court noted the child's young age and low intelligence. Also, the court noted that the boy's offending was 'seriously suggestive' of 'having been himself the subject of sexual interference' and that this would have interfered with his perception of what was and was not 'seriously wrong in a moral sense.'[39]

Children who commit offences for survival (e.g. shoplifting to eat), out of necessity (e.g. evade fare for transport), or because of a disability (e.g. wilful damage in anger), or whose offences are associated with learned or observed behaviours (e.g. drug use and violence) may not know that their actions were 'seriously wrong'. If the prosecution cannot prove that they did understand that their actions were seriously wrong, then a child under 14 years of age will have the benefit of the doli incapax presumption. It should be noted that **the position at international law is that children under 14 should never be held criminally responsible for their actions**.[40]

4.2.2 Children with disabilities and complex trauma

Speech and language disorders, cognitive impairment and learning disorders can also influence a child's capacity to understand that their actions were seriously wrong.

A child aged 14 years and over does not have the benefit of the doli incapax presumption. However, in Queensland, a person of any age who 'is in such a state of mental disease or natural mental infirmity as to deprive the person of capacity to understand what the person is doing, or of capacity to control the person's actions, or of capacity to know that the person ought not to do the act' is not criminally responsible for their actions.[41]

There is a high prevalence of speech, language and communication difficulties amongst children in the youth justice system.[42] Studies in Australia and internationally have found that more than 50% of children in youth detention have severe language difficulties including problems with auditory and reading comprehension.[43] There is substantial evidence that **speech and language disorders, as well as intellectual impairments, can compromise a child's capacity to understand the consequences of their actions**.[44] These impairments can also interfere with a child's ability to follow and participate in legal proceedings and provide instructions to a lawyer.[45]

Questions of criminal responsibility might also be raised in relation to offences committed by children in care, many of whom are severely traumatised, and have speech and language disorders and cognitive impairments.[46] **Children who are charged with offences in their placement, in circumstances where the same behaviour would not be criminalised if it occurred in a family home, could rightfully argue that they did not understand that they 'ought not to do the act'.**

Police are the 'gatekeepers' of the youth justice system and it is important that they consider a child's capacity when deciding what action to take in response to an alleged offence.[47] Training for police in 'disability awareness and communication skills' could assist.[48]

4.3 Police diversion: Existing options

4.3.1 Decision-making principles

The importance of diverting children away from the criminal law system where possible is reflected in several provisions of the *Youth Justice Act 1992* (Qld).

Youth Justice Principle 5 states that a child 'should be treated in a way that diverts the child from the courts' criminal justice system'.

The Queensland Police Service (QPS) Operations and Procedures Manual (OPM) notes that diversion of children from the criminal law system is an 'important component of reducing recidivism'.[49]

The *Youth Justice Act 1992* (Qld) (section 11(1)) states that before arresting a child, police officers *must*[50] consider whether, in all the circumstances, it would be more appropriate to:

- take no action;
- caution the child;
- refer the child to a restorative justice process; or
- offer the child an opportunity to attend a drug diversion assessment program or a graffiti removal program, for relevant offences.[51]

A police officer can decide to divert the child under section 11(1) even if the child has been diverted before, or there are already proceedings on foot against the child for another offence, and even if the offence is serious in nature.[52] When deciding whether or not to divert a child under section 11(1), police officers must have regard to the circumstances of the offence, the child's criminal history and any prior dealings police have had with the child including any previous cautions administered to them.[53]

The child's individual circumstances should also influence a police officer's decision to divert a child, and what kind of diversionary option to apply. Section 48AA(4) of the *Youth Justice Act 1992* (Qld) (which concerns bail decisions) provides a useful model. The considerations listed in that section include:

- the child's age, maturity level, cognitive ability and developmental needs;
- the child's exposure to, experience of and reaction to trauma;
- the child's health, including the child's need for medical assessment or medical treatment;
- for a child with a disability—the disability and the child's need for services and supports in relation to the disability;
- if the child is an Aboriginal person or Torres Strait Islander—the desirability of maintaining the child's connection with the child's community, family and kin;
- if the child is under 14 years— that children under 14 years are entitled to special care and protection due to their vulnerability.

These should be mandatory considerations for all decisions concerning children in the youth justice system. This would improve the quality of decision-making, and go some way towards ensuring compliance with the *Human Rights Act 2019* (Qld).

4.3.2 Official counselling and police referrals

The OPM provides police with two additional options for diversion: 'official counselling' and 'police referral'.[54]

Official counselling involves 'substantially the same process as that used for cautions' but the discussion with the child is for the purpose of 'guidance', accommodating for the child's age and 'level of understanding'.[55]

A police referral can be made in situations where 'additional support would assist to divert a child from future offending'.[56] Referrals can relate to matters such as domestic and family violence, health and wellbeing, homelessness and mental health support.[57] Police officers are required to obtain the consent of the child (if they are 16 years of age or older) or their parent or guardian (if the child aged under the age of 16 years) before making a police referral.[58]

Official counselling and police referrals reside somewhere between taking no action and cautioning a child. They do not require the child to admit the offence, but they require police to have a supportive conversation with, and provide some assistance to, the child which may be appropriate in situations where the child is homeless, intoxicated or suffering from a mental or cognitive impairment. **'Official counselling' and 'police referral' could be added as diversion options to the legislation, to ensure that police officers turn their minds to such options before arresting a child.** There is international precedent for this. Section 6 of Canada's *Youth Criminal Justice Act* – which is very similar to section 11 of the *Youth Justice Act 1992* (Qld) – includes two additional options, 'warn the young person' and 'refer the young person to a program or agency in the community that may assist the young person not to commit offences.'

Children who continue to come to the attention of police should be linked in with services as early as possible, and their families and communities should be provided with support to meet the protective needs of the child and prevent future engagements with the criminal law system. 'Police referrals' could provide a mechanism for this kind of early intervention.

In the ACT, **online platforms assist police to make 'on the spot' referrals** to support services.[59] 'OneLink', coordinated by the Woden Community Service, is an integrated referral system that can be accessed by police via phone, email and webchat.[60] OneLink coordinates referrals, intake, and delivery of accommodation and social support services in the ACT. 'SupportLink' is a web-based integrated services framework used by ACT Police to refer individuals and families to local service providers.[61]

QPS could develop, and expand on, similar referral platforms. The Coordinated Response to Young People at Risk program (CRYPAR) was an early intervention program operated by QPS that involved the referral of vulnerable young people to available services.[62] QPS may already be using SupportLink, however no information is publicly available on how extensively it is used.[63] Resources should be dedicated to enhancing QPS referral platforms so all officers are motivated to use them.

4.3.3 Cautions

A police officer can caution a child instead of bringing them before a court for an offence.[64] If an Aboriginal child is being cautioned, a respected member of the child's community may administer the caution instead of the police officer.[65] A caution may involve apologising to a victim if the child is willing to do so.[66] The Act contemplates that it may be necessary to have an interpreter explain the effect of the caution to the child, or to provide an explanatory note to the child to assist them to understand it.[67]

Cautions are an effective diversionary mechanism because if a child receives a caution, they are not liable to be prosecuted for the offence, and a caution is not part of the child's criminal record.[68] However, past cautions can be taken into account by police when deciding whether a child should be diverted on subsequent occasions.[69] This could be considered problematic – **children should always have the benefit of a caution where this is appropriate, regardless of how many cautions they have had in the past.**

Research has shown that cautions are associated with lower levels of recidivism amongst children when compared with those who are formally processed by the youth justice system.[70] Research has shown that, for children who commit low-level offences, better outcomes are achieved through minimal intervention.[71]

In 2021/22, there was a 6.6% increase in the number of cautions administered to children by police in Queensland (n=14,589).[72] This is consistent with best practice, which suggests that children should be diverted from the criminal law system wherever possible. Cautions were most commonly issued for theft and related offences, and drug offences, and a substantial proportion were for unlawful entry with intent and property damage offences.[73]

Table 3.1 Most common offences that led to cautions 2021/22[74]

Theft and related offences *Motor vehicle theft*	26.3% *9.1%*
Illicit drug offences	13.1%
Property damage	11.8%
Unlawful entry with intent	11.5%
Acts intended to cause injury	10.3%

It is a matter of concern that, in Queensland, a police officer can only caution a child if the child admits the offence, and consents to the caution.[75] In other jurisdictions, such as Canada and Ireland, only an 'acceptance of responsibility' is required.[76] In the ACT and New Zealand, the child needs only to 'not deny' the offence to receive a caution for it.[77] In New Zealand, a police officer may give a 'warning' to a child where an offence is 'alleged or admitted to have been committed by a child' – and there is no requirement that the child admit the offence.[78] In the Northern Territory, only consent is required for a warning to be given to a child.[79]

Under the Protected Admissions Scheme, outlined in the QPS OPM, a child may decline to admit an offence and still be diverted in certain circumstances.[80] The Protected Admissions Scheme recognises that children may be advised by a legal representative not to admit to committing an offence, but diversion may otherwise be appropriate in the circumstances.[81] However, in practice, such schemes are rarely used by police and are not widely supported by them.[82] Also, to access the Protected Admission Scheme, the child must have a legal representative, which may limit its effectiveness as a diversionary option.

There is no legal reason why an admission should be necessary for a child to be diverted. Once a child is cautioned for an offence, the question of whether they are guilty or not is not a matter that can, or will, be determined by a court. Also, research suggests that Aboriginal and/or Torres Strait Islander children are more likely to refuse to admit an offence.[83] This is due to their high levels of mistrust of police, and also because they are often advised by lawyers not to make admissions. If we are to reduce the number of Indigenous children within the youth justice system, it is important that they have maximum opportunity to be cautioned instead of charged.

4.3.4 Restorative justice

Another diversion option available to police instead of arresting a child is to refer the child for a restorative justice process.[84] If the restorative justice process is successfully completed, the child will not be liable for prosecution for the offence.[85]

A police officer can only refer a child for restorative justice if a caution would be inappropriate and restorative justice is an appropriate way to deal with the matter.[86] When deciding whether restorative justice would be appropriate or not, police officers are directed to consider the nature of the offence, the harm suffered by anyone as a result of the offence, and 'whether the interests of the community and the child would be served by having the offence dealt with under a restorative justice process.'[87] Youth Justice will then convene a restorative justice conference bringing together the accused child and the victim, or a representative of the victim, where possible. The aim of the conference is to reach an agreement on how any harm caused can be repaired.

If a restorative justice conference cannot be organised for the child, the child can instead participate in an alternative diversion program.[88] The most common reason for a restorative justice conference not being held is that there is no victim willing or able to participate.

If police decide to proceed against a child instead of referring them for restorative justice, a court can dismiss the charge, even if the child pleads guilty, where the court is satisfied that the child should have been referred to a restorative justice process.[89]

As with a caution, a child can only be referred by police for restorative justice if they admit the offence and the child is willing to have the matter dealt with in this way.[90] **This could limit children's opportunities for diversion.** As noted above, there are several examples of jurisdictions where an admission is not required for a child to be diverted – instead, the child might be asked to 'accept responsibility' or 'not deny' the offence. Under the Victorian *Children, Youth and Families Act 2005*, a child need not admit or plead guilty to an offence to participate in a diversion program. Rather, the child must acknowledge responsibility for the offence and consent to participate in the diversion program.[91] The child's acknowledgement of responsibility is not admissible as evidence and does not constitute a plea.[92] In the ACT, a child is eligible for restorative justice conferencing if they 'do not deny responsibility' for the commission of the offence,[93] and in New Zealand, a family group conference can be convened before a child admits an offence.[94] In the Northern Territory, the child need only consent to a youth justice conference.[95]

Whilst some have argued that dispensing with admissions undermines the theory behind successful restorative justice practice, others have observed that a 'black and white' approach to youth justice fails to account for the 'human greys', which are the reality of children's offending.[96] There is often no clear distinction between victim and offender in youth justice because so many children who commit offences have themselves been victimised. As noted above, requiring an admission disadvantages Indigenous children because they are less willing to admit guilt to police, and more likely to be advised by lawyers not to admit guilt, due to negative experiences with police in the past.[97]

Sometimes a child will breach a restorative justice agreement if the requirements imposed on them are too onerous. The *Youth Justice Act 1992* (Qld) states that if a child is referred to a restorative justice process by a police officer and they breach their restorative justice agreement, the police officer may:[98]

- take no action;
- administer a caution to the child;
- refer the child for another restorative justice process; or
- start a proceeding against the child

Some additional options could be added to this list, to maximise the number of children that are successfully diverted, such as: providing the child with more time to comply; making a police referral; and referring the child to the chief executive for participation in an alternative diversion program.

4.3.5 Drug assessment and diversion

Police can offer a child the opportunity to attend a drug diversion assessment program under section 11(1) of the *Youth Justice Act 1992* (Qld) if the alleged offence is a minor drugs offence or an offence related to a minor drugs offence. 'Minor drug offences' are limited to possession of small amounts of cannabis and utensils.[99] When a police officer refers a child to a drug diversion assessment program, they will provide them with a written requirement to attend the program and discontinue the arrest.[100]

Short educational programs involving a time commitment of only a few hours have been found to be the best means of responding to drug offences amongst children. Compliance with such programs is high and can have the added benefit of providing a future point of contact for children should they wish to engage in drug treatment later on.[101] International research has consistently demonstrated that the most effective and appropriate way of dealing with minor drug offences (such as possession) is to divert individuals away from the criminal law system.[102] Diverting people for low level drug offences has not been found to result in large increases in drug consumption and in some instances, diversion to educational or therapeutic programs can result in reduced drug use.[103] Police-referred drug diversion could be expanded to include drugs other than cannabis to ensure that as many children as possible can be diverted at the earliest possible stage.

A shortcoming associated with this diversion option is that a child will not be eligible if they have already been diverted in this way on two previous occasions.[104] Children can become receptive to information on addiction at any time, so **there should be no limit on the number of times a child can be diverted for drug offences.** Children may respond to a different worker, or they may simply become 'ready' to address their addiction after several sessions.

4.3.6 Failure to comply with a police direction to attend certain diversion programs

If a police officer refers a child to a drug diversion assessment program or a graffiti removal program and the child does not comply, this can amount to contravention of a police direction which is an offence under section 791 of the *Police Powers and Responsibilities Act 2000* (Qld).[105] This is problematic because, with only limited information available about the child, the **police officer may unknowingly impose a requirement that is impossible for the child to meet due to their personal circumstances.**

Section 791 includes a reasonable excuse defence. It is important that the child's personal circumstances are taken into account when determining whether the child had a reasonable excuse for the contravention. Again, section 48AA(4) of the *Youth Justice Act 1992* (Qld) provides guidance on what factors should be taken into account in such a determination.

4.4 Decriminalisation instead of diversion

4.4.1 Decriminalisation, depenalisation and legalisation

Diversion refers to a process by which a person who would otherwise be arrested or charged is directed away from the criminal law system, often towards therapeutic support services or education programs.[106] Depenalisation refers to the reduction in the use of criminal sanctions. This does not require any changes to legislation, but rather involves changes to police practices. Legalisation means making previously criminal conduct legal and not subject to any penalties.[107]

Decriminalisation refers to the removal of criminal sanctions for a criminal offence.[108] This might involve diversion to social services, or taking no action at all.[109]

These terms are often used improperly, and are conflated with one another, but it is important to understand the distinctions between them, because each of them provide us with different options for intervening in response to children's offending.[110]

Bearing in mind the damaging effects of the criminal law system on children, the decriminalisation of certain offences may provide a solution to the 'problem' of children's offending.

It should be remembered that many offences that children are now charged with would merely have been labelled 'youthful indiscretions' in generations past – it could be argued that children of this generation are being 'over-criminalised'.[111] There are several offences that do not impose significant harm on society, and are no longer stigmatised (such as cannabis possession, low level disorderly conduct and trespass), and these offences should be decriminalised.[112]

4.4.2 Which offences could be decriminalised?

No child should be charged with fare evasion. Children are completely reliant on adults for transportation. It is a tragic irony that children can be, and often are, charged with fare evasion when using public transport to attend court and youth justice offices. Fare evasion should be decriminalised for children. This could easily be done by amending the relevant section of the *Transport Operations (Passenger Transport) Regulation 2018* (Qld) so it applies only to adults. Fare evasion has been decriminalised already for children in some states in the US, along with other offences such as absence from school and alcohol possession.[113]

Low level public nuisance offences should also be decriminalised.[114] Queensland's public nuisance offence is framed so broadly that prosecuted behaviours include sleeping, drinking and swearing in public.[115] The use of public nuisance to criminalise swearing at or insulting a police officer is exceptionally common, despite the High Court's pronouncements that the offence should not be used for this purpose.[116] Decriminalisation of low-level offensive behaviour would reduce the burden on police, prosecution and court resources, and protect those who are disproportionately targeted, particularly those who are young, Indigenous, homeless, poor, and/or mentally

unwell.[117] The Queensland Parliament Community Support and Services Committee recently recommended that the offences of begging, public urination and public intoxication be decriminalised.[118] In the UK, begging and soliciting for prostitution were decriminalised in 1982.[119]

Ashworth has argued that **no person should be imprisoned for property offences**, no matter how many times they commit such offences.[120] Ashworth considers that the deprivation of personal liberty, a fundamental human right, is not proportionate to the mere deprivation of property by an offender. He argues that the most appropriate response to property offending, when taking into consideration the objectives of sentencing, is a compensation order in favour of the victim, or a community supervision order if the offence is more serious in nature. He also notes the **importance of self-help, saying the public should be responsible for taking preventative measures**, such as installing locks and reducing the opportunity for offending through smart design. Ashworth challenges law-makers to come up with 'more imaginative and more effective ways of dealing with people who persistently offend, other than to simply "up the ante" every time.'[121]

Decriminalisation of low-level drug offences has already occurred elsewhere in Australia and internationally. Cannabis use and possession has been decriminalised (and replaced with a civil penalty) in South Australia, the ACT and the Northern Territory, in fact Hughes reported in 2016 that 'de facto' decriminalisation of illicit drug use has occurred in all Australian jurisdictions except for Queensland and New South Wales.[122] A survey conducted by the Australian Institute of Health and Welfare found a high level of support (88%) for decriminalising cannabis use amongst the general Australian public.[123] The Queensland Productivity Commission (QPC) has reported that there is substantial public support for the decriminalisation of lower level drug offences in Queensland.[124] The QPC recommend a staged process where the possession of 'lower harm illicit drugs' such as cannabis and MDMA is first decriminalised and ultimately legalised.[125]

4.4.3 Offences committed in residential care units

Other offences should be decriminalised because of the context in which they are committed. It is well-established that children under the 'care' of Child Safety are at high risk of criminalisation.[126] Indeed, as many as three quarters of children in the youth justice system are known to Child Safety.[127] Children in residential care are at particular risk of criminalisation, and many of them are charged with offences that they have committed in their placement.[128] Most often, these behaviours would not have resulted in criminal charges if they had been committed within a family home. There are many examples of behaviour in out of home care placements that commonly result in criminal charges, including:

- where a child smashes a window, or punches a hole in a wall, often in anger or distress, this can result in a wilful damage charge;
- where a child removes an object from the placement without permission, such as food, keys, or electronic device, this can result in a stealing charge;
- where a child threatens, shoves, or otherwise lashes out at a foster carer or youth worker, including in anger, distress, or perceived self-defence, this can result in an assault charge.

Previous research has found that children in residential care in Queensland are charged under questionable circumstances, such as:

> 'spilling barbeque sauce on the tiles'; 'I had a kid who broke a door, but then fixed it – he still got charged'; 'We've had young people kick in toilet doors in resi care because the toilets are locked'; and even 'We had another young person charged with wilful damage for ripping gladwrap'.[129]

No child should be charged for behaviour in an out of home care placement where the same behaviour would not have resulted in criminal charges if the child had been in a family home.

Quality standards for children's homes in the UK protect against this, and explicitly state that '[c]hildren should not be charged with offences resulting from behaviour within a children's home that would not similarly lead to police involvement if it occurred in a family home'.[130]

The claim is often made by residential care services that a police report is necessary for insurance purposes. However, just as a parent would 'absorb' the costs of repairing a smashed wall, so should the statutory parent budget for such incidents. Considering the high levels of trauma, mental illness and disability amongst children in residential care, repairing such damage should be considered a predictable cost.[131]

4.4.4 Increasing the age of criminal responsibility

Of course, as Whyte notes, the most effective mechanism for decriminalising children's 'offending' behaviour is setting an age of criminal responsibility that is in the late-teen years. This is the approach taken in Norway, Denmark, Sweden and Finland, where the age of criminal responsibility is 15 years.[132] The UN Committee on the Rights of the Child has praised nation states that have set their age of criminal responsibility at 15 or 16 years, and has recommended that the age of criminal responsibility be no younger than 14 years.[133]

4.5 Diverting Indigenous children

4.5.1 Culturally safe diversion

In Australia, Indigenous children are often labelled as a 'hard to reach' group. But research confirms that Aboriginal and/or Torres Strait Islander children have been, and continue to be, subject to adverse treatment by police.[134] It is not uncommon for relationships between children and police to be characterised by mistrust, suspicion and even hostility. Sarre and Langos have written that 'police legitimacy' – whether children see police as having the legitimate authority of the state – is essential in deterring children from crime.[135] They note that legitimacy is created through feelings of 'trust in police, fair treatment and quality of decision-making'. [136]

Indigenous people have emphasised the need for community-led and place-based approaches to addressing criminal behaviour by Indigenous children, and the literature supports this.[137] Scholars have emphasised the importance of taking a culturally safe and 'decolonising approach' to diversion for Indigenous young people.[138]

Research led by Harry Blagg has found that Indigenous children should be diverted to 'community-owned and managed structures and processes' rather than government-run programs.[139] Blagg has emphasised that a culturally safe approach to children's offending requires a shift in focus away from the individual child, to the child's family and community.[140] In particular, it is suggested that Indigenous children be referred to 'on country' programs that prioritise healing and cultural learning.[141]

Blagg and colleagues have also concluded that partnerships between police and other support agencies that promote treatment and support for Indigenous young people at the 'gatekeeping stage' are likely to be most effective.[142] Several programs have been trialled across Australia aimed at building trusting relationships between children and police, most often in regional areas where individual police and children have high levels of contact with one another. Programs typically involve barbeques, sporting matches and other leisure activities that allow police and children to 'build rapport' with one another.[143] The hope is that next time those police officers and children encounter one another on the street, there will be a basis for appropriate, supportive, non-punitive intervention. Similar programs have been run overseas.[144]

Programs that have been developed with extensive community consultation have proven most effective in addressing Indigenous children's offending behaviour. For example, the Maranguka Justice Reinvestment Project was launched in 2013 in Bourke, NSW as Australia's first major justice reinvestment pilot.[145] It implemented a place-based response to the overrepresentation of its Indigenous population in the criminal law system. The project concentrated on improving aspects of the local justice system, with a prominent focus on community 'empowerment' and 'self-governance'.[146] A KPMG Impact Assessment of the project found improvements in family strength, youth development and school retention rates.[147]

Cunneen and colleagues argue that there are two key challenges to ensuring Indigenous children have access to meaningful diversionary alternatives. First, many Aboriginal and/or Torres Strait Islander children live in regional, rural and remote areas where few options for diversion exist. Secondly, few culturally competent programs are currently in operation.[148]

Butcher and colleagues argue that there is a lack of 'ecological validity' to the youth justice programs that are available for Indigenous young people in rural communities; that is, programs are often not tailored to the specific cultural and geographical circumstances of participants.[149] They conducted semi-structured interviews with 18 Aboriginal community members from western NSW. Participants said that programs are frequently implemented quickly, without sufficient time to build the essential rapport or trust between service providers and the community. They emphasised that **building trust is a long-term process**, particularly given the negative experiences of Indigenous people with service providers in the past, and the ongoing effects of dispossession and the Stolen Generations. Participants criticised the reliance on 'evidence-based' Western models of intervention, arguing that success would only come from programs that were designed by Aboriginal communities themselves.[150] They also noted that **success should be measured not by offending rates but by measures of well-being, connection to culture and healing**.

Butcher and colleagues conclude that there are five key factors that enhance the 'ecological validity' of youth justice programs for Indigenous children:

1. long term community engagement;
2. building trust;
3. drawing on knowledge-holders in the community;
4. community-defined targets and performance indicators; and
5. utilisation of community skills, capacity and assets in program delivery.

Cunneen and colleagues set out nine 'good practice principles' to be followed when implementing diversion policies and models for Indigenous young people:[151]

1. Self-determination: diversion programs should be community developed, owned and driven, and incorporate young peoples' voices.
2. Access to diversionary programs should not be based solely on police discretion.
3. Diversionary programs should ensure cultural safety and cultural security.
4. Programs should incorporate elements of Aboriginal and Torres Strait Islander custom and law.
5. Programs should deliver family-centred support based on a holistic view of Aboriginal and Torres Strait Islander health and well-being.
6. Diversion programs should include education, training and employment pathways and mentoring.

7. Diversion initiatives should be trauma-informed and involve healing plans specific to the needs of Aboriginal and Torres Strait Islander people.
8. Diversion must be appropriately funded and evaluated.
9. The age of criminal responsibility should be increased to minimise the reach of the criminal law system.

In 2014, the Australian Institute of Criminology conducted a mixed-methods review of four Indigenous programs aimed at preventing children's contact with the youth justice system.[152] The programs included the Aboriginal Power Cup, the Woorabinda Early Intervention Coordination Panel, the Tiwi Island Youth Diversion and Development Unit and the Aggression Replacement Training program. Each of these programs sought to prevent system contact at different stages, ranging from the 'prevention' stage, to 'early intervention, 'diversion' and 'tertiary intervention'.[153] All four programs were found to have 'excellent practice' in responding to a 'significant social need', each in different ways.[154] Successful aspects of the programs ranged from 'intangible' impacts on 'interpersonal relationships', to indications of reduced reoffending and crime prevention.[155] Each program was judged to be culturally competent, with some demonstrating greater commitment to community involvement or inclusion of cultural aspects in the program than others. However, it was found that the level of resourcing of the programs strongly influenced the ability of each program to fulfil its aims.

4.5.2 Community patrols

Community patrols provide an example of a community-led initiative aimed at preventing the criminalisation of Aboriginal and/or Torres Strait Islander children. Blagg and Anthony note that Indigenous community patrols represent the 'longest running form of Indigenous, community owned and designed harm prevention initiative in Australia'.[156] They first arose in the 1980s following the recommendations of the Royal Commission into Aboriginal Deaths in Custody[157] but they have received limited academic attention, so the precise number of patrols in operation across Australia is unknown.[158]

Porter says that community patrols perform a 'counter-policing' role; that is, they attempt to minimise intervention by state police and instead draw on the community itself to provide an alternative form of policing.[159] Importantly, community patrols are characterised by their lack of 'coercive powers' – they focus on enhancing community safety and welfare by providing services such as transportation to safe places, connecting people with support services and safeguarding against homelessness, substance abuse and domestic and family violence.[160]

Porter says that 'transportation' is a vital role played by patrols, especially for children who often need to be taken to a safe place and have no means of getting there themselves.[161] However, this is not simply 'a taxi service'; rather, relationships are built with these children. The patrol workers serve a vital 'mentoring' role, providing advice and support about topics ranging from alcohol consumption to future life goals.[162] Porter explains that patrol workers provide a 'caring role', largely by their presence alone, and an 'information-sharing' role, by connecting young people to services and supports. In her interviews with patrol workers, Porter found they did not view their job as a 'policing' one, but rather as a welfare and safety-oriented role operating within the cultural norms of the community. The fact that they were distinct from police was critical to the success of patrols, as was their specific community focus.[163]

Whilst some have argued that community patrols are 'a medium-term, band-aid solution to a problem that would be better addressed from a long-term, whole-of-society perspective, offering a therapeutic response for structural problems',[164] they are generally supported by Indigenous communities themselves.[165]

4.5.3 Community justice groups

Another example of a community-led, community-driven initiative already in operation in Queensland is the Community Justice Group Program.[166] Community justice groups were introduced in Queensland through a pilot project in 1993.[167] This pilot program was subsequently extended state-wide.[168] Currently, there are 41 community justice groups in operation across Queensland.[169]

Community justice groups are non-government organisations funded by the Queensland Department of Justice and Attorney-General. Funding provides for the employment of a community justice group coordinator, who is supported by community justice group members.[170] Community justice groups have statutory functions under several pieces of Queensland legislation, including the *Youth Justice Act 1992* (Qld).[171] Functions that are relevant to youth justice include delivering justice-related programs, developing agency networks and taking part in court proceedings, sentencing and bail processes.[172]

Community justice groups provide support and services to their communities at all key stages of the criminal law system, ranging from crime prevention to prison and post-prison support.[173]

Significant demands are placed upon community justice groups. They are responsible for short-term goals relating to the provision of culturally appropriate supports in the justice system, as well as fundamental long-term challenges relating to the over-representation of Indigenous people in the criminal justice system.[174] The available research confirms that a wide range of stakeholders in the criminal law system value and support the work of community justice groups.[175]

The KPMG review of the Community Justice Group Program in 2010 found that community justice groups supported 25% of Indigenous 'offenders' in Queensland,[176] and the program has grown and developed substantially since that time. However, it seems that there is 'a high degree of variability' in the way different community justice groups in Queensland operate.[177] Participants said that, because so much is expected of community justice groups, many of them specialise in particular areas – some have a youth focus, but others focus on domestic violence, for example. The review found that community justice groups generally performed their court-based roles in an effective manner, however some functions, such as report and submission writing, were not always a priority – some community justice groups have more of a focus on crime prevention or diversion.

The extent to which community justice groups can effectively undertake their statutory functions is highly dependent on the funding they receive. The KPMG review found that 'the quality and effectiveness of the Community Justice Group Program is severely constrained by poor program resourcing.'[178] Whilst it is acknowledged that substantial funding increases have occurred since this time under the 'Framework for Stronger Community Justice Groups' there is still a general belief that community justice groups are under-resourced and are not funded at the level of equivalent non-government organisations. The expectation is that they will rely substantially on the labour of volunteers, which is inappropriate and potentially exploitative. Community justice groups rely on there being sufficient services in the community for them to make referrals to, but insufficient local support services and programs exist, especially in rural and remote areas.[179] This means that community justice groups, in addition to all of their other functions, may be expected or required to fill 'service gaps', particularly in post-prison release and support, which they are not funded to do.[180]

Most importantly, not every community has a community justice group. Further, not all children and families will consider the community justice group to be representative of their family group or community. In such cases, the child and family may not want the community justice group to be involved in their matter, and this may mean they do not have cultural support available to them. The 2019 Murri Court evaluation noted that the functions of community justice groups are often carried out by elders and other respected persons.[181] For the purpose of the *Youth Justice Act 1992* (Qld), the statutory functions of community justice groups should be extended to elders and respected persons so that all Indigenous children and families can benefit from the formal involvement of cultural support persons.

4.6 Expanding police diversion options

Children should be diverted at the earliest possible time, to minimise the adverse impacts of system engagement. The best time to divert children is prior to arrest or charge. As previously noted, diversion (cautioning, warning, release) is associated with reduced reoffending rates when compared with processing children through the criminal courts.[182]

Whilst pre-charge diversion with no program intervention is most effective in preventing re-offending amongst low-risk children, research suggests that additional supports are likely to yield better outcomes amongst higher risk groups.[183] This means that diversion must be done correctly. We need to ensure that children receive the support they need, but we also need to avoid interventions that have a 'net-widening' effect – we must ensure that children who otherwise would have had no interaction with the youth justice system are not inadvertently drawn in. Drawing children into the youth justice system 'for their own good' is unlikely to bring about positive outcomes.

4.6.1 'Street-RJ'

England and Wales have been able to massively reduce the number of children who are dealt with by the criminal law system over the past decade. The number of children appearing before youth courts fell by 69% between 2007 and 2015.[184] The number of children entering the youth justice system for the first time fell by 82% over the same period, and the number of children sentenced to custody fell by 69%. This was achieved by a concerted shift in focus from disposition through traditional criminal law processes towards informal disposition wherever possible. This change in approach was actually driven primarily by austerity measures introduced after the global financial crisis.[185] What was discovered was that diversion and informal disposition are not only cheaper than traditional criminal law approaches, but also more effective in reducing recidivism.[186]

An important aspect of the UK's change in approach was the increased use of 'street RJ'.[187] 'Street RJ', or street-based restorative justice, is where instead of arresting a person, police 'just deal with' the issue before them.[188] This might involve phoning a housing or support person instead of arresting someone sleeping rough, or phoning a child's parents or carer to pick them up instead of taking them to the police station.[189] **Such approaches sit outside the formal criminal law system and rely on informal exchanges.** These exchanges might involve informal restorative justice responses, for example, requiring a child to apologise to a victim on the spot.[190] They rely on strong relationships existing between police and service providers, although Shapland and colleagues have recommended the increased use of electronic referral and communications systems to facilitate referrals.[191]

Shapland and colleagues note that officers must believe that 'restorative justice is something that is a part of policing and their own job to promote; that it is something they are supposed to be doing' or there is a risk they will return to a 'business as usual' approach.[192] Some studies have shown that police officers may be resistant to incorporating street RJ approaches into their policing due to a punitive or victim-centred mindset, or concerns about time and resource constraints.[193] Stockdale reports that the strong 'performance culture' amongst police can be a barrier to uptake and effective practise of street RJ approaches.[194] Key performance indicators should encourage frontline officers to use street RJ approaches, and there needs to be a 'common understanding' across all levels of policing as to what street RJ involves.[195]

Smith argues that the success of local strategies stemmed from their 'strong central commitment to the principle of minimum intervention and…diversion for its own sake'.[196] In areas with high uptake of street RJ practices in the UK, change was achieved through police policies dictating that:

1. less time be devoted to processing low level offences; and
2. there be an end to the system of 'automatic escalation' and 'sentencing tariffs' for repeat offences.[197]

Suggesting that police deal with as many incidents informally as possible is consistent with a community policing approach.[198] **Diversion can be done in a way that is mindful of victims' and broader community concerns, by facilitating the immediate reparation of damage instead of taking punitive action**.[199]

4.6.2 Therapeutic response teams

Police practices aimed at dealing with matters informally 'on the street' are greatly assisted by having support staff available to make referrals and implement therapeutic interventions. Police rightly observe that diversion involves service delivery which is outside their role and expertise.[200] Yet, they also agree that offending by children is largely a 'welfare issue', even if they do display a sense of pessimism or cynicism concerning therapeutic diversion.[201] **Research suggests that training, open dialogue and close relationships with community agencies who do provide the services required can increase police officers' willingness and confidence to change their practices**.[202]

In their interviews with police officers in NSW and Victoria, Green and colleagues found that the most commonly reported practical barrier to police diversion was 'heavy workloads and a lack of time' which resulted in a deferral to the comparatively quicker option of charging.[203] Police, therefore, must be sufficiently resourced, with time and personnel, if the use of diversionary strategies is to increase.

Police officers are first responders to those who are experiencing a mental health crisis or overdose, and diversion is often a feature of their crisis intervention strategies.[204] The problem is that police may be less likely to divert children who present as 'violent' or 'disturbed'.[205] Green and colleagues found that police officers may make assumptions about children related to their perceived capacity for rehabilitation, and base decisions about diversion on those assumptions.[206] Police may require more information about 'what works' for these children, and greater access to therapeutic services to refer to. Otherwise, only the most cooperative of children will have the benefit of diversion pathways.

Co-responder models are considered international best practice, and involve a police officer partnering with another professional, such as a mental health professional or social worker, to provide an appropriate multi-disciplinary response so individuals can be linked to community services.[207]

Current youth justice co-responder teams in Queensland comprise police officers and youth justice officers working in partnership with one another to 'tackle youth crime'.[208] The UK experience suggests that these partnerships can be effective in increasing diversion because they allow for joint decision-making on which children can and should be diverted to achieve the best outcomes.[209] However, coupling youth justice officers with police officers can have a punitive effect. **Co-responder models should have a therapeutic focus – police officers should be coupled with nurses, social workers and cultural advisors** for the best outcomes.[210]

In one co-responder model in NSW, Project Walwaay, police officers are accompanied by Aboriginal community liaison officers to facilitate diversion of Aboriginal young people in Dubbo. A 65% reduction in the number of Aboriginal young people entering the criminal law system was observed when this program was introduced.[211]

Partnerships with universities have been drawn on to provide services to children in the US, with psychology and social work interns providing counselling services and referrals to young people as part of the diversion process.[212]

In the UK, the Liaison and Diversion Service was created to support police (and court) diversion initiatives. Funded by the National Health Service, the Liaison and Diversion Service offers screening, assessment and referral services to all vulnerable people who are held in police custody or appear before the courts. The Liaison and Diversion Service has been credited as 'one of the major reasons for the decline in first time entrants' to the criminal law system in the UK in recent years.[213]

4.6.3 Police diversion programs

At present, the Queensland *Youth Justice Act 1992* has a strong focus on restorative justice conferencing. Restorative justice conferencing is available as a diversionary option at every step in the youth justice process: pre-charge, post-charge, pre-sentence and as a sentencing option. This represents a progressive approach to youth justice, and it is a positive aspect of the Queensland system.[214]

The problem is that formal restorative justice conferences are not appropriate for every offence, or for every child. Restorative justice is rooted in 'language, comprehension and communication, and the capacity for empathy and self-reflection' which can create barriers for children with cognitive impairments or speech and languge difficulties.[215] When used appropriately, restorative justice conferences can be extremely effective. However, if a child is referred to restorative justice inappropriately, holding a conference may not be possible, the conference may be counter-productive, or the child may not be able to complete the order. This will compromise the goal of keeping children out of the youth justice system because the child may end up being processed in the usual way. If restorative justice is not possible or appropriate for some reason, the child may lose the benefit of a diversionary strategy that might otherwise have been effective.

On the other hand, 'minimum intervention' may not be appropriate for certain cohorts of children either, particularly children with disabilities, who require multidisciplinary support to assist them in their everyday lives.[216] Children who are homeless, or have unmet care and protection needs, may also require additional services. Diversion with no further intervention may not be the best approach for them. In their meta-analysis on diversion for children, Wilson and Hoge found that pre-charge diversion with no program requirements was most effective for low-risk children, but orders with program requirements yielded better outcomes amongst higher risk groups.[217]

In some US jurisdictions, police can enter into 'diversion plans' with young people and their parents as an alternative to arrest.[218] If the child completes the plan, they will not be proceeded against. Such plans are tailored to the needs of the young person, and might include attendance at school or counselling, or involvement in sporting and other 'prosocial' activities. In the UK, police can refer children to Youth Offending Teams. These are multidisciplinary teams including the police service, social services, health services and education services that work to understand the underlying causes of children's offending and engage them in programs to meet their needs. Children who are referred by police to the Youth Offending Teams are generally those who have received multiple informal dispositions. Often, they have been charged with serious offences including violence against the person (33.2%).[219] In some areas, the level of intervention children receive is 'tiered' depending on the seriousness of their offending to ensure the response is proportionate.[220] Reviews of the UK police diversion programs have found that they are helpful and supportive according to children and parents.[221] Police officers surveyed have said that whilst such approaches do add to their workload, they would still recommend diversion programs to other police officers because they believe they are effective in reducing reoffending.[222] Research has confirmed that reoffending rates after diversion program completion are very low, much lower than traditional processing.[223]

In Queensland, if a restorative justice conference cannot be held, Youth Justice can refer a child for an alternative diversion program, if the child agrees.[224] If a child is referred to an alternative diversion program, youth justice officers will conduct an assessment and decide what kinds of interventions are appropriate for the child. The child might be required to complete a program, or they might be referred to service provider for counselling, for example.

There is a risk of net-widening with this approach.[225] In most instances, referring a child to an alternative diversion program at the pre-charge stage will be a disproportionate response to their offending behaviour, especially since at this stage they have not been found guilty of an offence. It is important that children's right to the presumption of innocence is preserved. However, for a small number of children, such as those who have committed repeat offences or serious offences, having an alternative diversion program available as a diversion option at the policing stage might prevent children from being repeatedly charged and processed through the courts. Careful consideration should be given to how breaches are dealt with. Children who fail to complete diversion programs may end up receiving additional penalties which are disproportionate to their original offence. Children who fail to complete diversion programs are also more likely to reoffend, but they are also more likely to have complex needs.[226]
If police diversion plans are offered, their goal should be rehabilitation rather than punishment at every stage of the process.

4.7 Keeping children out of the courts

Research shows that diversion reduces recidivism, whilst **police charges and court processing are associated with children's ongoing contact with the criminal law system**.[227] Our goal should be to ensure that as few children end up appearing before the courts as possible. It can be done – many of the youth courts in the UK have closed because of the effectiveness of their diversionary measures.[228]

To some extent, diversion can be encouraged by legislation, but it also requires a commitment to change police practices. This could be achieved by setting appropriate key performance indicators; as Taylor notes, the pursuit of targets is a key driver of police behaviour.[229] To reassure the community that supporting children to stop offending is not a 'soft on crime' approach, deidentified data or case studies on the type of action taken by police for certain offences could be published and shared with victims.

Ultimately, it will always be a matter of police discretion whether a child is diverted or not. Some have argued that too much discretion is placed in the hands of police officers and that there are insufficient checks and balances on the use of that discretion.[230] To address this, Cunneen and colleagues, and the Victorian Aboriginal Legal Service, have suggested that **police be required to present a 'failure to divert declaration' to the court if they proceed with a charge, explaining why a decision was made not to divert the child.**[231] This would go some way towards increasing police accountability and ensuring that children are kept away from the courts wherever possible.

Chapter 4 endnotes

1 C Taylor, *Review of the Youth Justice System in England and Wales,* 2016 (UK Ministry of Justice) 3.

2 Ibid.

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8 See G Gottfredson et al, 'School Climate Predictors of School Disorder: Results from a National Study of Delinquency Prevention in Schools' (2005) 42(4) *Journal of Research in Crime and Delinquency* 412; E Arcia, 'Achievement and enrolment status of suspended students' (2006) 38(3) *Education and Urban Society* 359.

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25 Ibid [33].

26 Ibid [64].

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28 *John (a pseudonym) v R* [2021] QCHC 6.

29 Ibid [12].

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31 Ibid [7].

32 *New Zealand Police/Oranga Tamaraki v L* [2020] NZYC 117, [66].

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50 Unless the child has committed a 'serious offence'. A serious offence is defined in section 8 to mean an offence that is punishable by life imprisonment or imprisonment for 14 years or more in the case of an adult, although there are some exceptions to this including drug offences that may be dealt with summarily under the *Drugs Misuse Act 1986* (Qld) ss 13, 14 and indictable offences that may be dealt with summarily under the *Criminal Code Act 1899* (Qld) Ch 58A.

51 See further *Police Powers and Responsibilities Act 2000* (Qld) ss 379, 379A. Even if a police officer does arrest a child, section 380 of the *Police Powers and Responsibilities Act 2000* (Qld) directs a police officer to release a child 'at the earliest reasonable opportunity' if the reason for the arrest no longer exists, or is unlikely to happen again, or it is more appropriate to divert the child.

52 *Youth Justice Act 1992* (Qld) s 11(6), (7).

53 *Youth Justice Act 1992* (Qld) s 11(2).

54 These are not mentioned in the *Youth Justice Act 1992* (Qld).

55 Queensland Police Service, *Operational Procedures Manual*, 2022 (Issue 87.2) 5.2.5.

56 Ibid 5.2.5.

57 Ibid 6.3.14.

58 Ibid 6.3.14.

59 See J Evans, 'Bringing it all together: Creating a single human service gateway' (2018) 31(9) *Parity* 23; 'Child and Youth Protection Services', *ACT Government Community Services* (Web Page, 2021) www.communityservices.act.gov.au/ocyfs/children/child-and-youth-protection-services.

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61 'SupportLink', *Australian Federal Police* (Web Page) www.police.act.gov.au/about-us/programs-and-partners/supportlink; 'Agencies', *Onelink* (Web Page) www.onelink.org.au/agency-referrals-to-onelink.

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65 *Youth Justice Act 1992* (Qld) s 17. Also, police officers are instructed to administer the caution in the presence of the child's parent or another trusted adult where practicable: *Youth Justice Act 1992* (Qld) s 16(2). The option of having a caution administered by an elder or respected person is supported by Cunneen and colleagues, however it is likely that this option is underutilised at present: see C Cunneen, S Russell and M Schwartz, 'Principles in diversion of Aboriginal and Torres Strait Islander young people from the criminal jurisdiction' (2021) 33(2) *Current Issues in Criminal Justice* 170, 176.

66 *Youth Justice Act 1992* (Qld) s 19.

67 *Youth Justice Act 1992* (Qld) s 18(2).

68 *Youth Justice Act 1992* (Qld) s 15.

69 *Youth Justice Act 1992* (Qld) s 11(2)(b).

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72 Childrens Court of Queensland, *Annual Report 2021/22*, 23. Although, note that the year before, there had been a 12% decrease: Childrens Court of Queensland, *Annual Report 2020/21*, 24.

73 Childrens Court of Queensland, *Annual Report 2021/22*, 23. A further 16.5% of cautions were for 'other offences' but this category is too broad to provide any meaningful information – it includes public order offences and offences against justice procedures, but also abduction and weapons offences.

74 Childrens Court of Queensland, *Annual Report 2021/22,* 23. Not all offence types are included so this table does not add up to 100%.

75 *Youth Justice Act 1992* (Qld) s 16(1).

76 K Cushing, 'Diversion from Prosecution for Young People in England and Wales – Reconsidering the Mandatory Admission Criteria' (2014) 14(2) *Youth Justice* 140, 144, 147.

77 E Pearce, 'Why admission of guilt is not working in youth diversionary schemes in NSW' (2021) 33(3) *Current Issues in Criminal Justice* 285, 295.

78 *Oranga Tamariki Act 1989* (NZ) ss 209-210.

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CHAPTER 5

Keeping children out of custody: Bail and remand

5.1 Bail and remand in youth justice

5.1.1 What is bail? What is remand?

If a child is arrested and charged with an offence by police, the police officer can release a child into the care of a parent, or permit them to go at large.[1] Alternatively, they can grant them bail,[2] or they can keep the child in custody.[3]

If the child is granted bail, they are released into the community on the condition that they appear in court at a later date. Bail can be conditional or unconditional, and it can be supervised or unsupervised. Supervision of children's bail is conducted by youth justice officers.

If a child is refused bail by a police officer, they will be held in a police cell or watchhouse while they wait for their first court appearance, which should be no more than 24 hours after their arrest.[4] The court will then decide whether to grant the child bail or remand the child in custody. If the child is remanded in custody, they will be transferred to a detention centre. The child will remain at the detention centre until they are released on bail by a court, or their matter is finalised. Lengthy court delays, due to backlogs of cases or inefficient handling of matters by prosecution and defence lawyers, can mean children spend longer periods on custodial remand than necessary.[5]

Children may end up staying in a watchhouse for more than 24 hours if there are no beds available in a detention centre. Lengthy stays in watchhouses represent a breach of children's fundamental human rights. In the watchhouse, a child will have no privacy, limited access to amenities, no access to education or health services, and will not be separated from adults.[6] Girls find watchhouses and police cells to be particularly traumatic and potentially abusive.[7] There may be no female officers on duty, they may be subject to sexual harassment from male detainees and officers, and they may be left without clean underwear or sanitary products. A recent review of all children on remand in Victoria found that girls were more likely to be remanded in custody than adult females.[8] It was further found that Indigenous children were over-represented, particularly Indigenous girls, and that children from culturally and linguistically diverse backgrounds were also over-represented.[9]

Historically, under both the common law and bail legislation, there has been a presumption in favour of bail.[10] This consistent with a person's right to the presumption of innocence.[11] Incarceration is necessarily punitive, so a person who has not been found guilty of an offence should only be remanded in custody where there is no less restrictive alternative available.[12] In respect of children in particular, detention should only be used as a last resort for the shortest possible period.[13] **Placing a child on remand stigmatises them, disrupts relationships, interferes with education and employment, and exposes children to negative influences.**[14] Furthermore, **detaining a child substantially increases the likelihood of them reoffending**.[15]

Notably, the adverse effects of remand on children go beyond those that apply to detained children generally. Freeman and Seymour interviewed 62 children on remand in Ireland.[16] Children said that the 'worst part' of being held in custody on remand was the uncertainty, not knowing how long they would be in detention. Children's remand status reduced their ability to engage in programs and form peer relationships whilst in detention.

The UN Committee on the Rights of the Child suggests that state parties introduce legislation to set time limits on custodial remand and the length of criminal proceedings.[17] The Committee states that children's matters should not be finalised any later than six months after the initial date of detention, 'failing which, the child should be released.'[18] A UN Independent Expert has said that pre-trial remand for young people should not exceed 30 days.[19] A Queensland Magistrates Court Practice Direction[20] states that copies of statements should be provided to the defence within 14 days, adjournments should be limited to 21 days, and a full brief of evidence should be made available within 35 days of the matter being set for trial.[21] **If this Practice Direction was strictly adhered to, delays could be reduced**. Yet, at present, the average time taken to finalise a matter in the Childrens Court is very long: 84 days in the Childrens Court (Magistrates) and 286 days in the Childrens Court of Queensland.[22] By comparison, in Victoria, 59% of all Children's Court matters are finalised within three months.[23]

5.1.2 Why are so many children remanded in custody in Queensland?

Queensland has had a particularly high number of children on custodial remand, higher than other Australian jurisdictions.[24] 86% of children in Queensland detention centres are on remand, more than any other state or territory. In 2021/22, the average length of time spent on remand by Queensland children was 43 days.[25] It costs $1901 per day for one child to be held in a detention centre. That equates to an average remand cost of $81,743 for each child.

The number of children on remand can be reduced by police exercising their discretion to arrest fewer children, or release them as early as possible, and by courts granting bail more often at the first mention. Legislation that limits decision-makers' discretion to grant bail will necessarily result in higher numbers of children being held in custody on remand.[26]

The main justification for placing a child on remand is to 'get them off the streets' and thereby protect the community.[27] However, **research has shown that there is no association between increased rates of custodial remand and reductions in youth crime**.[28]

Police may refuse bail, or impose onerous bail conditions, to shift responsibility for the child's future actions to magistrates.[29] There is some evidence to suggest that judicial officers may use remand for punitive purposes; that is, they may believe that a child will 'learn their lesson' if they spend some time in custody.[30] Some children are placed on custodial remand by judicial officers 'for their own good', for example where they lack safe accommodation or supervision. Children in out of home care are more likely to be remanded for this reason – often, a placement is not or cannot be found for them.[31] Sadly, some children will choose not to apply for bail because they prefer to be in youth detention than in the community.[32] This may be because they are homeless or unsafe at home.

Lately, particular incidents involving youth crime have resulted in legal changes that have eroded the presumption in favour of bail for children.[33] Recent changes to bail laws in Queensland are an example of this. 'Community protection' has become an important driver of remand decisions, whereas its legal purpose is to ensure the person attends court.[34] Using remand as a form of 'summary' or 'pre-emptive' punishment is a breach of human rights and is not consistent with the legal purpose of bail.[35]

Most children who are held in custody on remand do not ultimately receive a custodial sentence.[36] Many children are being held on remand for non-serious offences.[37] Custodial remand has more adverse effects than benefits and will not enhance community safety in the medium- or long-term. It should also be noted that punitive approaches to remand tend to affect Indigenous children more severely: research has demonstrated that Aboriginal and/or Torres Strait Islander children tend to be held on remand for longer periods of time than non-Indigenous children.[38]

5.2 Children's bail laws

Section 48(2) of the *Youth Justice Act 1992* (Qld) requires a police officer to release a child unless they are 'required' under the legislation to keep the child in custody.[39] However, recent changes to Queensland's bail laws as they apply to children have substantially altered the circumstances in which children will be eligible for bail. Each of the legislative changes were implemented in response to isolated, but tragic, events that received extensive media attention. Whilst a degree of community concern is understandable, recent history has shown that 'knee-jerk' changes in law and policy can have unintended consequences.[40] Changing laws in response to the behaviour of a few can breach the human rights of all.

5.2.1 'Unacceptable risk'

Amendments in 2019 added a requirement for police and courts to consider, when making decisions about bail, whether there is an 'unacceptable risk' that the child will commit another offence if released (section 48AA).[41] Section 48AA(4) listed a number of factors that could be taken into account when making this determination, including: the nature and seriousness of the offence; the child's criminal history and any history of a previous grant of bail; the child's associations, home environment, employment and background; the strength of the evidence against the child; the child's age, maturity level, cognitive ability and developmental needs; whether a parent, or another person, has indicated a willingness to support the child to comply with any bail conditions, and notify Youth Justice or police of a breach; and, if the child is Aboriginal and/or Torres Strait Islander, a submission made by a representative of the community justice group in the child's community.

One effect of this provision is that **needs are conflated with risk**. A child with higher needs – such as a child who does not have someone who has indicated a willingness to support them, or a child with cognitive or developmental needs – may be considered at higher risk of reoffending and therefore less likely to be granted bail. Further to this, the provision allows a court to remand a child in custody while they obtain further information as to whether they pose such an unacceptable risk or not.[42] This means a child is essentially punished with additional time in detention for having the kinds of needs that require an assessment or report. At the same time, the personal circumstances of children should be taken into account in bail decisions because if a child has high and complex needs, detention is likely to be an unjust and inappropriate response to their offending.

In 2020, a further section was added – section 48AAA – which states that a court or police officer *must* decide to keep a child in custody if they are satisfied that 'if the child is released, there is an unacceptable risk that the child will commit an offence that endangers the safety of the community or the safety or welfare of a person' and 'it is not practicable to adequately mitigate that risk by imposing particular conditions of release on bail.'[43] The section further states that police and courts *may* decide to keep a child in custody if they are satisfied that there is an unacceptable risk that the child will commit some other offence.[44]

These legislative amendments have resulted in a substantial increase in the number of vulnerable children being held on custodial remand. The purpose of the provisions was to increase community safety by incapacitating children to prevent them from offending. But holding these children in custody on remand is not in the best interests of these children, and actually increases their risk of reoffending when they are ultimately released.

5.2.2 The 'show cause' provision

Queensland's bail laws pertaining to children were amended again in April 2021.[45] These amendments created a 'show cause' provision in respect of certain children applying for bail. Show cause provisions reverse the presumption of bail – that is, they create a presumption *against* bail, and the onus shifts to the accused person to convince the court that they should be granted bail. The bar is set very high – if a defendant is in a 'show cause' position, and the evidence against them is strong, their application must be 'special', 'abnormal' or of an 'extraordinary nature' for them to be granted bail.[46] A child in a show cause position can still receive bail, particularly in situations where they can show that there are supports in place that reduce their risk of re-offending, such as housing, parental supervision or re-engagement in education, training or employment.[47] However, magistrates might consider that the statutory intention of the provision is that only extraordinary circumstances will suffice.

Section 48AF of the *Youth Justice Act 1992* (Qld) creates a presumption against bail for children who are charged with a 'prescribed indictable offence' and are already on bail, or at large and awaiting trial or sentencing, for an indictable offence. Children who wait long periods of time to have their matter finalised by the courts will be penalised under such a provision through no fault of their own: the difference between being in a show cause position or not can be how quickly their other matters are dealt with. Children could plead guilty simply to avoid the impacts of the show cause provision. This represents a breach of their right to the presumption of innocence.

'Prescribed indictable offences' include those associated with breaking into houses, stealing keys and using the keys to remove the car from the premises – all of which are common offences amongst Queensland children.[48] A court or police officer 'must refuse to release' such children from custody unless the child 'shows cause why the child's detention in custody is not justified.' A court or police officer may still release the child if they state their reasons for the decision.

Anecdotal evidence indicates that this change to the law led to a sharp increase in the number of children being denied bail. Such children include those who have relatively minor criminal histories, and are not likely to receive a sentence of detention. These children would not otherwise have experienced any time in custody. **This is directly inconsistent with the principle that detention should be a last resort.** The practical effect of show cause provisions is that they shift the focus away from the chances of reoffending to the nature of the offence itself. This is not consistent with the purpose of bail. Just because a person's behaviour has been 'despicable' does not 'say a great deal about the likelihood of reoffending.'[49]

If section 48AF is retained, the number of children on remand will continue to increase. This is undesirable considering that children who spend time in custody are more likely to reoffend than those who are diverted. When applying s48AF, consideration should be given to the sentence the child is likely to receive.[50] A child's detention in custody should not be considered justifiable under section 48AF(2) if a detention order is not a likely sentence for the new offence. This is consistent with section 48AA(3) of the *Youth Justice Act 1992* (Qld), which states that if a court is making a decision about whether or not to release a child on bail, or otherwise keep the child in custody prior to sentencing, the court must have regard to the sentence order that is likely to be made if the child is found guilty.[51]

Case law confirms that **the length of time a person spends in detention prior to trial is an 'important factor' to be considered when determining whether they have shown cause**.[52] The Queensland Court of Appeal said in *Lacey* (in respect of an adult offender in a show cause position) that if the amount of time a person will spend in pre-trial detention is likely to exceed the custodial sentence, this 'may very well be regarded by the judge as outweighing the other relevant factors.'[53] In respect of children, this comment carries even greater weight. The *Youth Justice Act 1992* (Qld) is premised on the principle that detention of children should occur only as a last resort when all other possible alternatives have been considered and rejected. There is no reason why considerations related to bail should be different to those related to imposing a detention order. The effect on the child is the same. Indeed, an unsentenced child is entitled to additional protections by virtue of the presumption of innocence. It must be remembered that some children who are held on remand will be found innocent.

5.3 Supporting children's bail applications

Despite the recent changes to Queensland's bail laws for children, which significantly restrict children's access to bail, there are several provisions in the *Youth Justice Act 1992* (Qld) that are supportive or protective of vulnerable children.

5.3.1 Taking children's circumstances into account

The current list of circumstances that *may* be taken into account when police and courts are making a decision about whether or not to grant bail to a child provides a useful blueprint for decision-making in relation to children accused of committing offences more generally. The section 48AA(4)(b) factors include:[54]

- the principle that a child should be detained in custody for an offence, whether on arrest, remand or sentence, only as a last resort and for the least time that is justified in the circumstances;
- the desirability of strengthening and preserving the relationship between the child and the child's parents and family;
- the desirability of not interrupting or disturbing the child's living arrangements, education, training or employment;
- the desirability of minimising any adverse effects on the child's reputation;
- the child's exposure to, experience of and reaction to trauma;
- the child's health, including the need for assessment or treatment;
- any disability the child has, and their need for services and supports;
- if the child is an Aboriginal person or Torres Strait Islander—the desirability of maintaining the child's connection with the child's community, family and kin;
- if the child is under 14 years—the particular desirability of releasing children under 14 years from custody.

These considerations should *always* be taken into account when decisions are made about bail because they direct a decision-maker's mind to the child's vulnerabilities:

- Children with disabilities should never be dealt with by the youth justice system in relation to behaviours associated with their disability – instead, they require individualised assessments and treatment.[55]
- Children with health needs should be released to receive treatment. Aboriginal and/or Torres Strait Islander children should have the benefit of remaining with their families and communities if cultural safety is to be ensured.
- 'Punishing' children who have experienced trauma through the child protection system is neither appropriate nor just.

Police and judicial officers should be required to take these considerations into account in every case; indeed, it could be argued that **in order to make decisions in a rights-compliant manner, these considerations should be taken into account as a matter of course**.

Another important protection exists in respect of Indigenous children. When making a bail decision in respect of an Aboriginal and/or Torres Strait Islander child, submissions of community justice group representatives concerning community and family ties, existing programs and services and other cultural considerations *may* be taken into account by courts and police officers.[56] This provision could be improved by changing the word 'may' to 'must'. However, it should be remembered that not every community has a community justice group. This provision should be expanded to **allow elders and other respected persons to make submissions, in addition to members of community justice groups.**

5.3.2 Ensuring that homelessness is not a barrier to bail

Section 48AA(6) states that a court or police officer must not decide that a child poses an unacceptable risk 'solely' because they have 'no apparent family support' or 'will not have accommodation, or adequate accommodation, on release from custody.'[57] This is an important protection for children who are homeless or have unmet care and protection needs. Similar provisions exist in Victoria and the Northern Territory.[58]

The reality is that police cells, watchhouses and detention centres are still being used as 'quasi-care' where suitable accommodation cannot be found or children – custodial settings essentially become a placement for Child Safety children.[59]

To be effective, this provision needs to be supported by other provisions that place a duty on the relevant public entity to provide accommodation to the child.[60] In the UK, section 38(6) of the *Police and Criminal Evidence Act 1984* states that children who are refused bail must be moved into local authority accommodation – that is, they are not to be detained in police cells. Section 21(2)(b) of the *Children Act 1989* (UK) places a corresponding duty on local authorities to provide such accommodation. The local authority then becomes responsible for the child and must ensure they attend court.[61] The local authority can decide to release the child into the care of a parent or other carer, or place the child in a children's home if necessary.[62]

In NSW, a different approach has been taken. There, a court can impose a bail condition requiring that 'suitable arrangements be made for the accommodation of the accused person.'[63] This is known as an 'accommodation requirement' and its aim is to ensure that accommodation is found for a person as soon as possible to facilitate their release on bail. To ensure this occurs, another provision has been added. Under section 28(4) of the *Bail Act 2013* (NSW), the court responsible for hearing the bail application 'must ensure' that if a bail accommodation requirement is imposed in respect of a child, 'the matter is **re-listed for further hearing at least every two days until the**

accommodation requirement is complied with.' Further, section 28(5) empowers the court 'direct any officer of a Division of the Government Service to provide information about the action being taken to secure suitable arrangements for accommodation of an accused person.'[64] This arrangement enables the court to monitor the Department's dealings with the child, to ensure that the child's housing issues are resolved expeditiously.

5.3.3 Review of bail decisions

There are only limited opportunities for a child to subsequently receive bail after it has been denied by a court.[65] If bail is refused by the Childrens Court, and the child wants another opportunity to apply for bail during the course of proceedings, a 'material change of circumstances' must be shown.[66] This is inappropriate, bearing in mind the principle that detention of a child should occur for the least possible amount of time. The **number of children on remand could be reduced by allowing children to make an application for bail, or variation of bail conditions, at any time during proceedings**.

5.4 Bail conditions

5.4.1 Difficulties with compliance

Imposing bail conditions is one way that police and courts reassure themselves that the safety of the community will be ensured after the child is released. Every grant of bail is made on the condition that the person will appear before a court when required, will surrender into custody if required, will not commit an offence, and will not interfere with evidence or witnesses.[67] A court or police officer can only impose additional bail conditions on a child if:[68]

- there is a risk of the child committing an offence, failing to attend court, interfering with a witness or otherwise obstructing the course of justice; and
- the condition is 'necessary to mitigate the risk'; and
- the condition does not involve 'undue management or supervision of the child' having regard to the child's 'age, maturity level, cognitive ability and developmental needs', the child's health, any disability the child has, the child's home environment, or the child's ability to comply with the condition.

If an additional bail condition is imposed on a child, the court or police officer must state how the condition is intended to mitigate the risk identified.[69]

The *Youth Justice Act 1992* (Qld) does not outline the kinds of conditions that can be imposed on children who are released on bail. Research suggests the most common bail conditions imposed are curfews, reporting requirements, residential requirements, no contact or non-association orders, orders that the child attend school, orders that the child obey house rules, and orders not to harm people or property.[70] When deciding what kinds of conditions to impose, decision-makers generally consider the young persons' criminal history, the nature of the offence, breach history and personal circumstances.[71]

Many children breach their bail conditions. This may be because the conditions are impractical, too onerous, or they may not take children's personal circumstances into account.[72] For example, a child whose housing situation is precarious will find it difficult to comply with a residential requirement. Courts often impose a requirement that the child 'reside as directed' by Child Safety, but children may breach this requirement because they feel unsafe at that place of residence, or they have other concerns about the placement and do not consider it to be suitable for them.[73] Judicial officers themselves sometimes object to children being placed at the location proposed by Child Safety, and judicial officers have been known to request that another placement be found.

Children can also find it difficult to comply with curfews. Curfews of '6 to 6' or '7 to 7' are very common, but this means children will be in breach of their curfew if they abscond from a placement. If children socialise at night-time, imposing a curfew can cut them off from their peer group. Children may make a 'calculated decision' to breach their curfew to maintain these peer relationships. Curfews can also interfere with children's extra-curricular commitments, particularly sports. Reporting requirements are also common, but they ignore the fact that children have no means of transport or money for fares.[74] Research has found that children are subject to more, and harsher, bail conditions than adults.[75] Often, children cannot remember all of their bail conditions or understand what they mean.[76]

It is important that bail conditions are imposed in consultation with the child and the child's family and after an assessment of the child's circumstances has been undertaken.[77] Prescriptive conditions place an onus on the parent or carer to ensure compliance with bail conditions, which can place additional stress on families, especially disadvantaged families.[78] Children in out of home care come under increased scrutiny because carers may report breaches in circumstances where parents would not.[79]

5.4.2 Conditional bail programs

Conditional bail programs are aimed at children who need intensive support to avoid breaching bail. Children subject to a conditional bail program undertake a structured program of activities three to five days a week, focusing on topics such as anger management, cultural connection, emotional regulation and educational re-engagement.

The programs are intended to be therapeutic, however there is growing concern in the literature that the **'welfarisation' of bail conditions may actually be harmful to children**.[80] For children who have high and complex needs, conditional bail programs do provide an opportunity for supportive interventions to be delivered at a time of crisis. However, they can also have a ratchetting up effect: if children breach a conditional bail program, the 'next step' is often custodial remand, or detention.[81] Further, conditional bail programs require a substantial time commitment, equivalent to a community-based sentence, which may be a disproportionate response considering the child has not yet been found guilty. Intensive bail programs involve high levels of surveillance, and set high behavioural expectations, increasing children's risk of recidivism.[82]

In 2021/22, 821 Queensland children were ordered to commence a conditional bail program, which represents a 19% increase on the year before.[83] Less than two thirds of children who commence conditional bail programs complete them successfully; Indigenous children are even less likely to complete a conditional bail program (57%), yet more than 60% of children on conditional bail programs are Indigenous.[84]

Extensive use of conditional bail programs has the potential to lead to higher rates of detention, particularly for Indigenous children. **Conditional bail programs should only be used as an alternative to custodial remand.**

When used in this way, bail support programs can reduce reoffending and improve long-term outcomes for some offenders.[85] Willis identified several key factors necessary for a successful bail support program:[86]

- They should be voluntary.
- They should be timely, commencing immediately after the granting of bail. Delays in the provision of services can increase the likelihood of reoffending.
- They should take account of the full range of needs and circumstances that led to the child's offending. Programs should be holistic and collaborative, utilising intergovernmental and interorganisational services.
- They should provide an individualised plan for participants.
- They should prioritise support and service delivery over supervision and monitoring.
- There should be regular contact between defendant and the bail support officer.
- Services and treatments should be local, and accessible to participants without unreasonable travel or wait times. This is especially so for children in rural and remote areas.[87]

Bail support programs are most effective when they offer a throughcare approach, and allow the **same agency and staff to continue to support the child after sentencing**.[88]

5.4.3 Breach of bail and bail checks

At time of writing, breach of bail is not a separate offence for children in Queensland.[89] However, a Bill is currently before the Queensland Parliament to re-introduce breach of bail as an offence for children.[90] At present, if a police officer reasonably suspects that a child has contravened – or is likely to contravene – a condition of bail, they can arrest the child and bring them before a court.[91] The child can have their bail revoked as a result.[92] In this way, breach of bail can result in children entering detention on remand.[93] An additional offence of breach of bail seems unnecessary.

Before a police officer arrests a child for contravening a condition of their bail, the police officer must consider whether, in all the circumstances, it would be more appropriate to:[94]

- take no action;
- warn the child that they may be arrested under the *Police Powers and Responsibilities Act* for the contravention;
- make an application for a variation or revocation of the child's bail.

When deciding how to respond to a breach, or possible breach, of bail, a police officer must consider:[95]

- the seriousness of the contravention or likely contravention;
- whether the child has a reasonable excuse for the contravention;
- the child's circumstances to the extent the officer is aware of them;
- any other relevant circumstance.

Police officers, therefore, have considerable discretion to decide how serious the consequences of a breach of bail will be for the child.[96] Children could be kept out of custody by increasing police officers' diversion options in the event of a breach (for example, by replicating the options available to them under section 11(1) of the *Youth Justice Act 1992* (Qld)) or by expanding the range of factors they are required to consider before they take action in response to a breach (for example, by replicating the factors for consideration under section 48AA(4)(b) of the *Youth Justice Act 1992* (Qld)). Alternatively, decision-making about breach action could be removed from police officers altogether, as was recommended by the Queensland Sentencing Advisory Council in respect of adults.[97]

Monitoring children's compliance with bail conditions is resource intensive. One way of monitoring compliance is through 'bail checks', where police officers (often in partnership with youth justice officers) regularly attend the child's home to ensure they are complying with their bail conditions. Van den Brink observes that bail checks invariably lead to net widening, because more criminal conduct is detected, and net-strengthening, because 'the usual suspects' are subjected to high levels of surveillance which makes it more difficult for them to exit the system.[98] Importantly, **there is no evidence that strict monitoring and arresting young people when they breach bail conditions reduces reoffending**.[99] For this reason, undertaking a high number of bail checks should not be an indicator of police performance.[100]

Some successful programs have been trialled to reduce the adverse impact that bail checks have on criminalised children. For example, Just Reinvest NSW's Maranguka program in Bourke has worked with local police to establish protocols around bail compliance checks. Instead of arresting young people who breach bail, police are giving more warnings to children, and referring them to community hubs for support.[101] As a result, there has been a significant reduction in children's contact with the criminal law system.

It could be argued that the most appropriate way to deal with any breach of bail – even serious breaches – is to re-think a child's bail conditions to try to address the issues that caused the breach.[102] It is critical that only appropriate, realistic bail conditions are imposed in the first place, and that bail conditions are not overpoliced.[103]

The goal of any surveillance should be to work with families to ensure the protective needs of children are met. Research indicates that **semi-formal therapeutic interactions with families – as an alternative to bail checks – could bring about better outcomes for children and their families.** In their 15-year follow up with at-risk mothers who received pre- and post-natal home visits from nurses, Olds and colleagues found that sporadic supportive home visits benefitted not only mothers but also their children, even into adolescence.[104] Monthly home visits by nurses during pregnancy and two years after birth were associated with lower rates of child abuse and neglect, less maternal criminal behaviour and less drug and alcohol use, but also fewer convictions and arrests amongst their children.[105]

5.4.4 Bail accommodation and support

Children are commonly refused bail, or have their grant of bail delayed, because they do not have access to safe or appropriate accommodation, or do not have a responsible adult in their lives who is able to provide adequate supervision. This is a problem not just in Queensland, but elsewhere in Australia and indeed around the world.[106] Indigenous children are particularly vulnerable because they may not have a traditional primary carer.[107]

Securing housing for criminalised children is one of the greatest challenges practitioners face, particularly in rural, regional and remote areas.[108] Providing accommodation, along with support to assist compliance with bail conditions, can address this problem.[109] 'Bail hostels' are residential establishments that provide children with accommodation and 24/7 supervision to facilitate their release on bail, and prevent them from being placed on custodial remand for 'welfare' reasons.[110] However, scholars have mixed views on the effectiveness of bail hostels. Freeman found that bail hostels were successful not only in reducing remand numbers, but also in increasing bail compliance and reducing reoffending.[111] On the other hand, a 2017 review of the Bail Accommodation Support Scheme (BASS) in England and Wales found that those who received support under the BASS were more likely to re-offend within 12 months than those who did not.[112] The Sentencing Commission for Scotland has highlighted that bail hostels can perpetuate criminal activity because children who offend are grouped together.[113] Gutterswijk and colleagues found that non-residential youth care (foster home and other home-based placements) provided better outcomes for criminalised children than bail hostels.[114]

It has been suggested that police could be held more accountable for the action they take, or fail to take, to find accommodation for children. In his recent review of youth justice systems in the UK, Taylor suggested that police be required to record information about what steps they have taken to secure accommodation for a child.[115] A Key Performance Indicator for police could be to increase the number of children who have been successfully referred to accommodation services rather than being kept in custody overnight. In Queensland, this could be done through a 'police referral.' In NSW, there is a 'Bail Assistance Line', which is an after-hours telephone hotline operated by Youth Justice that police can call for assistance in placing children in short-term accommodation so they can safely release them on bail. A recent evaluation found that children placed by the Bail Assistance Line were 10% less likely to be in custody six months later.[116]

5.5 Court delays and children on remand

Every effort should be made to ensure that as many matters as possible are dealt with 'on the day', that is, at the child's first court appearance. Children can spend longer periods of time on remand due to court delays, some of which could be avoided.[117] For example, delay may result if lawyers are unable to obtain appointments with children in detention centres. If it is determined that a report or assessment is needed, this can also cause delays. The increased availability of court liaison officers has ensured that more information can be provided to the court immediately, but not all courts have court liaison officers present on every sitting day. If a pre-sentence report has been ordered, this will also cause delays, although courts are directed to consider whether this is the most efficient and effective way of obtaining relevant information.[118] Whilst it is important that decisions made by police and the courts are based on assessments and information, in some cases a formal report may not be needed.[119] Often there are alternative sources of information, including simply asking the child themselves. Where possible, information should be obtained quickly by the court by obtaining a verbal report from adults who know the child. Importantly, a pre-sentence report should follow the child not the offence: having to obtain new pre-sentence reports for new offences is a common cause of delay.[120]

Delays can also occur if there is disagreement between police and defence lawyers over the charges, including: where children deny certain charges but admit to others; where there is evidence to support some charges but not others; and where defence lawyers challenge a charge on the basis that another (less serious) charge is more appropriate in the circumstances. If there is disagreement over the charges, the matter will go to a 'case conference':[121] the prosecution and the defence lawyer will discuss each charge and make decisions about how to proceed in respect of them. Lawyers may request that a charge be withdrawn, or 'downgraded' if the child's version of events does not support the charge made against them.

Most police prosecutors have the authority to withdraw or downgrade charges 'on the day':[122] they can substitute, withdraw or 'offer no evidence' to a charge. However, they may as a matter of 'courtesy' wish to consult with the arresting officer about this decision, or they may decide they need more information from the arresting officer to make this decision. The arresting officer may then wish to discuss the matter with the victim. This process will typically result in an adjournment. If the charge is ultimately 'NETO'd' ('no evidence to offer'), this will require another court appearance by the child, which is undesirable.

Over the past five years, an average of **13% of all children appearing before a Childrens Court magistrate had one or more of their charges NETO'd**.[123] Therefore, in more than one in ten cases, children's lawyers will successfully negotiate to have charges against the child withdrawn or substituted for less serious charges. Each of these matters will have been conferenced, and most will have been adjourned to allow that process to occur. It is possible that these cases could have been resolved 'on the day' – that is, at the first mention – if the prosecutor had been willing or able to make that decision. Alternatively, police could have decided not to charge the young person in the first instance. The *Human Rights Act 2019* (Qld) requires police officers and prosecutors to take children's rights into account when making decisions about charges – prioritising the interests of victims is not a demonstrably justifiable limit on children's human rights.[124]

5.6 Custodial remand as a last resort

In Victoria, decision makers are required to **consider all other options before remanding a child in custody**.[125] Children should only be held on custodial remand if there is no alternative, and the times when that is the case will be few. In theory, no more children should be held on remand than are ultimately placed on detention orders. Children have a right to the presumption of innocence.

For children who are placed on custodial remand, the conditions under which they are held will influence their prospects for rehabilitation. Children who have been held on remand say that having access to family and friends during their time on remand helped them feel connected to the world outside and provided them with hope for the future.[126] Providing them with activities to occupy their time, a consistent base (the same room and bed each night), and regular information about their case is also important to them. For most young people, a period of remand will result in a deterioration of their circumstances – many will experience mental health decline, some will lose their accommodation and employment. This is counterproductive because it will increase their risk of re-offending. Whilst it may be said that custodial remand promotes community safety by incapacitating the child, in the medium to long-term, community safety is actually compromised.

Chapter 7 endnotes

1 *Youth Justice Act 1992* (Qld) ss 50(2)(a), 51.

2 *Youth Justice Act 1992* (Qld) ss 50(2)(b), 52.

3 *Youth Justice Act 1992* (Qld) ss 50(2)(c), 54.

4 *Youth Justice Act* (Qld) s 49(2).

5 Y Van den Brink, 'Young, Accused and Detained; Awful, But Lawful? Pre-Trial Detention and Children's Rights Protection in Contemporary Western Societies' (2019) 19(3) *Youth Justice* 238, 246.

6 K Richards and L Renshaw, *Bail and remand for young people in Australia: A national research project*, 2013 (Australian Institute of Criminology) 1-2.

7 C Taylor, *Review of the Youth Justice System in England and* Wales, 2016 (UK Ministry of Justice) 22.

8 Victorian Sentencing Advisory Council, *Children Held on Remand in Victoria: A Report on Sentencing Outcomes*, 2020, 34-36.

9 Ibid.

10 *Bail Act 1980* (Qld) s 9; *Youth Justice Act* (Qld) s 48(2). See also *R v Light* [1954] VLR 152, 157 per Sholl J; *R v Wakefield* (1969) 89 WN (Pt 1) NSW 325, 331 per Cross J; L Bartels et al, 'Bail, Risk and Law Reform: A Review of Bail Legislation across Australia' (2018) 42 *Criminal Law Journal* 91.

11 *Human Rights Act 2019* (Qld) s 32(1). See also P Mazerolle and J Sanderson, *Understanding Remand in the Juvenile Justice System in Queensland*, 2008 (Griffith University), 3.

12 *Human Rights Act 2019* (Qld) s 13(2)(d).

13 *Youth Justice Act 1992* (Qld) sch 1, Youth Justice Principle 18.

14 N M Myers, 'Eroding the Presumption of Innocence: Pre-trial Detention and the Use of Conditional Release on Bail' (2017) 57(3) *The British Journal of Criminology* 664, 664; J Stubbs, 'Re-examining bail and remand for young people in NSW' (2010) 43(3) *Australian and New Zealand Journal of Criminology* 485, 486.

15 Victorian Sentencing Advisory Council, *Children Held on Remand in Victoria: A Report on Sentencing Outcomes*, 2020, 37; S Cusworth Walker and J R Herting, 'The Impact of Pretrial Juvenile Detention on 12-Month Recidivism: A Matched Comparison Study' (2020) 66(13) *Crime & Delinquency* 1865.

16 S Freeman and M Seymour, '"Just waiting": The nature and effect of uncertainty on young people in remand custody in Ireland' (2010) 10(2) *Youth Justice* 126.

17 Committee on the Rights of the Child, *General Comment No. 24 on children's rights in the child justice system*, CRC/C/G/24 (18 September 2019) [90].

18 Ibid.

19 *Report of the Independent Expert leading the United Nations global study on children deprived of liberty*, UN doc A/74/136 (2019), 20.

20 Queensland Childrens Court (Magistrates Court), *Practice Direction No. 2 of 2017*, 2017.

21 Ibid [7].

22 Childrens Court of Queensland, *Annual Report 2021/22,* 6.

23 Victorian Sentencing Advisory Council, *Children Held on Remand in Victoria: A Report on Sentencing Outcomes*, 2020, 26. See further Children's Court of Victoria, *Practice Direction No. 7 of 2018*, 2018 (Fast Track Remand Court). In Scotland, see M Hill et al, 'More Haste, Less Speed? An Evaluation of Fast Track Policies to Tackle Persistent Youth Offending in Scotland' (2007) 7(2) *Youth Justice* 121, 122.

24 K Richards and L Renshaw, *Bail and remand for young people in Australia: A national research project*, 2013 (Australian Institute of Criminology) 11, 23.

25 Childrens Court of Queensland, *Annual Report 2021/22*, 5. This is a substantial increase on the year before, when the average time spent in unsentenced custody was 36 days.

26 K Richards and L Renshaw, *Bail and remand for young people in Australia: A national research project*, 2013 (Australian Institute of Criminology), 56.

27 K Richards and L Renshaw, *Bail and remand for young people in Australia: A national research project*, 2013 (Australian Institute of Criminology) 65-66; K Wong, B Bailey and D Kenny, *Bail Me Out: NSW Young Offenders and Bail*, 2009 (Youth Justice Coalition); Y Van den Brink, 'Young, Accused and Detained; Awful, But Lawful? Pre-Trial Detention and Children's Rights Protection in Contemporary Western Societies' (2019) 19(3) *Youth Justice* 238, 246.

28 J Stubbs, 'Re-examining bail and remand for young people in NSW' (2010) 43(3) *Australian and New Zealand Journal of Criminology* 485; S Vignaendra et al, 'Recent trends in legal proceedings for breach of bail, juvenile remand and crime' (2009) 128 *Contemporary Issues in Crime and Justice* (NSW Bureau of Crime Statistics and Research).

29 K Richards and L Renshaw, *Bail and remand for young people in Australia: A national research project*, 2013 (Australian Institute of Criminology) 72.

30 Y Van den Brink, 'Young, Accused and Detained; Awful, But Lawful? Pre-Trial Detention and Children's Rights Protection in Contemporary Western Societies' (2019) 19(3) *Youth Justice* 238, 246.

31 K Richards and L Renshaw, *Bail and remand for young people in Australia: A national research project*, 2013 (Australian Institute of Criminology) 66.

32 Ibid.

33 Ibid 69.

34 Victorian Sentencing Advisory Council, *Children Held on Remand in Victoria: A Report on Sentencing Outcomes*, 2020, 10. Most recently, see *Strengthening Community Safety Bill 2023* (Qld).

35 K Richards and L Renshaw, *Bail and remand for young people in Australia: A national research project*, 2013 (Australian Institute of Criminology) 69.

36 Childrens Court of Queensland, *Annual Report 2021/22*, 26. See also Victorian Sentencing Advisory Council, *Children Held on Remand in Victoria: A Report on Sentencing Outcomes*, 2020, 42; P Mazerolle and J Sanderson, *Understanding Remand in the Juvenile Justice System in Queensland*, 2008 (Griffith University) 7.

37 K Richards and L Renshaw, *Bail and remand for young people in Australia: A national research project*, 2013 (Australian Institute of Criminology) 4.

38 Ibid. See also Australian Institute of Health and Welfare, *Youth Justice in Australia 2020/21*, Table S107a.

39 See also *Youth Justice Act 1992* (Qld) s 55 which states that a court may release a child into the care of their parents, or permit them to go at large, instead of granting bail.

40 As to 'knee-jerk legislative responses', see W O'Brien and K Fitz-Gibbon, 'Can human rights standards counter Australia's punitive youth justice practices?' (2018) 26 *International Journal of Children's Rights* 197, 204.

41 The amending Act was *Youth Justice and Other Legislation Amendment Act 2019* (Qld). Further amendments to these sections were made in 2021: see *Youth Justice and Other Legislation Amendment Act 2021* (Qld).

42 *Youth Justice Act 1992* (Qld) s 48AAA(4), (5).

43 *Youth Justice Act 1992* (Qld) s 48AAA(2). The amending Act was *Community Services Industry (Portable Long Service Leave) Act 2020* (Qld) Part 13 Division 8.

44 *Youth Justice Act 1992* (Qld) s 48AAA(3(b)).

45 The amending Act was *Youth Justice and Other Legislation Amendment Act 2021* (Qld).

46 *R v Iskandar* (2001) 120 A Crim R 302 at 305, [14] per Sperling J, approved by Lyons J in *Turbill* and cited by Chesterman JA in *Sica v DPP* [2010] QCA 18, [54].

47 In respect of adults, see *Lacey v DPP* [2007] QCA 413 [19].

48 Those offences include: *Criminal Code 1899* (Qld) ss 328A (dangerous operation of motor vehicle), 408A(1) (unlawful use of motor vehicle where offender was the driver), 408A(1A), (1B) (unlawful use of motor vehicle with circumstances of aggravation), and 412 (attempted robbery).

49 *Williamson v DPP* [1999] QCA 356, [19].

50 As to sentence indications generally, see Victorian Sentencing Advisory Council, *Sentence Indication and Specified Sentence Discounts: Final Report*, 2007 where the Council concluded that indicating whether a defendant was likely to receive a sentence of immediate custody did not compromise the role of the judicial officer, commit the defendant to a guilty plea, or interfere with the rights of victims (at 73-74, 93).

51 *Youth Justice Act 1992* (Qld) s 48AA(3).

52 *Williamson v DPP* [1999] QCA 356 [22]; *Lacey v DPP* [2007] QCA 413 [11], [23]; *Re JMT* [2020] QSC 72; *Re Dunshea* [2021] QSC 163.

53 *Lacey v DPP* [2007] QCA 413 [13].

54 *Youth Justice Act 1992* (Qld) s 48AA(4)(b).

55 Committee on the Rights of the Child, *General Comment No. 24 on children's rights in the child justice system*, CRC/C/G/24 (18 September 2019) [28].

56 *Youth Justice Act 1992* (Qld) s 48AA(4)(a)(vii).

57 *Youth Justice Act 1992* (Qld) s 48AA(6).

58 *Bail Act 1977* (Vic) s 3B(3); *Bail Act 1982* (NT) s 24A(4).

59 D Haydon, 'Children deprived of their liberty on "welfare" grounds: A critical perspective' in Elizabeth Stanley (ed), *Human Rights and Incarceration: Critical Explorations*, 2018, 27; Victorian Sentencing Advisory Council, *Children Held on Remand in Victoria: A Report on Sentencing Outcomes*, 2020, 23; J Stubbs, 'Re-examining bail and remand for young people in NSW' (2010) 43(3) *Australian and New Zealand Journal of Criminology* 485, 493.

60 As to the NSW provision, see K McFarlane, 'NSW bail laws mean well but are landing homeless kids in prison', *The Conversation* (Media Article, 16 December 2016) https://theconversation.com/nsw-bail-laws-mean-well-but-are-landing-homeless-kids-in-prison-68490. She argues that the remand population remains too high in NSW.

61 *Police and Criminal Evidence Act 1984* c.60 (UK) ss 39(4), 47.

62 Youth Justice Legal Centre, *Police Bail and Remand: Legal Guide No. 8*, 2021. Note, however, that even these provisions have not received universal praise: S Thomas, 'Accommodation and youth crime' (2013) 12(3) *Safer Communities* 111, 116.

63 *Bail Act 2013* (NSW) s 28(1).

64 *Bail Act 2013* (NSW) s 28(5).

65 If a child is refused bail by police, a court can decide to grant bail: *Youth Justice Act 1992* (Qld) s 55(2). Also, a Childrens Court Judge can grant bail to a child held in custody even if bail has been refused by the Magistrate: *Youth Justice Act 1992* (Qld) s 59. Note that a Childrens Court Magistrate cannot grant bail to a child in relation to a charge that attracts a life or indefinite sentence for adults; only a Childrens Court judge can grant bail in relation to such charges: *Youth Justice Act 1992* (Qld) s 59(3); *Bail Act 1980* (Qld) s 13(1).

66 *Sica v DPP* [2010] QCA 18 [17]; *Bail Act 1980* (Qld) s 19. Note, however, that if bail is refused by a Childrens Court Magistrate, a child can apply for bail before a Childrens Court Judge: *Youth Justice Act 1992* (Qld) s 59.

67 *Youth Justice Act 1992* (Qld) s 52A(2); *Bail Act 1980* (Qld) s 11(2).

68 That is, additional to the condition that they attend court or surrender into custody as required: *Youth Justice Act 1992* (Qld) s 52A(2).

69 *Youth Justice Act 1992* (Qld) s 52B.

70 K Richards and L Renshaw, *Bail and remand for young people in Australia: A national research project*, 2013 (Australian Institute of Criminology) 57; K Wong, B Bailey and D Kenny, *Bail Me Out: NSW Young Offenders and Bail*, 2009 (Youth Justice Coalition) 15.

71 K Richards and L Renshaw, *Bail and remand for young people in Australia: A national research project*, 2013 (Australian Institute of Criminology) 57.

72 Ibid 75. See also J Stubbs, 'Re-examining bail and remand for young people in NSW' (2010) 43(3) *Australian and New Zealand Journal of Criminology* 485, 495; *Royal Commission into the Protection and Detention of Children in the Northern Territory*, 2017 (Final Report, Volume 1) 26.

73 K Richards and L Renshaw, *Bail and remand for young people in Australia: A national research project*, 2013 (Australian Institute of Criminology) 66.

74 K Richards and L Renshaw, *Bail and remand for young people in Australia: A national research project*, 2013 (Australian Institute of Criminology) 75.

75 J Stubbs, 'Re-examining bail and remand for young people in NSW' (2010) 43(3) *Australian and New Zealand Journal of Criminology* 485; Young people given on average seven conditions, adults received average five conditions: P Jones, 'Breaking a vicious cycle: The impact of bail and conditions on juvenile interaction with the justice system' (2018) *Journal of Applied Youth Studies* 2(4) 29, 34.

76 K Wong, B Bailey and D Kenny, *Bail Me Out: NSW Young Offenders and Bail*, 2009 (Youth Justice Coalition) 15.

77 J Stubbs, 'Re-examining bail and remand for young people in NSW' (2010) 43(3) *Australian and New Zealand Journal of Criminology* 485, 496; K Wong, B Bailey and D Kenny, *Bail Me Out: NSW Young Offenders and Bail*, 2009 (Youth Justice Coalition) 15.

78 Ibid.

79 K Richards and L Renshaw, *Bail and remand for young people in Australia: A national research project*, 2013 (Australian Institute of Criminology) 75.

80 As to bail programs generally, see M Willis, *Bail Support: A review of the literature*, 2017 (Australian Institute of Criminology) 5-6; C Cunneen, R White and K Richards, *Juvenile Justice: Youth and Crime in Australia*, 2015, 301.

81 This was also noted by the Royal Commission into the Protection and Detention of Children in the Northern Territory (2017, Final Report, Volume 1) 12.

82 K Richards and L Renshaw, *Bail and remand for young people in Australia: A national research project*, 2013 (Australian Institute of Criminology) 82-83.

83 Childrens Court of Queensland, *Annual Report 2021/22,* 36.

84 Department of Children, Youth Justice a nd Multicultural Affairs, *Youth Justice Annual Summary Statistics: 2015-2016 to 2019-2020* (Miscellaneous Data).

85 M Willis, *Bail Support: A review of the literature*, 2017 (Australian Institute of Criminology) iv; M Ericson and T Vinson, *Young People in Remand in Victoria: Balancing Individual and Community Interests*, 2010 (Jesuit Social Services), 42.

86 M Willis, *Bail Support: A review of the literature*, 2017 (Australian Institute of Criminology) 11, 17, 27-28, 30, 35.

87 See further E Colvin, 'Postcode (in)justice: location and bail support services' (2019) 5(4) *Journal of Criminological Research, Policy and Practice* 307, 311.

88 In the UK, for example, children can be required to engage with the Youth Offending Team as a condition of their bail. The Youth Offending Team will prepare a tailored package of bail conditions for the court and they continue to work with the child after they are sentenced: Y Van den Brink, 'Remand decision-making in the youth court. A comparative analysis of youth remand and bail in England & Wales and the Netherlands' (2021) 66 *International Journal of Law, Crime and Justice* 1,3.

89 *Bail Act 1980* (Qld) s 29(2)(a).

90 *Strengthening Community Safety Bill 2023* (Qld) clause 5.

91 *Police Powers and Responsibilities Act 2000* (Qld) s 367.

92 *Bail Act 1980* (Qld) ss 29A(1)(c), (2), 30(1A). Note that an application to revoke or vary a child's bail can be made ex parte: *Bail Act* s 30(2).

93 K Richards and L Renshaw, *Bail and remand for young people in Australia: A national research project*, 2013 (Australian Institute of Criminology) 77, 80; S Vignaendra et al, 'Recent trends in legal proceedings for breach of bail, juvenile remand and crime' (2009) 128 *Contemporary Issues in Crime and Justice* (NSW Bureau of Crime Statistics and Research) 2.

94 *Police Powers and Responsibilities Act 2000* (Qld) s 367(4); *Youth Justice Act 1992* (Qld) s 59A(3).

95 *Youth Justice Act 1992* (Qld) s 59A(4). Note, these sections are not consistent with the equivalent provisions in the *Bail Act 1980* (Qld) which could cause confusion: see *Bail Act 1980* (Qld) s 367(4).

96 P Mazerolle and J Sanderson, *Understanding Remand in the Juvenile Justice System in Queensland*, 2008 (Griffith University) 15.

97 Queensland Sentencing Advisory Council, *Community-Based Sentencing Orders, Imprisonment and Parole Options: Final Report,* 2019, 59.

98 Y Van den Brink, 'Young, Accused and Detained; Awful, But Lawful? Pre-Trial Detention and Children's Rights Protection in Contemporary Western Societies' (2019) 19(3) *Youth Justice* 238, 243.

99 K Wong, B Bailey and D Kenny, *Bail Me Out: NSW Young Offenders and Bail*, 2009 (Youth Justice Coalition) 3.

100 L McAra and S McVie, 'Youth Justice?: The Impact of System Contact on Patterns of Desistance from Offending' (2007) 4(3) *European Journal of Criminology* 315, 333; K Richards and L Renshaw, *Bail and remand for young people in Australia: A national research project*, 2013 (Australian Institute of Criminology) 80-81.

101 P Gregoire, 'Reducing Indigenous Youth Incarceration: An Interview with Just Reinvest's Sarah Hopkins', *Sydney Criminal Lawyers* (Media Article, 29 May 2017) www.sydneycriminallawyers.com.au/blog/reducing-indigenous-youth-incarceration-an-interview-with-just-reinvests-sarah-hopkins/.

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103 Ibid.

104 D Olds et al, 'Long-term effects of nurse home visitation on children's criminal and antisocial behaviour: 15 year follow-up of a randomised controlled trial' (1998) 280(134) *Journal of the American Medical Association* 1238.

105 Ibid.

106 K Richards and L Renshaw, *Bail and remand for young people in Australia: A national research project*, 2013 (Australian Institute of Criminology) 57; Y Van den Brink, 'Young, Accused and Detained; Awful, But Lawful? Pre-Trial Detention and Children's Rights Protection in Contemporary Western Societies' (2019) 19(3) *Youth Justice* 238; J Stubbs, 'Re-examining bail and remand for young people in NSW' (2010) 43(3) *Australian and New Zealand Journal of Criminology* 485, 493.

107 P McNamara, 'Young People at Risk of Lifelong Poverty: Youth Homelessness in Australia' in E Fernandez et al (eds), *Theoretical and Empirical Insights into Child and Family Poverty: Cross National Perspectives*, 2015, 224; J Stubbs, 'Re-examining bail and remand for young people in NSW' (2010) 43(3) *Australian and New Zealand Journal of Criminology* 485, 493.

108 E Colvin, 'Postcode (in)justice: location and bail support services' (2019) 5(4) *Journal of Criminological Research, Policy and Practice* 307, 314.

109 A Hucklesby and T Goodwin, *Pre-trial accommodation for young people*, 2004, 54, cited in J Stubbs, 'Re-examining bail and remand for young people in NSW' (2010) 43(3) *Australian and New Zealand Journal of Criminology* 485, 494.

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111 S Freeman, 'Surviving on Remand: A Study of How Young People Cope in Remand Custody in Ireland' (PhD thesis, Dublin Institute of Technology, 2009) cited in M Ericson and T Vinson, *Young People in Remand in Victoria: Balancing Individual and Community Interests*, 2010 (Jesuit Social Services) 34. Scotland's Supported Accommodation Services for adult ex-offenders have also received positive reviews. Evaluations have noted the importance of services extending beyond accommodation, to include training in practical and social skills, and the provision of positive encouragement and role-modelling by staff: S Kirkwood and T Richley, 'Supported accommodation services for offenders' (2008) *SCOLAG Legal Journal* 141.

112 Ministry of Justice, *Justice Data Lab analysis: offending behaviour after housing support from the Bail Accommodation and Support Service and a Court Sentence*, 2017, 9.

113 Sentencing Commission for Scotland, *Report on the Use of Bail and* Remand, 2005, 38; K A Dodge, J E Lansford and T J Dishion, 'The Problem of Deviant Peer Influences in Intervention Programs' in K A Dodge, J E Lansford and T J Dishion (eds), *Deviant peer influences in programs for youth: Problems and solutions*, 2006, cited in P McKay, D Hollist and J Mayrer, *Foster of Group Home Care for Youth on Probation*, 2016 (University of Montana), 3. See also M J McGowan, 'Location, Location, Mis-Location: How Local Land Use Restrictions Are Dulling Halfway Housing's Criminal Rehabilitation Potential' (2016) 48(2) *The Urban Lawyer* 329.

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115 C Taylor, *Review of the Youth Justice System in England and* Wales, 2016 (UK Ministry of Justice) 23.

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118 *Youth Justice Act 1992* (Qld) s 151(1), (2).

119 C Taylor, *Review of the Youth Justice System in England and* Wales, 2016 (UK Ministry of Justice) 19, 23.

120 See further *R v QTA* [2019] QChC 19.

121 Queensland Police Service, *Operational Procedures Manual*, 2022 (Issue 87.2), 3.16.

122 Ibid 3.4.4, 3.16.1.

123 In 2021, the figure was 17%: statistics supplied by Queensland Department of Justice and Attorney-General.

124 *Human Rights Act 2019* (Qld) s 13.

125 *Bail Act 1977* (Vic) s 3B(1)(a).

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CHAPTER 6

Creating a culturally safe, child-friendly childrens court

6.1 Childrens Courts of Queensland

6.1.1 The Childrens Court process

The Childrens Court of Queensland has two tiers:[1]

1. The Childrens Court as constituted by a Childrens Court Magistrate or other Magistrate – referred to here as the Childrens Court (Magistrate). Childrens Court magistrates can hear all charges against children other than serious offences.[2]
2. The Childrens Court of Queensland as constituted by a Childrens Court Judge or a District Court Judge – known as the Childrens Court of Queensland (CCQ). The CCQ hears all indictable offences against children, other than Supreme Court matters.[3] (Supreme Court offences include murder, attempted murder and serious drug offences.)[4] The majority of children who appear before the CCQ have been charged with robbery, theft and unlawful entry with intent (61%).[5]

Serious offences will usually proceed by way of a committal hearing: a magistrate will first consider the evidence and decide whether the child should be committed for trial.[6] If the matter proceeds to trial, the trial will be heard in the CCQ. The Childrens Court (Magistrate) and the CCQ could reasonably be merged into a single court to avoid duplication and to streamline processes. Magistrates (preferably specialist magistrates) could reasonably hear and determine all children's criminal matters apart from Supreme Court offences.

In 2021/22, 92% of all youth justice matters were heard by the Childrens Court (Magistrates).[7] Most of the remaining matters were heard by the Childrens Court of Queensland; there were only 11 appearances by children in the Supreme and District Courts in 2021/22.[8]

The Childrens Court is a closed court, which means only certain people can be present during proceedings – members of the public are generally not entitled to attend.[9] Parents are encouraged, and can be compelled, to attend court proceedings.[10] 'Parent' is defined to include a representative of the chief executive (Child Safety) where the child is in the care of the Department.[11] In practice, child safety officers do not regularly attend court with children in out of home care.

There is provision in the *Youth Justice Act 1992* (Qld) for certain proceedings to be conducted via audio link or video link.[12] Video link has increasingly been used to enable children to appear from detention centres and rural and remote areas. This is appropriate because it means children do not have to be transported, held in court cells for hours, and searched, all of which are necessary if they have to travel to court. During the COVID-19 pandemic, the use of video link became more prevalent, and the use of video link is likely to increase in spite of any criticisms that may be made of it. The main concern is that when children appear by video link, their lawyer is in the courtroom, not with the child, which limits the quality of advice they are able to offer during proceedings.[13] Further, lawyers often find it difficult to obtain appointments with children who are in detention because there are not enough video conferencing suites in the detention centres to facilitate this. This means that **detention centre staff often need to explain the meaning and outcome of proceedings to children in detention.**

The *Youth Justice Act 1992* (Qld) states that children are entitled to have their sentence explained to them in terms they can understand.[14] Section 72 of the *Youth Justice Act 1992* (Qld) **requires the court to take steps to ensure that the child, and their parents, have full opportunity to be heard and participate in proceedings.** The court must also ensure that the child and parents understand the nature of proceedings and the consequences of any order that is made. This applies even if the child has legal representation.[15] The court must ensure that the child understands the nature of any sentence imposed and the consequences of failing to comply.[16] Children also have a right to the assistance of an interpreter if necessary.[17]

Yet, **children and parents consistently say they do not feel like active participants in the court process**.[18] Children often do not speak at hearings, and they generally report that they are not able to follow what is happening because complex legal terms are used. Research has found that parents want to participate in proceedings, and they try to assist their children to understand legal language and court processes, however many do not understand the process themselves.[19] It is important that children participate in proceedings because this will influence the extent to which they comply with their orders.[20] Research has found that children's respect for the legal system is associated with the extent to which they feel listened to and understood.[21]

Children's courts are said to be 'specialised courts',[22] yet most children's experience of court will not differ much from that of adults. Most children will appear in an ordinary courtroom before whichever magistrate has been rostered on that day. In some courts, there is only small number magistrates who are Childrens Court Magistrates, and sometimes there is only one. In these courts, children will likely see the same magistrate each time they are in court. However, in the larger courts, children may come before a different magistrate each time they appear. Court mentions generally only last a few minutes, so there is limited opportunity for dialogue between the judicial officer, the child and the parents.

6.1.2 Youth Murri Court and the High-Risk Youth Court

Some children will appear before a Youth Murri Court (in Cairns, Mackay and Rockhampton) or the High-Risk Youth Court in Townsville.[23] In these courts, children appear before the same magistrate each time. More time is available in these hearings and a dialogue between the magistrate and child is more likely to occur.

Murri Courts were established in Queensland in 2002.[24] In 2012, they were defunded but some continued to run informally[25] until they formally recommenced in 2016.[26] The goal of Murri Courts is to facilitate the appropriate resolution of criminal matters (other than serious indictable offences)[27] by addressing the causes of an Indigenous person's offending behaviour in a culturally safe manner. Murri Courts adhere to the principles of rehabilitative justice and therapeutic jurisprudence, and place significant emphasis on the person's offending behaviour in their community and personal context.[28]

Murri Court elders or respected persons sit alongside the magistrate during mentions and sentence hearings (as 'the Murri Court Panel'). Whilst the magistrate alone has the 'final authority' to make determinations as to bail conditions and sentencing, magistrates are 'encouraged' to 'give consideration to cultural and other advice' provided by panel members.[29] The defendant is encouraged to speak openly to the magistrate and elders rather than through their legal representative.

Referrals to the Murri Court can be made by the defendant, the defendant's legal representative, a community justice group representative or the magistrate, but the defendants' consent is required.[30] Defendants must identify as Aboriginal or Torres Strait Islander, or have a kinship or other appropriate connection to an Aboriginal or Torres Strait Islander community 'in Queensland or elsewhere.'[31] The defendant must plead guilty and be on bail, and must provide written informed consent to participate in the Murri Court process.[32]

A Magistrates Court Practice Direction outlines the Murri Court process.[33] After a defendant is referred to the Murri Court, the matter is adjourned for two to four weeks to allow for an assessment to be completed. The 'Murri Court Assessment Panel', comprised of one to three elders or respected persons and a community justice group representative, must then meet and prepare a 'Murri Court Entry Report' which provides a detailed overview of the defendant's personal and cultural circumstances, causes of offending behaviour, personal goals, and identifies treatment and support services that the defendant will be referred to. At the first Murri Court mention, the defendant's eligibility is confirmed, and the magistrate can endorse or amend the Murri Court Entry Report. A progress mention date is set for no more than six weeks' time, and participation in the Murri Court process is added as a bail condition. The plan outlined in the Murri Court Entry Report is executed under the supervision of the community justice group, and subsequent progress mentions are held at regular intervals of around six weeks. The community justice group completes a 'Murri Court Progress Report' to inform the magistrate about the defendant's 'engagement' with services and 'progress since commencement.' At the end of the process, the Murri Court Assessment Panel must prepare a Murri Court Sentence Report, and the Murri Court magistrate will then impose a sentence, taking into account the information contained in the Sentence Report, and any opportunities to continue their treatment and rehabilitation.

Murri Courts are more informal than generalist courts, in terms of both speech and attire, and there is closer collaboration between the court and various government and non-government entities to promote rehabilitation.[34] The 2019 review of the Murri Court found that mentoring by elders and respected persons was a key ingredient of the court's success; indeed, the role of elders and respected persons has been described as a 'defining feature' of the Murri Court.[35] It is said that the involvement of elders and respected persons motivates defendants to engage with the process, increases defendants' and communities' respect for the process and increases compliance with orders.[36] Another successful element of the Murri Court process is its ability to link defendants to culturally appropriate treatment and support services.[37]

Youth Murri Courts are (formally) in operation in Cairns, Rockhampton and Mackay, however their practices have differed over time. In particular, the length of engagement varies. Overall, whilst some children remain in the Youth Murri Court for longer, the goal is to successfully refer them to support services and exit them within a few months.

Very few children appear before Youth Murri Courts. Between 2016 and 2018, a total of 1077 defendants were referred to the Murri Court, but only 70 of them were children.[38] Only a few children can be dealt with by each Youth Murri Court at any one time. Reviews of the Murri Court have identified challenges in relation to elder participation, particularly the significant time demands placed on elders, the relative lack of participating male elders in comparison to female elders, and elders not being from defendants' own community.[39]

Whilst there is no difference in raw recidivism rates, it has been reported that children sentenced by Youth Murri Courts offend less frequently than those sentenced in regular courts.[40] A strength of the Murri Court process is that it allows for breaches to be dealt with in an appropriate way: **if children re-offend while they are before the Murri Court, additional supports can be put in place.** Rather than forcing a child to exit the program because of non-compliance, the magistrate can consider whether there were 'sufficient opportunities to comply' with the directions of the community justice group and exercise their discretion to continue the defendant in the program.[41] However, the process requires considerable commitment from the child, much more than some community-based orders.

The High-Risk Youth Court is another specialist Childrens Court that was established in Townsville to deal with high risk repeat offenders. There is a dedicated magistrate for this list, and consistent court staff. Community justice group representatives, court liaison officers and court staff get to know the children, and work together to try to achieve better outcomes for them. Sometimes, the magistrate will use their power to adjourn proceedings[42] to allow the child to engage with service providers before a sentence is handed down. Other matters will be finalised quickly to allow the child to exit the system. Anecdotal evidence suggests that this court model can be effective for children with high and complex needs, although it is experienced as onerous by some children because it involves a lengthy period of participation.

6.2 Building child-friendly courts

6.2.1 Child-friendly infrastructure

Going to court can be a confusing, frightening and overwhelming experience for a child. The physical layout of a court can have a significant impact on a child's ability to understand, and participate in, court proceedings.[43] Where possible, the physical design of Childrens Courts should be 'child-friendly'[44] in the same way that schools and children's hospitals are built with the unique needs of children in mind.[45] Previously, the Childrens Court in Brisbane was located in a separate courthouse. This created a more child-friendly environment. However, there is no free-standing Childrens Court building in Queensland anymore, and this is often lamented by those who work with criminalised children.

The quality of children's court infrastructure and facilities across Australia has been found in need of improvement.[46] In their national assessment of Australia's Children's Courts, Sheehan and Borowski expressed concerns about the **failure to separate children's courts from adult courts, and the failure to separate criminal and child protection jurisdictions** within the children's court itself.[47] Concerns are often raised about the **inadequacy of facilities such as interview rooms, audio-visual technology and holding cells.** Court facilities are particularly poor in regional and remote areas.

The Australian Law Reform Commission has recommended that guidelines be developed for children's court design.[48] Researchers have outlined some key considerations in children's courtroom design. They have concluded: [49]

- Children's courtrooms should be small enough to create a **'less intimidating' and 'conversational'** space, but large enough to accommodate all attendees.
- The magistrate's bench should be elevated but 'not dominate the room'.
- Children should be positioned where they can participate in the process with their legal representatives but also 'retain contact with family members'.
- Children **should not be placed in a dock**.
- **Private interview rooms and child-friendly waiting** areas, separate from adult courtrooms, should be incorporated into court design.
- **Food and other services should be available to children while they wait**. Long waiting times at court can result in children failing to appear because they leave before their matter is heard.

The Edmund Edelman Children's Court in Los Angeles provides the best example of a court that was designed to be child-friendly.[50] This child protection court was architecturally designed to make the environment more appropriate for children. It includes features such as **murals and artworks, indoor and outdoor play areas with a range of age-appropriate toys and craft options, and waiting rooms with expansive views of natural scenery.** Anath describes the courtrooms as being akin to an 'elementary school classroom'.[51]

Modifications could be made to improve existing Childrens Courts in Queensland. For example, children could enter and exit court through a different entrance; separate waiting areas could be established; and children's matters could be listed at times when adults are not appearing.

6.2.2 Cross-over lists

In Queensland, the Childrens Courts are responsible for hearing and determining both youth justice matters and child protection matters.[52] However, they hear them separately, in separate sittings on different days. There is substantial overlap between children subject to child protection orders and children who appear on criminal charges. In 2020/21, there were 264 children on child protection and youth justice orders at the same time.[53]

Some jurisdictions around hear children's child protection and youth justice matters together, in recognition of the fact that there is often an association between children's care and protection needs and their offending.[54] For example, some Youth Courts in New Zealand run a 'cross-over list' for children who are dually involved with the child protection and youth justice systems.[55] The list aims to 'coordinate issues' for children subject to child protection orders who are charged with criminal offences 'because the issues that have brought them before both courts are always inextricably linked and cannot be sensibly dealt with in isolation.'[56] This allows for the development and implementation of a single plan in respect of the child which can then be monitored by the court.[57] Some jurisdictions (Scotland, England and Wales) have replaced children's courts with panels that develop intervention plans for children charged with offences.

In 2020, Walsh and Fitzgerald recommended the establishment of 'community justice centres' to deal with both child protection and youth justice matters within the one list.[58] They suggested that these centre be established in a separate buildings, and provide a 'one-stop-shop' for families involved in the child protection and youth justice systems, as well as being a court. Participants in that study considered that a dual child protection/youth justice list was the most appropriate response to the 'cross-over' of so many children between youth justice and the child protection system.[59] They emphasised that a community justice centre should take a strengths-based approach and aim to build family and community capacity.

6.3 Building culturally safe children's courts

Research has shown that children's courts, in their current form, do not cater to the needs of Indigenous children, families and communities. Mainstream courts force Indigenous people to engage with a culturally foreign legal system, in a culturally inappropriate manner, that 'inadvertently and directly influences outcomes in criminal proceedings.'[60]

The deficiencies or challenges in children's courts are felt most keenly by Indigenous children.[61] An analysis of Western Australia's Children's Courts found that in rural and remote courts, infrastructure is poor, workloads are high and support services are few.[62] In rural and remote areas of Queensland, children have to travel long distances to attend court. This is costly, but it also means that children who have been accused of offences are mixing with one another on these trips, often on a regular basis. This contributes to their stigmatisation as well as exposing children to negative peer effects. Blagg and colleagues recommend the establishment of a 'mobile needs focused' circuit court for rural and remote communities.[63] In some regional and remote areas of Queensland, magistrates do travel on circuit, however hearing dates are not frequent enough to ensure the expeditious hearing of children's matters which is why children still often travel to regional centres to attend court. Some magistrates use video link to ensure that children can stay within their communities and attend court remotely.

Irrespective of whether they appear in person or remotely, Aboriginal and/or Torres Strait Islander children are simply unable to participate in the court process 'in the absence of trained and skilled interpreters and culturally literate legal practitioners'.[64] Magistrates are keenly aware of the 'cultural barriers' that exist between themselves and Indigenous children, and they lament the lack of Indigenous judicial officers and other staff in the youth justice system.[65] Indigenous participation in courts, particularly in remote communities, could be increased by employing local community members as court clerks and in other court-based roles.[66] This would increase community involvement in the court, and reduce the intimidating and non-Indigenous nature of children's courts for young people.

Indigenous sentencing courts, including the Queensland Murri Courts, incorporate several measures to improve cultural safety, and some of these could be adopted in all children's courts. In particular:[67]

- There should be an **Acknowledgement of Country at the beginning of every sitting day**. The 2016 review of the NSW Koori Court suggested that a statement be made in all sentencing hearings 'about the impact of past government policies on Aboriginal and Torres Strait Islander families, country and heritage, and how the Youth Koori Court process recognises this historical legacy.'
- **Indigenous artwork and artifacts should be present in every courtroom**.
- **Elders and respected persons should be encouraged to attend every children's court sitting.**
- Children should have a **single magistrate** preside over their entire case from beginning to end where possible.
- The aim of court processes should be to **address the causes underlying children's offending behaviour**.
- **Support services and treatment** to address identified needs should be available.
- All youth justice stakeholders – police, lawyers and judicial officers – would benefit from regular and ongoing education and training to promote cultural safety.
- The NSW Youth Koori Court Pilot Project recommended that some hearings take place in **outdoor settings** that hold cultural significance for Indigenous people, such as 'traditional meeting places'.

The role of **community justice groups** in the court process is of particular importance. Their key court-based activities include:[68]

- preparation of bail and sentence submissions to the court;
- attending court sittings;
- supporting victims and offenders through the court process;
- referring victims and offenders to support and legal services;
- providing cultural advice and community input on justice related issues; and
- supporting the operation of Murri Courts.

Queensland courts have held that the submissions of community justice group representatives should carry 'great weight' in the sentencing process.[69] In fact, failure to take a report or submission of a community justice group representative into account amounts to a failure to take into account a relevant consideration, and therefore is an error in the exercise of sentencing discretion.[70] Sofronoff P said in *R v SCU*:[71]

'[T]he opinion of a Community Justice Group is a matter of great weight. It is not merely an opinion volunteered on behalf of an offender's community. It has a statutory basis. Parliament has expressed its intention that the views of Aboriginal communities are to be taken into account when sentencing children. One of the ways such views can be formed and communicated is by the carrying out of the statutory functions of the Community Justice Group.'

Unfortunately, not every community has a community justice group.[72] One way of addressing this would be to **create a new position of 'First Nations Court Liaison Officer' in every children's court in Queensland**.[73]

This should be an identified position, that is, every First Nations Court Liaison Officer should themselves identify as Aboriginal and/or Torres Strait Islander. First Nations Court Liaison Officers would not replace elders. Elders who attend court should be appropriately remunerated, but some may wish to attend court as volunteers and this should not be discouraged. Nor should the role of the First Nations Court Liaison Officer interfere with the statutory functions of community justice groups. The **First Nations Court Liaison Officers should work with elders and community justice groups**, rather than supplanting them.

First Nations Court Liaison Officers should be remunerated at the same rate, and employed under the same terms, as other Court Liaison Officers. They should attend every sitting day of every Childrens Court in Queensland and **their submissions should be taken into account in bail decisions and sentencing.**[74] They should be available to provide services to all Aboriginal and/or Torres Strait Islander children who appear before a children's court. Their role should involve:

- providing pre- and post-court support to Aboriginal and/or Torres Strait Islander children and their families;
- making referrals to community-based organisations to ensure cultural support and other required services are provided to Aboriginal and/or Torres Strait Islander children and families;
- working with community justice groups to provide support to accused children and their families;
- building partnerships and alliances between Indigenous-led organisations and the court;
- advising the court on matters related to cultural safety, cultural awareness and cultural appropriateness; and
- providing information to the court on programs that Aboriginal and/or Torres Strait Islander children could be referred to for the purpose of diversion and sentencing.

There may be some value in creating specialist 'Murri lists' in courts with high numbers of Aboriginal and/or Torres Strait Islander child defendants so that all Indigenous children can be seen in the same session. This would allow elders and First Nations Court Liaison Officers to attend for part of each sitting day, and undertake pre- and post-court work while the non-Indigenous children are seen by the court.

Of course, any changes to court structures or processes that are implemented without **extensive consultation with Aboriginal and/or Torres Strait Islander people** could be perceived as 'tokenistic'.[75] Elders, respected persons, community justice group members and other Indigenous stakeholders of the court should be involved in co-designing court spaces and practices.[76]

6.4 Court support services

6.4.1 Existing court liaison services

Queensland Childrens Courts are currently supported by court coordinators and court liaison officers. Court coordinators are employed by Youth Justice and provide a 'go-between' between the court and the child in youth justice matters. Court coordinators undertake both pre-court and post-court work which can include organising transport, organising assessments, liaising with community services to ensure service delivery, explaining the court process to children and their parents, and providing information to the court about the child's personal circumstances.

Court liaison officers provide much needed information, support and service delivery in Queensland's Childrens Courts. Court liaison officers appear as a 'friend of the court' to provide information about the child and any action that might be taken in the community to support their rehabilitation. Some deliver services to young people directly, providing screening, assessments, and therapeutic and referral services. Others liaise with external organisations to coordinate service delivery to children in the community.

Existing court liaison services in Queensland's Childrens Courts are:

- **Education Queensland Court Liaison Officer (Education Justice Initiative)** – Funded by the Queensland Department of Education, Education Queensland Court Liaison Officers work with children and families to link children with education and training services. This may involve re-connecting with school or finding an appropriate educational alternative (such as a flexible education setting) or linking children with vocational education and other training opportunities. There are currently 10 Education Queensland Court Liaison Officers, servicing 13 Childrens Court locations.
- **Child Safety Court Liaison Officers** – This service was created in response to criticisms that child safety officers were often not available to attend court with children on their caseload, despite the requirements of the *Youth Justice Act 1992* (Qld). The Department of Child Safety created the court liaison officer position to ensure that someone from the Department was in court to provide information on all children under the care of the Department on that court list. Child Safety Court Liaison Officers have access to a central database which contains information on every child subject to child protection orders, so they are able to provide information to the court about the child's child protection history and current placement. However, they are not personally known to the child, so they may not have up to date information about the child's specific circumstances. There are currently 14 Child Safety Court Liaison Officers, operating out of 12 locations, but they do not service all courts.

- **Mental Health Child and Youth Court Liaison Service (CYMS)** – CYMS is funded by Queensland Health to provide mental health assessments and therapeutic services to children who have a mental illness and appear before the court on criminal matters. Children are screened at court, and referrals are made to local CYMS clinics where necessary. Assessments and reports can be done quickly, including in rural and regional areas by using video link. CYMS clinicians can assess whether a child is of unsound mind, or unfit for trial, and they aim to provide a throughcare model of service delivery where the same clinician provides as many services to the child as possible. In rural and regional areas, the CYMS service has been effective in reducing the amount of time children spend in custody waiting for assessments: previously, many courts did not have access to an assessment service. However, the Childrens Court Annual Report describes the service as 'chronically understaffed'.[77] In some locations, assessments can still take weeks resulting in children spending longer periods in custody on remand than necessary.[78] Another concern that has been raised about CYMS assessments is that children may be declared 'fit' when they are practically unable to understand proceedings or provide instructions.

6.4.2 Adding a Disability Court Liaison Service

Additional court liaison services are needed to fill gaps in service delivery, particularly in relation to disability.

One reason why children may be declared 'fit for trial' by CYMS clinicians, even when other practitioners are convinced the child is unfit, is because their unfitness does not stem from a mental health condition, but rather from another disability, such as a cognitive or neurological impairment. Disabilities such as autism spectrum disorder, foetal alcohol spectrum disorder and attention deficit hyperactivity disorder may limit a child's capacity to understand the consequences of their actions, and their ability to understand or participate in legal processes. Communication difficulties associated with impairments are also major barrier to participation for children in criminal law processes.[79] It is important that neurodevelopmental impairments are identified as early as possible, and that children receive appropriate and timely interventions to address the risk of persistent offending later in life.[80] Winstanley and colleagues found that adults who received intervention for developmental language disorder in early childhood had less police contact than those who did not receive treatment.[81]

Practitioners must be mindful of neurological and cognitive impairments when communicating with children to ensure they understand questions and instructions.[82] Yet, most practitioners will not be aware of the barriers to communication that these children experience, or how to accommodate their communication needs.

Many children who have disabilities do not have NDIS plans and are not linked in with disability services. Parents may be struggling to cope with their children's behaviour without the support of allied health professionals, and without the financial resources to pay for private services. If early intervention services are received, offending behaviour could be addressed.

Disability Services Court Liaison Officers should be introduced, funded by Queensland Health. They could be responsible for:

- undertaking fitness assessments for children who CYMS do not consider to have a mental illness but who may indeed be unfit;
- linking children and parents with the NDIS;
- making active referrals to disability services; and
- liaising with schools to ensure that appropriate educational adjustments are being made for the child.

6.4.3 Adding communication assistants

Research around the world has demonstrated that there is a strong association between language difficulties and children's offending: 66% to 90% of children in the youth justice system have a developmental language disorder.[83] Children who experience complex trauma are more likely to have speech and language disorders.[84] Children with poor language may act aggressively and receive a conduct disorder diagnosis while their speech and language problems remain undiagnosed.[85] Speech and language difficulties may also indicate there are other undiagnosed disabilities, such as hearing loss, vision impairment or FASD, which may require intensive ongoing support.[86] Low intelligence and low education, in addition to the stress of proceedings, can further compromise a child's capacity to communicate effectively when they interact with the youth justice system.[87]

Many young children who come into contact with the youth justice system have undiagnosed speech, language and communication needs.[88] These needs can be difficult to identify, and are often effectively masked by children in their everyday interactions.[89] Common responses to questions such as 'yep', 'nup', 'dunno', and 'maybe', as well as 'poor eye contact and shrugs of the shoulders' can be mistaken for rudeness, a bad attitude or disinterest.[90]

Children with language disorders may be unable to instruct lawyers, understand the nature of any charges or orders imposed, or appreciate the consequences of non-compliance.[91] Research also suggests that restorative justice conferencing may not be appropriate for this cohort because they may not be able to effectively understand or participate in the dialogue.[92] Yet, statistical information indicates that many children with disabilities are referred for restorative justice in Queensland. Of those who are referred for a restorative justice process, 8% have autism, 10% have a cognitive or intellectual disability, and up to 2% have a sensory disability.[93]

Children from culturally and linguistically diverse backgrounds, and Indigenous children, can also struggle to understand legal concepts despite being competent English speakers. Kippen and colleagues examined communication skills amongst children at the Banksia Hill Detention Centre in Western Australia, many of whom were multilingual.[94] Testing indicated that 73% of participants who spoke English as an additional language had an English language ability level equivalent to that of a 9-year-old English-speaking child.[95] Also, age is not always an accurate guide to a child's level of understanding. A study by Snow and colleagues found that boys with an offending history performed significantly poorer on a re-tell activity than the control group of boys who were, on average, two years younger.[96]

There is increasing recognition of the struggles that children face with communication in youth justice settings. Speech pathologists employed by Youth Justice have developed a series of helpful resources which explain complex legal terms in plain English, accompanied by picture prompts.[97] Legal Aid Queensland has also created resources that provide advice to practitioners on how to adapt their communication style to accommodate children with impairments: for example, they recommend **speaking slowly and carefully, using simple everyday language, avoiding the use of abstract concepts, and using visual aids when communicating**.[98] Lawyers, magistrates and others can draw on these learnings by communicating with children in a manner that 'go[es] beyond mere interrogation or checking of facts'.[99] This requires the use of open-ended questioning, inviting children to speak back what has just been said to them, and encouraging them to offer their perspectives freely, without judgement. Questions such as 'do you understand?' may not provide information about the child's level of comprehension.[100]

Unlike the *Child Protection Act 1999* (Qld), the *Youth Justice Act 1992* (Qld) provides no statutory guidance on steps that should be taken to ensure a child's understanding or enhance their capacity for participation. A new section could be added to the *Youth Justice Act 1992* (Qld) that mirrors section 5E(1) of the *Child Protection Act 1999* (Qld), which reads:

Ensuring a child's understanding and participation

When communicating with a child:

a) language appropriate to the age, maturity and capacity of the child should be used; and
b) communication with the child should be in a way that is appropriate to the child's circumstances; and
c) if the child requires help to express their views, the child should be given help; and
d) the child should be given an appropriate explanation of any decision or order affecting the child; and
e) the child should be given an opportunity, and any help if needed, to respond to any decision or order affecting the child, and to seek clarification about the consequences of any decision or order affecting the child.

In a number of international jurisdictions, communication assistants have been introduced in children's courts to provide support to children with communication difficulties.

In the UK, if an accused person is unable to participate effectively in proceedings, as a result of a mental disorder or a 'significant impairment of intelligence or social function', they are entitled to the assistance of a 'Registered Intermediary'.[101] Registered Intermediaries are self-employed communication specialists who will assess the person's communication needs and provide them with communication assistance throughout proceedings, by sitting with the person in court and explaining questions and answers as necessary to enable them to understand and be understood.[102] Following the appointment of an intermediary, a ground rules hearing will be held for the judge, intermediary, and parties to plan any adaptations to questioning or the conduct of the hearing in order to enable the participation of the person.[103] UK courts have concluded that children have a right to an intermediary in certain circumstances. For example, in 2011 the England and Wales High Court determined in respect of a child defendant with ADHD that 'there is a right, which might in certain circumstances amount to a duty, to appoint a registered intermediary to assist a defendant to follow the proceedings and give evidence if without assistance he would not be able to have a fair trial'.[104] In 2020, the England and Wales High Court decided the failure to appoint an intermediary for the whole of a trial to enable a child with communication difficulties to understand the proceedings 'was not consistent with a fair trial'.[105] The UK House of Commons Justice Committee recommended that intermediaries be available to all children and young people who appear before a court.[106]

In New Zealand, communication assistants are available to defendants with communication needs to assist them to understand proceedings.[107] Their role involves meeting with the defendant and assisting them to provide instructions to their lawyer, explaining documents and providing easy to read versions of documents, and providing advice to the court on how to ensure the defendant is able to participate in proceedings.[108] To be eligible for communication assistance, the defendant must be insufficiently able to understand the proceedings as a result of insufficient proficiency in the English language or a communication disability.[109] Howard and colleagues found that children and parents spoke very positively about communication assistants in NZ, saying they made it 'easier' to understand a system they had previously found difficult to comprehend.[110] They said that communication assistants were able to **simplify legal jargon so they could understand what was happening and be meaningfully involved**.[111] Howard and colleagues also found that criminal justice professionals strongly supported the use of communication assistants; they said that communication assistance 'put the young person at the centre of youth justice' rather than forcing them to be 'outside' of it.[112] They also said that the involvement of a communication assistant made them realise how limited children's understanding of court processes is, and this encouraged them to modify their own communication practices.[113]

The Law Council of Australia has recommended that 'qualified, trained, and remunerated' communication assistance services be available for all witnesses or defendants in legal proceedings with communication difficulties, including children.[114] The Victorian Law Reform Commission has made a similar recommendation.[115]

6.4.4 Adding lay advocates and social workers

In their study on communication assistants, Howard and colleagues noted that communication assistance does not address children's and parents' emotional distress at being involved in a criminal process.[116] Additional support may be required. It has been said that one reason for parents to be present at, and involved in, legal proceedings is to provide children with emotional support. However, they should not be expected to act as advocates, or to explain complex legal terminology to their children – they will typically have struggles, distractions, and misunderstandings of their own.[117]

In New Zealand, children have access to both 'lay advocates' and 'youth advocates'. Youth advocates are court-appointed specialist youth lawyers.[118] **Lay advocates provide information about the child's home life, cultural connections and schooling, and help to arrange accommodation.**[119] Judge Becroft has said that the role of the lay advocate is to represent the interest of the child's family and broader family and tribal group, whereas the youth advocate is appointed to represent the child's legal interests.[120] Lay advocates are generally from social work, teaching or community advocacy backgrounds and ought to have sufficient standing ('mana') in the specific culture of the child they are appointed to.[121] Lay advocates have a wide range of powers, including the ability to make representations on behalf of the child in family group conferences or court proceedings, and request reports concerning the child.[122] Researchers have concluded that lay advocates are important to ensure culturally appropriate participation of children and families in court proceedings.[123]

Lay advocates have 'no known counterpart anywhere in the world'[124] although some aspects of the Scottish 'safeguarder' system are similar. **Safeguarders are independent persons appointed in Children's Hearings to safeguard a child's interests during proceedings**. In practice, this usually involves producing a report that outlines the views of the child, family members, and/or professionals involved with the child and provides recommendations as to what is in the best interests of the child.[125] These views are generally obtained through one-on-one meetings, if the child consents.[126] Whilst the safeguarder's role is described as 'relationship-based', they are discouraged from taking an active role in trying to help the child or their family, although they may recommend services to meet a child's needs.[127] A safeguarder may appeal a decision of the Children's Hearing if they consider it did not give due weight to their report.[128] Safeguarders are generally from social work, law, or teaching professional backgrounds, but since remuneration is low, most safeguarders are retired or undertake this role alongside other work commitments.[129]

In Queensland, the Public Guardian can provide advocacy services under the *Public Guardian Act 2014* (Qld) to a 'relevant child' in legal proceedings.[130] A relevant child is a child who is known to Child Safety.[131] The Office of the Public Guardian employs seven Child Advocate Legal Officers (CALOs) who provide 'complementary' advocacy services to children known to Child Safety who come before the Childrens Courts on criminal matters. This is a valuable service, but unfortunately it is not available to children who require support but are not known to Child Safety services.

In the UK, children and families can be appointed a social worker for support during and after criminal court proceedings.[132] Social workers support the whole family, providing parenting advice, emotional support and and practical assistance.[133] In Scotland, some local authorities offer a comprehensive court support service, called the 'Whole System Team' or WST.[134] Children report that WST support workers ease their worries and help them feel less scared about court, as well as assisting them to manage personal and social issues that contribute to their offending.[135] The quality of relationship between the child and service provider, through 'trust', 'respect', and feeling 'valued', is central to the success these programs.[136] Providing clear information to children about court procedures, possible outcomes and legal rights, and alternatives to custody, such as supervised bail, is also considered important.[137]

6.4.5 Lawyers' role within the Childrens Court

Having a highly skilled lawyer can make a significant difference to a child's case. However, some lawyers that represent children may lack experience with children's matters.[138] It is often argued that there should be a specialist accreditation process for lawyers representing children in youth justice matters.[139] It is critical that specialist legal services with expertise in children's matters, and multidisciplinary teams to address children's legal and non-legal needs, are adequately funded, to enable them to represent all children. In Queensland, the Youth Advocacy Centre, YFS and Legal Aid are universally praised but known to be under-resourced.[140]

In rural and remote areas, legal services for children are limited.[141] In some regional centres in Queensland, Aboriginal and Torres Strait Islander Legal Service (ATSILS) have only a handful of staff. It is important that ATSILS is sufficiently well-resourced to ensure that they are not reliant on volunteers or new graduates to undertake their important very important work.

Section 421(2) of the *Police Powers and Responsibilities Act 2000* (Qld) requires police officers to tell the child that Legal Aid will be informed that they are in custody.[142] The Youth Legal Aid Hotline assists children who have been so informed under this section, and is available outside business hours during the week and on the weekend. This has been described as a 'valuable' service by the Childrens Court and should be appropriately resourced.[143]

6.5 Child-friendly judgements and reasons

The *Youth Justice Act 1992* (Qld) states that children should be provided with information about decisions and plans concerning them, and that this information should be in a form they can understand – indeed, courts are required to ensure that the child (and parent) understands the nature of the offence, the court's procedures and the consequences of any orders.[144] Yet, the **language used in court proceedings continues to confound children and parents** – they are unsure of the meaning of legal terminology, and they invariably report feeling lost and confused both during and after proceedings.[145] Feeling confused by unfamiliar terms and acronyms can be a trauma trigger for some, particularly for children who have been subject to child protection orders, because it serves as a reminder of the experience of removal.[146]

Bail conditions are often drafted in a manner that children cannot understand and this will affect their capacity to comply.[147] Legal Aid Queensland and Youth Justice have developed, and are continuing to create, visual resources that are aimed at assisting children to understand legal terminology and processes.[148] These resources use infographics, large easy to read font and more basic terminology. However, more could be done to ensure that children can understand the determinations of the court.

The published reasons of Judge Fitzgerald of the New Zealand Youth Court provide examples of judgements that can be understood by children. The introductory pages of His Honour's judgements read more like a letter, indeed they are a reproduction of the Judge's opening statement which is delivered orally in court. Table 6.1 provides some examples of how Judge Fitzgerald substitutes complex legal concepts and confounding legal terminology with child-friendly plain English.[149]

Table 6.1 – Judge Fitzgerald's alternative terminology in published reasons

absolute discharge	• 'In relation to your Youth Court case, it will finish today.' • 'there will be no record that you came to the Youth Court for those charges' • The order 'will make it seem as if the charges were never laid in court in the first place. They are gone for good.' • 'it's as if you and I could pretend that we had never even met'
adjournment	'You heard me earlier set a new court appointment for your Family Court case... That day I will find out what progress is being made and make sure everything that needs to happen is happening.'
no appearance required	'You do not have to come to court that day if you do not want to, especially if all we are going to do is legal talk. But you would be very welcome.'
consequences of breach	'It is important that you know that if you do not [finish the plan], if you are not making a good effort, and things are not progressing like they should, it is still possible to make the supervision order the police were seeking so that has not disappeared as an option.'

The NSW Equality Before the Law Bench Book further suggests:[150]

- 'regarding' should be replaced with 'about';
- 'proceed' or 'commence' should be replaced with 'go' or 'start'; and
- 'legislation' should be replaced with 'law'.

Other terms that have been identified as confusing are 'affidavit', 'bail', 'statement', 'evidence', 'intent', 'incriminating' – 'my friend' and 'argument' can also be misconstrued.[151]

Children's language can likewise be misunderstood by the court. C'Zarke Maza explains that words in Aboriginal English do not always accord with Standard English.[152] For example, Aboriginal children may use the word 'kill' to mean 'hurt,' and 'smash' to mean 'messy'. 'Deadly' is the most well-known example of a word with a very different meaning in Standard English compared with Aboriginal English. For some Indigenous children, particularly those who live in remote areas, English is not their first or dominant language. They may require an interpreter, however, interpreters can be hard to come by.[153] Marchetti notes that Indigenous people may not be provided with an interpreter due to an 'assumption' that Standard Australian English is similar to Aboriginal Australian English.[154] However, there are often differences between Aboriginal English and Standard English.[155]

Martin notes that the languages spoken by Indigenous children are highly variable: they 'may speak a combination of Australian Aboriginal English, Standard Australian English and their traditional language, and may speak them separately or code-switch between them'.[156]

Martin makes several suggestions for culturally safe communication. She suggests:

- following Aboriginal ways of communicating;
- providing comparative information;
- using indirect questioning;
- including people in the client's support system in discussions and interviews;
- considering communicating with the child in a group; and
- 'seeking the support of an Indigenous person in that community to help interpret the information's intent and meaning.'[157]

Judge Fitzgerald also emphasises the importance of using appropriate cultural language.[158] **Using cultural terminology allows for cultural concepts to be embedded in reasoning and applied in individual cases**.[159]

Judge Fitzgerald **relates to children personally, and with compassion**. His Honour states in various cases:[160]

> 'The first important thing that needs to be done here is to say sorry to you because somebody needs to... I am so sorry about what you've been through in your life so far because most of it shouldn't have happened, certainly not in the way many things were done by people who are part of the system and I guess you probably see all of us here as part of that system to. So, on behalf of a system that at times has been so cruel and unfair to you, I apologise from the bottom of my heart.'
>
> 'I think the decision by the police to charge you... was completely wrong. I feel very offended by it...'

His Honour **expresses empathy**, by saying: [161]

> 'I know that if it happened to me I would be so hurt, and so angry at times that it would affect how I think and how I act, the choices I would make and a whole lot more as well.'
>
> '[L] has a lot to be angry about... Her behaviour and responses are what you would expect from someone who has experienced serious ongoing trauma... The impression is that she may have felt more like an object than a person.'

His Honour **praises children, and provides encouragement** regarding their progress under existing orders and **acknowledges their strengths**: [162]

> 'I think the way you have just gone out and got your first paid job on your own is fantastic. And I think it is time we stopped treating you like a criminal.'
>
> 'there are wonderful aspects of her character that shine through in the reports and other information on file, and when you meet her. Reports from the schools she went to describe her as a friendly, engaging, bright, outgoing girl...'
>
> 'Against a background of great sadness, pain and darkness, the thing that shines vividly and brightly, is how people describe her when she is able to engage with her culture; "proud", "strong", "clever", "awesome to engage with", and with special gifts that have been handed down to her from her tupuna (ancestors).'
>
> 'His needs are therefore many and complex. However, he has interests, talents and qualities to be nurtured. His interests include social media and sports, especially [deleted]. He is good at taking care of his siblings and others in the whanau indicating that he has a caring heart.'

The child is referred to as an individual with a hope for the future: [163]

> 'That is just a brief glimpse of who [L] is, where she belongs, and some of her hopes and dreams for the future.'

6.6 Creating a child-friendly Queensland Children's Court

Queensland's children's courts are slightly modified adult courts that do not ensure children's full participation. Legal jargon continues to alienate and confuse children, and often they leave the courtroom not knowing what happened and not understanding what the outcome of the proceedings was.[164]

Traditional criminal law terminology is alienating for children, but it also promotes misinformation and a lack of understanding within the community. By simplifying our language, we can make our intentions clearer, assist children to understand the process, and take the community with us.[165] Practice Directions that require the use of child-friendly language in children's courts could support efforts already being made to reduce the amount of legal jargon used during children's matters.

In the meantime, children will continue to rely on the adults around them to make proceedings comprehensible to them. Parents cannot be relied upon to fulfil this role because they are usually confounded themselves. The presence of court liaison officers, communication assistants and appropriate advocacy services can contribute to making our Childrens Courts 'child-friendly'.[166]

Children should not need to be charged with offences to receive community services, but when children find themselves at court, there is an opportunity to intervene in a positive way in their lives. Service delivery may start at the courthouse, but it is imperative that it continue in the community. Children's needs go beyond their youth justice involvement, and will need to be met by other services in the community.

Chapter 6 endnotes

1 *Childrens Court Act 1992* (Qld) s 5. Note that the court is referred to as the Childrens Court (not the Children's Court).

2 They are life offences or offences that if committed by an adult would attract a sentence of imprisonment for 14 years or more: see *Youth Justice Act 1992* (Qld) s 8.

3 *Youth Justice Act 1992* (Qld) ss 64, 99 (and see generally Part 6 Division 2).

4 *Youth Justice Act 1992* (Qld) sch 4 (definition of 'supreme court offences'); see also *District Court of Queensland Act 1967* (Qld) s 61. In 2020/21, 31 of the 52 finalised charges in the Supreme and District Courts were for illicit drug offences: Childrens Court of Queensland, *Annual Report 2021/22,* 33. Note that a child can elect to be sentenced in CCQ for a summary offence: *Youth Justice Act 1992* (Qld) s 100.

5 Childrens Court of Queensland, *Annual Report 2021/22*, 26.

6 *Youth Justice Act 1992* (Qld) s 81.

7 Childrens Court of Queensland, *Annual Report 2021/22*, 16.

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9 *Childrens Court Act 1992* (Qld) s 20. Note, however, that this does not apply to matters heard by a judge: s 20(5).

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27 Magistrates Court of Queensland, *Practice Direction No. 2 of 2016,* [14].

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31 Ibid.

32 Ibid [14].

33 Ibid [23], [23], [26], [84].

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35 Ibid 8; Queensland Courts, *Murri Court Reinstatement: Feedback Report,* 2015, 22-23; see also A Morgan and E Louis, *Evaluation of the Queensland Murri Court: Final Report*, 2010 (Australian Institute of Criminology) 122.

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CHAPTER 7

Preventing reoffending: Dismissal, sentencing and finalisation of charges

7.1 Purposes of sentencing children

When sentencing a child, a balance must be struck between ensuring the safety of the community and upholding the rights of the child. These goals are often presented as being in conflict with one another, but there is actually considerable overlap between them.[1] In fact, **research shows that if children are treated with dignity and respect, and intervention addresses the underlying causes of their offending behaviour, they are likely to desist from offending**.[2]

Those who work with criminalised children speak of them with affection. They do not feel unsafe or threatened in their presence. It is not true to say that these children need to be 'locked up' to keep the community safe. What these children need is nurturing, safe accommodation, the necessities of life, and a reason to stop offending. **They need a hope for the future** – an alternative pathway forward that does not involve crime. The most effective way of reducing recidivism is to help children develop a plan for their lives that is positive and realistic. They should believe that they do not need to commit offences to obtain what they desire in life.

Vague appeals to 'community outrage' do not displace the statutory intention that a child must be treated more leniently than an adult, bearing in mind 'the short life history to which a judge can have regard in assessing likely reoffending and, by contrast, the large unknown future that awaits children.'[3] It is often assumed that members of the public support punitive interventions for children who commit crimes, but research has shown that this is not necessarily so. **The public is actually very supportive of rehabilitative approaches to youth crime**, and this is true even amongst people who have been victims of youth crime themselves.[4] The community's opinion regarding how a child should be sentenced is best ascertained by seeking information from those who know the child and are familiar with their personal circumstances. Such people include elders, respected persons and community justice group representatives, parents, social workers, teachers, court liaison officers and youth justice officers.[5]

7.2 Sentencing principles for children

Section 150 of the *Youth Justice Act 1992* (Qld) states that the principles that apply to the sentencing of all persons are also applicable to children. The purposes of sentencing listed in the *Penalties and Sentences Act 1992* (Qld) are: just punishment; rehabilitation; deterrence; denunciation; and protection of the community.[6] It is up to the court to place appropriate weight on these factors taking into account the circumstances of the individual case.[7] The importance of each of these purposes may be different in the context of a child's offending: what is just, what will effectively rehabilitate, and what will protect the community is different for children than adults.

The courts have said that the **principal object when sentencing a child should be the rehabilitation of the child**.[8] The *Youth Justice Act 1992* (Qld) states that in sentencing a child, the **court** must **have regard to**:[9]

- the general principles of sentencing that apply to all people, eg. imprisonment should only be used as a last resort; the offender's culpability; time spent in custody already; compliance with previous orders;[10]
- the youth justice principles;[11]
- the child's age, and the fact that this is a mitigating factor and should influence the nature of the penalty imposed;
- the fact that a non-custodial order is better than detention in promoting a child's ability to reintegrate into the community;
- the principle that the rehabilitation of a child is greatly assisted by the child's family, and having an opportunity to engage in education and employment;
- the principle that a child without family support should not receive a more severe sentence;
- the principle that a detention order should only be imposed as a last resort and for the shortest possible time;
- the nature and seriousness of the offence, and the presence of any aggravating or mitigating circumstances;
- the child's offending history and whether the child was on bail or subject to other criminal law proceedings, or sentence, at the time of the offence;
- the impact of the offence on a victim;
- if the child is Aboriginal or Torres Strait Islander – any submissions made by a representative of the community justice group regarding cultural considerations and available programs;
- proportionality between the sentence and the offence.

It is important to emphasise the principle in section 150(2)(d), that a child who lacks family support, or 'opportunities to engage in educational programs or employment', should not receive a more severe sentence for this reason.[12] It could be argued that the section 48AA(4)(b) factors (which may be considered when making decisions about bail) should also be considered in sentencing. They include:

- the desirability of strengthening and preserving the relationship between the child and the child's parents and family;
- the desirability of not interrupting or disturbing the child's living arrangements, education, training or employment;
- the desirability of minimising any adverse effects on the child's reputation;
- the child's exposure to, experience of and reaction to trauma;
- the child's health, including the need for assessment or treatment;
- any disability the child has, and their need for services and supports;
- if the child is an Aboriginal person or Torres Strait Islander—the desirability of maintaining the child's connection with the child's community, family and kin;
- if the child is under 14 years—the particular desirability of releasing children under 14 years from custody.

If a pre-sentence report has been ordered, information on these matters will often be included in it, but for children who are not the subject of a pre-sentence report, such information may not be before the court.[13] Section 150(1)(h) states that the court *must* have regard to 'any information about the child… provided to assist the court in making a determination.' This could include reports of court liaison officers and allied health professionals. Submissions made by a community justice group must also be considered under section 150(1)(i), indeed it has been held that failure to take the report or submission of a community justice group representative into account amounts to a failure to take into account a relevant consideration, and therefore is an error in the exercise of sentencing discretion.[14]

There are other factors that could be added to section 150 to ensure that the child's unique circumstances are recognised, and to minimise the adverse impact of any sentence on the child's life chances. They include:

- systemic factors that contributed to the child's offending, such as their child protection history;
- intergenerational trauma caused by decolonisation – the Victorian Aboriginal Legal Service has recommended the *Sentencing Act 1991* (Vic) be amended to include a requirement 'to take into account the unique systemic and background factors affecting Aboriginal and Torres Strait Islander peoples' in sentencing;[15]
- major events such as Year 12 exams, cultural/religious events, sporting and music competitions – the Irish *Children Act 2001* achieves this by requiring that 'any penalty… should cause as little interference as possible with the child's legitimate activities and pursuits'.[16]

7.3 Sentencing orders currently available for children

Individual magistrates differ markedly in their approach to sentencing.[17] Some have more experience in the adult jurisdiction, so they may not understand the complexities of children's offending, and may fail to make appropriate adjustments for children. For example, some magistrates may make a detention order 'for the child's own good' if they are homeless or have a mental or cognitive disability.[18] Children get to know which courts will treat them more harshly and will try to have their matters transferred to more sympathetic courts.[19]

The *Youth Justice Act 1992* (Qld) includes a limited number of sentencing options – these are the only options available to judicial officers when sentencing a child for a criminal offence.[20] Broadly speaking, the sentencing options available in youth justice matters are: dismissal; unsupervised orders; and supervised orders.

7.3.1 Dismissal

A court can dismiss a charge against a child, instead of accepting a child's guilty plea, if it is satisfied that:

- the child should have been cautioned – in such circumstances, the court can caution the child, or direct police to caution the child.[21]
- the offence should have been referred for a restorative justice process by police – in such circumstances, the court may refer the offence for a restorative justice process.[22]
- the child was or appears to have been, of 'unsound mind' when the offence was committed or is 'unfit for trial', where the charge is for a simple offence.[23]

'Unsound mind' means 'a state of mental disease' (that is, a permanent or temporary mental illness) or 'natural mental infirmity' (that is, a defect in higher order processing, including intellectual impairment or acquired brain injury) that interferes with the person's capacity to make decisions, control their actions or understand what they were doing.[24] 'Unfit for trial' means that the person did not have the capacity to: understand the charge or plead to the charge; follow the course of proceedings; understand the effect of the evidence against them; or make a defence, answer the charge, or give instructions to a lawyer.[25]

If a child has been charged with a simple offence, magistrates also have the power to adjourn proceedings so that a mental health examination can be undertaken.[26] If the magistrate dismisses the charge, the magistrate may refer the child to a relevant agency or health service for care and treatment.[27] If a child has been charged with an indictable offence, and the court is reasonably satisfied that the person was of unsound mind when the offence was committed or is unfit for trial, the court may refer the child's matter to the Mental Health Court.[28] These options are under-utilised: very few children have their charges dismissed

on the grounds that they are or were of unsound mind or are unfit for trial, and very few children are referred to the Mental Health Court.

7.3.2 Restorative justice referrals

If a child is referred for a restorative justice process, a restorative justice conference may be held.[29] The conference is organised and convened by youth justice officers. A victim is entitled to attend the conference, or participate via a pre-recorded message, or the victim can be represented by a victims' advocacy organisation.[30] The goal of the conference is for the child to enter into a restorative justice agreement to redress any harm they have caused.[31] If a conference cannot be convened, the restorative justice process 'is to be an alternative diversion program.'[32]

There are four ways in which a child can be referred for a restorative justice process by the Childrens Court in Queensland:

- Police referral – that is, where a court determines that a police officer should have referred the offence for a restorative justice process.[33] The court may then refer the child for a restorative justice process, but the police officer is still considered to be the 'referring authority.'[34]
- Court diversion referral – that is, referral by a court prior to making a determination of guilt.[35] If a child pleads guilty to an offence, the court must consider referring the child for restorative justice instead of sentencing the child.[36] If the referral is successful, and the child completes the program, the child is not liable for further prosecution.[37]
- Pre-sentence referral by a court – that is, where a court has found a child guilty of an offence but refers the offence for a restorative justice process 'to help the court make an appropriate sentence order.'[38] If a finding of guilt is made in respect of a child, the court must consider referring the child for restorative justice to assist them in determining an appropriate sentence for the child.[39] If the child is referred for restorative justice at this stage, and the matter is adjourned to enable their participation in this process, and the court must take this into account when sentencing the child.[40] If the child does not complete the process, the court must proceed with sentencing.[41]
- As a sentence order.[42]

A court may only make a restorative justice order if the child is informed of and understands the process, and indicates a willingness to comply with the order. The court must also be satisfied that the child is a 'suitable person to participate in a restorative justice process' and that the order is appropriate in the circumstances, taking into account the nature of the offence, any harm suffered by someone, and whether the 'interests of the community and the child would be served' by having the offence dealt with this way.[43]

Referrals for restorative justice are not limited to less serious offences – the 2018 evaluation of Queensland's restorative justice program found that 41% of conferences involved 'high seriousness' offences.[44] In 2021/22, restorative justice processes were held in response to a wide range of offences including theft and related offences (29%), unlawful entry with intent, burglary or break and enter offences (17%), acts intended to cause injury (8%), property damage (6%) and illicit drug offences (5%).[45] It is concerning that 6% of restorative justice processes concerned public order offences and a further 4% concerned offences against justice procedures such as breach of orders and failure to appear in court. These offences are generally victimless and therefore inappropriate for conferencing. Having said that, it is reported that most conferences (98%) result in agreements being reached between the conference participants and 84% of agreements are successfully completed.[46]

Aboriginal and/or Torres Strait Islander children are less likely to be offered restorative justice at the earliest stages of the process. Only 42% of restorative justice referrals were for Aboriginal and/or Torres Strait Islander children in 2021/22, which was even less than the year before.[47] The 'cultural responsiveness' of restorative justice processes has been raised as an area requiring improvement.[48]

The 2018 evaluation of Queensland's restorative justice program reported that 32% of conferences were attended by actual victims, and a written victim impact statement was available in 19% of conferences.[49] An additional 15% were attended by a representative of a 'victim' organisation, 16% were attended by a representative of the victim (such as a family member or counsellor) and 16% were attended by a community representative representing victims of crime.[50] Notably, 56% of conferences were attended by a police officer, whilst only 12% of conferences were attended by a cultural representative.[51] Parents attended 78% of conferences, and a further 9% were attended by other family members.[52]

The vast majority of children (85%) and victims (89%) reported being satisfied with the outcome of the conference, although the evaluation found that **children were less likely than victims to 'feel safe' at the conference**, and less likely than victims to feel that they 'had a genuine say in what went into the agreement'.[53]

The most common activities undertaken by children under restorative justice agreements are: apologies (81%), participation in counselling (11%) or educational programs (10%), and volunteer work (8%).[54]

Some referrals are returned to court.[55] Most often, this is because the referral was inappropriate, a restorative justice conference could not be convened, or an agreement could not be made.[56] If the referral is returned to court and it was a court diversion referral, the court can take no further action, allow the child a further opportunity to comply with the referral, or sentence the child.[57] If the referral was a pre-sentence referral, the court must sentence the child.[58] If the referral was part of a sentence order, this amounts to a contravention of a community based order, and Youth Justice will determine whether or not to apply to the court for a finding that the child has breached the order.[59] If the child is brought back before the court, the magistrate will determine whether to take no action, vary the child's order, or re-sentence the child.[60]

Children receive substantial support from youth justice officers to comply with restorative justice agreements. It is not an offence to breach a restorative justice order, but breach action was taken against 15% of children on restorative justice orders in 2021/22.[61] The 2018 evaluation found that 77% of children either did not reoffend or showed a decrease in their offending after conferencing.[62]

7.3.3 Alternative diversion program

If a referral to restorative justice is made by police, or by a court under section 24A (where the court determines the offence should have been referred for a restorative justice process by police) or section 163 (where the court refers the child for a restorative justice process before they are sentenced), and a conference cannot be convened, the child can instead complete an 'alternative diversion program'.[63]

Section 38 of the *Youth Justice Act 1992* (Qld) says that an alternative diversion program can involve the child participating in:

- remedial action;
- activities to strengthen their relationship with their family and community; or
- educational programs.

The 2018 evaluation of restorative justice conferencing said there was 'a level of confusion about the purpose of ADPs [alternative diversion programs].'[64] The legislation simply states that the program must 'help the child to understand the harm caused by their offending behaviour' and allow them an opportunity to 'take responsibility for the offence.'[65]

Only 69 alternative diversion programs were recorded in 2016/17.[66] By 2021, 646 of the 2090 referrals to restorative justice that were completed were dealt with via the alternative diversion program pathway. In practice, an alternative diversion program was originally a restorative justice conference without the presence of a victim. However, during 2021, a decision was made to expand the activities available under an alternative diversion program. Children can now be referred to programs or other pursuits with the aim of addressing their offending behaviour. These include vehicle programs, drug diversion programs, knife programs and Family-Led Decision Making.

7.3.4 Unsupervised orders

The sentencing orders a court can make are listed under sections 175(1) and 176A of the *Youth Justice Act 1992* (Qld). Some orders require no ongoing supervision by youth justice officers – the child is released and has no further contact with the youth justice system unless they reoffend.

There are three types of unsupervised orders: a reprimand, a good behaviour order, and a fine.[67] A reprimand is a 'severe reproof' only.[68] It has no ongoing effect. A good behaviour order imposes only one condition on the child, that they not violate the law for the term of the order, which can be no longer than one year.[69] A conviction cannot be recorded if either of these sentences are handed down.[70] If the child breaches their good behaviour order, no breach action can be taken.[71]

Reprimands are the most common sentence imposed by Childrens Court Magistrates in Queensland. In 2021/22, around 33% of children convicted in the Childrens Courts (Magistrate) received a reprimand as their most serious penalty.[72] A further 12% received good behaviour orders as their most serious penalty.[73]

Fines are rarely imposed on children, and a fine can only be ordered if the court is satisfied the child has the capacity to pay.[74] In 2021/22, only 1% of convicted children received a fine as their most serious penalty.[75]

If a child is charged with a minor drug offence, and the court finds the child guilty of the offence, the court can refer the child to a drug assessment and education session.[76] The child must have entered a plea of guilty and must consent to attend the session.[77] If the child attends, they will not be liable for further prosecution for that offence.[78]

7.3.5 Supervised orders

Probation orders are the most commonly imposed supervised order. In 2021/22, 32% of convicted children received a probation order for their most serious offence.[79] Children who receive probation orders are required to attend programs as directed, report to and receive visits from youth justice officers, remain in Queensland, and notify of any change of residence, employment or school.[80] Other requirements that the child must comply with may be added, such as a curfew,[81] but only if this is considered necessary and desirable by the court for preventing future offending.[82] Any additional requirements must be related to the offence and supported by written reasons.[83] Probation orders can be for no more than 12 months if imposed by a magistrate and no more than three years if imposed by a judge.[84] A court can only impose a probation order if the child indicates a willingness to comply with the order.[85]

Community service orders are imposed in around 10% of children's cases.[86] A court can only impose a community service order if: the child is aged 13 years or over; the child indicates a willingness to comply; the court is satisfied that the child is a 'suitable person' to perform community service; and Youth Justice have confirmed that community service of a suitable nature can be provided.[87] Up to 100 hours of community service can be ordered for children aged between 13 and 15 years, and up to 200 hours can be ordered for children aged 15 years and over.[88] A community service order can only be of 12 months duration unless it is extended by the court.[89] There is some concern in Queensland that community service orders are too lengthy and onerous. For children, 20 hours community service represents a substantial time commitment, taking into account the importance of children remaining engaged, or reengaging with, education and training.

Community service work is organised and coordinated by Youth Justice. When determining what kind of community service work a child will engage in, Youth Justice is required to avoid conflicts with the child's religious or cultural beliefs, and attendance at education, training or employment, 'if practicable'.[90]

Children aged 12 years or over who are charged with a graffiti offence may receive a graffiti removal order.[91]

A court must make a graffiti removal order for a graffiti offence unless the court is satisfied that the child is not capable of complying with the order due to physical or mental incapacity.[92] The child's age and maturity must be taken into account when setting the number of hours of service required, however a graffiti removal order cannot exceed 20 hours for any child.[93] In 2021/22, only 94 graffiti removal orders were made.[94]

Children aged less than 13 years who are at high risk of reoffending can receive an intensive supervision order if they express a willingness to comply.[95] These orders have strict conditions and only a handful are ordered each year. In 2021/22, only eight were ordered.[96]

Probation orders, community service orders and intensive supervision orders can only be made if the child would be liable for a period of imprisonment if they were an adult.[97]

7.3.6 Detention order

A detention order requires the child to reside in a detention centre.[98] Whilst there is an explicit acknowledgement in the *Youth Justice Act 1992* (Qld) that a non-custodial order 'is better than detention' in facilitating a child's reintegration,[99] a detention order can be made if:

- all other available options have been considered and, taking into account the desirability of not detaining a child, the court is satisfied that no other sentence is appropriate;[100] and
- a pre-sentence report has been prepared by Youth Justice and considered by the court.[101]

This means that 'every other available sentencing option' must be 'considered and found inappropriate.'[102] The court must record its reasons for making the detention order in writing, and must state its reasons in court.[103]

A detention order can only be for a maximum of one year if ordered by a magistrate.[104] If a judge makes the detention order, it can usually be for no more than half the maximum term for an adult or five years, whichever is shorter; however, if the offence is particularly serious, even a sentence of imprisonment for life can be ordered.[105] Any period of time that the child spent in custody awaiting sentence must be counted as part of the period of detention.[106]

If a court makes a detention order against a child, it may immediately suspend that order and make a conditional release order.[107] The effect of this order is that the child is immediately released 'into a structured program with strict conditions' for a period of no more than three months.[108] Importantly, a conditional release order is considered to be a form of detention order, and therefore can only be made as a last resort.[109] **Before sentencing a child to detention, the court must consider whether a conditional release order can be imposed instead of immediate detention**.[110]

In 2021/22, 309 detention orders were made in Queensland Childrens Courts, which equates to 6.6% of all convicted appearances.[111] 100 children were in custody on remand when they were sentenced to a detention order.[112] Of these, 45% were immediately released – less than half of these children were released subject to a supervised release order, and the remainder were not required to serve any more time, possibly because they had spent such a long time in custody on remand.[113] On an average day in 2021/22, only 38 children in detention were serving a detention order.[114]

Ensuring that detention is used only as a last resort is important to ensure community safety. This has been recognised by the courts. **The Court of Appeal has remarked that detention is the 'least effective and bluntest instrument' to respond to a child's offending**.[115] The court further noted that **detention can result in children 'being exposed to experiences that may wreck and disfigure a child's transition to adulthood. This is not an outcome that benefits the community.'**[116] For children who have suffered themselves in their short lives, detention is **unlikely to 'constitute a moment of enlightenment' for them**.[117]

Most detention orders are for six months or less (51.3%).[118] The Queensland Sentencing Advisory Council (QSAC) reports that whilst the overall rate of offending has decreased amongst children, the number of detention orders imposed has increased substantially in the last 10 years.[119] QSAC has observed that fewer children are appearing in court on charges, but those that do appear are charged with more offences.

7.3.7 Additional orders

A child may be subject to a range of different orders at any one time, and courts can make more than one order in respect of an offence in certain circumstances.[120]

If a court makes a sentence order, it may also make:[121]

- Restitution or compensation orders – A restitution order can only be made if the child has committed an offence that affects property, whereas a compensation order can be made to pay for loss caused to offence-affected property or to compensate a victim for injury suffered.[122] The court must be satisfied that the child has the capacity to pay, and a conviction cannot be recorded.[123]
- Orders for disqualification of driver license – If a child is found guilty of certain vehicle-related offences, the court can disqualify their driver license.[124]

Children may also be named as a respondent on a domestic violence protection order if they are alleged to have perpetrated intimate partner violence against an aggrieved person.[125] Children cannot be named as respondents in other domestic violence situations, for example, where the aggrieved person is the child's parent or another member of the child's family.[126]

7.4 Expanding dismissal powers

7.4.1 Adding a general dismissal power

In 2021/22, more than 40% of convicted children received either a reprimand or a good behaviour order as their most serious penalty.[127] This suggests that **almost half of all children who appear before the Childrens Court could reasonably have been diverted from the system** because, in all of these cases, a judicial officer concluded that no further action was required, and the child did not need to be supervised in the community.

Often, it will be inappropriate to take any further action in respect of a child's offending. Children's charges should be dismissed in as many instances as possible. Dismissal of charges should not be limited to situations where the charge was inappropriate, or the offence was trivial in nature or unproven. **Charges against children should be dismissed in any case where there is 'no useful purpose' in ongoing criminal law involvement**.[128]

Some children are 'immature' with 'not much insight into [their] behaviour, [their] responsibility for that behaviour or the consequences of [their] behaviour to others.'[129] Many children are 'followers' which may lead us to question their role in the offending and therefore their culpability. Children with speech and language disorders, and other disabilities such as hearing impairment, ADHD and autism spectrum disorders, may lack the capacity to understand the consequences of the actions or understand and participate in court proceedings.[130] Courts have recognised that in remote communities where children are bored and mixing with one another on the streets at night, it is 'inevitable that the behaviour of one of two of these would escalate into truly criminal conduct.'[131] In these cases, the offending does not 'indicate a proclivity in the applicant to commit serious offences or that [they have] any dangerous tendencies.'[132]

Compared to other states and territories, Queensland judges and magistrates have only limited dismissal powers. **In NSW, Children's Courts are empowered to dismiss a charge even if the child has been found guilty**; the court may also administer a caution to the child if it thinks fit[133] and there is no initial requirement for the court to consider whether the police should have taken alternative action, as is the case in Queensland. The Victorian *Children, Youth and Families Act 2005* empowers the court to dismiss a charge without a conviction, with or without conditions.[134]

Section 282 of New Zealand's *Oranga Tamariki Act 1989* empowers a court to discharge a young person 'after an inquiry into the circumstances of the case.'[135] In such cases, the charges are 'deemed never to have been filed.' This power is used extensively by judges to dismiss charges where punishing the child would be unfair or unjust in the circumstances. An important aspect of the New Zealand's section 282 dismissal power is that the child leaves the system with no formal record – it is as if the charge was never laid.

> Case example (NZ Youth Court, 2021): In *New Zealand Police/Oranga Tamaraki v SD*, the accused was a 15-year-old girl. She had committed a range of violent offences, including robbery, aggravated robbery and assault with a weapon, as well as theft and escaping custody. She had 'refused' to engage with her family group conference plan, which required her to write apology letters, do community work, engage with a mentor, attend counselling, return to school and comply with a curfew.[136] The charges were very serious, and the child had a history of non-compliance with orders. Yet, Judge Fitzgerald dismissed all of the charges. His Honour determined that this was appropriate in the circumstances because: 'she has done as much as she can do to try and put things right', and therefore, 'has well and truly been held accountable'; and 'there is no useful purpose in ongoing Youth Court involvement' and indeed, it 'would only continue to traumatise her, thereby increasing her risk profile'.[137]

Amending the *Youth Justice Act 1992* (Qld) to include a broad dismissal power would provide a clear option for courts to discharge children in circumstances where this is appropriate or beneficial to the child.

7.4.2 Mental health dismissals

Queensland magistrates currently have the power to dismiss a charge for a simple offence if the court is 'reasonably satisfied, on the balance of probabilities' that the child was or appears to have been, of 'unsound mind' when the offence was committed or is 'unfit for trial'.[138] Yet, this power is almost never used. One possible explanation for the under-use of mental health dismissal powers is that the current legal test for mental incapacity is too narrow. **Whilst many children have high needs, do not understand legal processes, and may have committed their offences as a direct result of a disability, they may not meet the strict legal criteria for being of 'unsound mind' or 'unfit.'**

The terms 'unsound mind' and 'unfit' are antiquated and not reflective of current knowledge or understanding of mental illness and cognitive impairment. It is not clear whether these provisions extend beyond mental illness to other conditions that might equally render a person unable to understand or appreciate the consequences of their actions, or unable to follow or participate in court proceedings, such as autism spectrum disorder.

NSW recently revised their mental health legislation and passed a new Act, the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW). Under that Act, **a magistrate has the power to dismiss a charge and discharge a defendant if 'it appears' that they have a 'mental health impairment' or a 'cognitive impairment' or both**.[139] 'Mental health impairment' is defined broadly to include a 'temporary or ongoing disturbance of thought, mood, volition, perception or memory' that would be sufficient for a clinical diagnosis, where the disturbance 'impairs the emotional wellbeing, judgment or behaviour of the person.'[140] 'Cognitive

impairment' is defined to include any person who has an 'ongoing impairment in comprehension, reason, judgment, learning or memory' resulting from damage, dysfunction or developmental delay, and this **extends to someone with autism spectrum disorder**.[141]

The NSW dismissal power is superior to that under the *Mental Health Act 2016* (Qld) – its terms accord with contemporary understandings of mental impairments; it allows for situations where the person's diagnosis is unclear, or where they have a dual diagnosis of mental illness and cognitive impairment; and enabling a magistrate to dismiss a charge if the person 'appears' to have an impairment imposes a more realistic standard of proof than requiring the court to be 'reasonably satisfied on the balance of probabilities.'[142]

Whilst judicial officers may feel more comfortable dismissing children's charges if they can attach treatment conditions to their release, **there is a risk that conditional dismissal powers may result in net-widening. Some programs impose onerous obligations that are difficult for children with cognitive disabilities and mental illnesses to comply with**.[143] Also, appropriate mental health services may not be available: few public services provide ongoing therapeutic care.[144] Whilst CYMS can provide ongoing services to some young people, children with dual diagnoses of mental illness and cognitive impairment may slip through the cracks. Children who have cognitive disabilities, but not mental illness, will not be eligible to receive CYMS services at all. On the other hand, if more judicial officers released children with treatment conditions attached, the allocation of resources to such services might follow.

7.5 Restorative justice – what's the problem?

Restorative justice conferencing is very much 'institutionalised' in Australia.[145] Restorative justice processes are popular in youth justice systems around the world, indeed some say they have 'induced a paradigm shift in global criminal justice.'[146] The United Nations has endorsed the use of restorative justice conferencing in youth justice, confirming that it is consistent with a 'best interests' approach.[147] The UN Economic and Social Council has said:

'[Restorative justice] provides an opportunity for victims to obtain reparation, feel safer and seek closure; allows offenders to gain insight into the causes and effects of their behaviour and to take responsibility in a meaningful way; and enables communities to understand the underlying causes of crime, to promote community wellbeing and to prevent crime'.[148]

Restorative justice approaches are premised on Braithwaite's theory of 'reintegrative shaming', which posits that social disapproval and forgiveness play a significant role in desistance from crime.[149] Conferencing is advanced as a productive way for offenders to manage shame and restore relationships.[150]

Restorative justice can be very effective. Indeed, the pre-conference and post-conference support offered to children can be therapeutic in itself: children receive the benefits of the conference, in understanding the impact their offending has had on any victims, as well as the supportive interventions that are delivered incidentally. However, **restorative justice approaches can also be used as a means of de-escalation, conflict resolution and as a form of reparation in everyday settings – a formal conference is not always required for the best results.**

There are some shortcomings to formal restorative justice processes. First, restorative justice conferences are extremely resource-intensive. Extensive support is provided to children who participate in a restorative justice conference – before, during and after the conference. Since the child's written consent must be obtained, much time and effort is dedicated to describing the process in an age-appropriate manner so that the child is able and willing to provide consent. Many children will require a lengthy process of preparation for the conference, so that terminology and process can be explained, and the child can be assisted to present their version of events. Youth Justice conference convenors in Queensland are highly skilled and undertake this role very effectively, however for children with disabilities or language impairments, the support of allied health professionals may also be required. It may be that the benefits that flow from restorative justice conferencing have as much to do with the pre- and post-conference support that children receive as the conference itself. Suzuki and Wood emphasise the importance of the 'preparation' and 'follow up' stages, and conclude that **conferencing is ineffective where it is merely a 'one-off' intervention that does not address the socioeconomic or family factors in a child's life**.[151]

In Queensland, many children wait months for their restorative justice conference to be held. As a result, the **'consequences' of their actions are far removed from the event itself** – sometimes the passage of time is such that the child does not remember what happened when they committed the offence and has 'moved on' since then.

Secondly, **restorative justice is not appropriate for every child**. Some children find restorative justice conferences difficult to follow because the terminology is confusing. Some children, particularly those with speech and language disorders, **may struggle to present a coherent narrative of events or articulate emotions such as remorse**.[152] Other children may not be able to feel or express empathy in a sufficiently sophisticated manner either because they have a relevant diagnoses (such as autism spectrum disorder) or because of trauma.[153] Other children will be **unable to maintain attention for long enough to engage in a lengthy discursive process** either because they have a relevant diagnosis (such as ADHD) or because of their age. There is also some evidence to suggest that restorative justice may not be appropriate for Aboriginal and/or Torres Strait Islander children. Little, Stewart and Ryan found significantly higher rates of recidivism after restorative justice conferencing amongst Indigenous children when compared with non-Indigenous children, perhaps because restorative justice is not able to address the structural causes of children's offending behaviour.[154]

Thirdly, restorative justice is not appropriate for all charges. Children are sometimes conferenced for trivial, victimless offences. **Restorative justice conferences are not appropriate for offences that are survival-related, such as shoplifting food, fare evasion or trespass.** Suzuki and Wood suggest eliminating conferencing for low level offences, such as drug possession, public nuisance and shoplifting, where there is no immediate victim.[155] Maruna and colleagues agree, noting that participants express more negative feelings about conferencing when there is no direct and personal victim.[156] **The success of restorative justice conferencing may also be compromised by the presence of police at the conference**, especially for children who have had adversarial relationships with police officers.

Whilst the available research confirms high levels of satisfaction with restorative justice conferencing amongst children and victims, and indicates that restorative justice conferences can be successful in reducing offending, many scholars remain critical of the use of restorative justice conferencing in youth justice matters. For example, Goldson and Muncie note that restorative justice conferencing is 'predicated on assumptions that children and young people should ultimately accept responsibility and atone' for their offences.[157] The idea is that a 'remorseful' child and a 'receptive' victim come together to engage in a dialogue focused on 'repair'.[158] Yet, this **over-simplifies the concepts of 'offender' and 'victim.'**[159] As McAra and McVie note, there is no neat distinction between 'victims' and 'offenders' in youth justice – many 'offenders' will have been victims themselves.[160] There is a profound power imbalance between the child on one hand and 'the system' on the other,[161] and the process of 'shaming' that underpins many restorative approaches may be experienced by the child as 'disintegrative' rather than 'integrative'.[162] For some children, there is a **cruel irony in being asked to apologise** or make reparation for wrongdoing.[163] As Judge Fitzgerald explains:[164]

'People do comment critically about what they see as a lack of remorse and sympathy for victims… Apologising meaningfully does not come easily to those who have never had such things taught or modelled for them… It is no wonder to me that [L] comes across sometimes as an angry young woman who could not care less. However, I do not judge her that way. If I had been through what she has, I think I would present in much the same way.'

Cunneen and Goldson have questioned the assertion that restorative justice results in desistence from offending. They observe that reduced offending has only been associated with restorative justice conferences in the context of minor previous offending, suggesting the child may have desisted regardless.[165] **Restorative justice approaches may be most effective when they are applied in real time as an alternative to arrest or charge, rather than as a sentence order**.[166]

An assessment process should be undertaken before a decision is made to refer a child for restorative justice conferencing to ensure this is appropriate in the circumstances. However, in practice, police and courts frequently make referrals for restorative justice processes before an assessment process has taken place. Some referrals are returned because the referral was inappropriate, and where all parties agree that the order should be discharged. Sometimes, the consequence of an inappropriate referral is that the child fails to attend the conference, or fails to comply with the agreement, and receives a more serious penalty for the offence as a result. It has been suggested that **restorative justice should only be used where there is a 'good chance of success', rather than as a default option or 'catch-all' response**.[167]

7.6 Diversion programs

7.6.1 Diversion programs as an alternative to restorative justice conferencing

Rehabilitative sentence orders should be 'tailored to the individual needs *and abilities* of a young person' rather than adopting a 'one-size-fits-all format'.[168] A restorative justice referral may not provide the flexibility that is required. The benefits of restorative justice conferencing – diversion, dialogue and support – could be achieved in other ways.[169]

'Diversion programs' could instead be the main diversionary pathway for children. Police officers and courts could divert children to a 'diversion program' and decide later whether that should involve a restorative justice process. Completion of a diversion program could involve one or more of a range of activities, including:

- participation in a restorative justice conference;
- participation in programs like vehicle programs, on-country programs, mentoring programs or educational programs;
- participation in therapy or treatment, including drug diversion programs, mental health treatment or speech therapy; or
- participation in Family-Led Decision Making;

Once children were referred to a 'diversion program', youth justice officers could undertake an assessment to determine which of these options is most appropriate considering the nature of the offence and the child's individual circumstances.

7.6.2 Diversion orders as a sentence order

At the same time, 'diversion orders' could be added as a sentencing option in section 150(1) of the *Youth Justice Act 1992* (Qld). This would allow a court to sentence a child to receive programs and treatment under the supervision of youth justice officers.

A similar approach is taken **in the UK where courts can impose 'Referral Orders' and 'Youth Rehabilitation Orders'**.[170]

- A Referral Order is a referral to attend a Youth Offender Panel, comprised of two trained community volunteers and one member of the local Youth Offending Team.[171] A contract is entered into where the child commits to certain activities to make up for any harm caused and address the causes of the offending. Such activities might include repairing any damage caused, re-engaging with education, training or employment, or engaging in victim-offender mediation.[172] The order must be for a period of three to 12 months, and regular panel meetings are held to monitor compliance and provide ongoing support to the child and family. The contract must be expressed in such language as the child can understand. If the contract is complied with, the order is discharged.
- A Youth Rehabilitation Order is an order that imposes rehabilitation requirements on young people who are convicted of an offence.[173] Requirements under a Youth Rehabilitation Order can include activity requirements, program requirements, supervision requirements, unpaid work, curfews, drug treatment and testing requirements, education requirements and electronic monitoring requirements.[174]

In the UK, most children with proven offences are sentenced to either a Referral Order (65%) or a Youth Rehabilitation Order (34%). Children's detention rates are much lower in the UK than in Queensland: in England and Wales, only 1.4 children per 10,000 are in detention on an average day compared with 4.7 in Queensland.[175]

Canada's 'extra-judicial sanctions' are another form of diversion order that provides a viable model. **Extra-judicial sanctions are aimed at providing the child with an opportunity to redress the harm caused by the offence, and can include mediation sessions, community service or participation in a program**.[176] The child is referred to the youth probation office, or another suitable approved agency, and a youth worker there decides whether an extrajudicial sanction is appropriate and which sanction should be imposed. If the young person completes the extrajudicial sanction, their charge must be dismissed. The court may also dismiss the charge if the young person partially completes the extrajudicial sanction and 'in the opinion of the court, prosecution of the charge would be unfair'.[177]

Graffiti removal orders and community services orders could be 'collapsed' into a diversion order.[178] That is, a child could be diverted to, or sentenced to, a diversion order but, as part of that order, the child might be ordered to remove graffiti or undertake community service. The benefit of referring a child to a graffiti removal program or community service as part of a diversion order is that youth justice officers will have conducted an assessment to determine whether such community work is appropriate for that particular child. **Police and courts may not have all of the information they require to assess a child's suitability for community work**. For children with disabilities, community work may be inappropriate. Past research has shown that for children without family support, **graffiti removal and community service orders can be difficult to comply with**.[179] Each year, around 25% of community service orders are breached, and only 60% are successfully completed.[180]

7.6.3 Diversion programs

Diversion programs and diversion orders allow for all kinds of initiatives and programs to be trialled and implemented without the need for a legislative amendment. Some innovative programs are currently being trialled in Queensland, and several others are detailed in the literature.

Vehicle programs for 'joy-riding' offences

'Joy-riding' is not a new phenomenon. In the past, stealing a car involved 'hot-wiring' the vehicle. In modern cars, this is not possible, so the additional crime of breaking and entering the house to obtain the keys is a necessary step to gain access to the vehicle.

At present, there is substantial moral panic concerning children who enter houses to obtain car keys, and then proceed to steal (or unlawfully use) cars and QSAC has reported that this type of offending does seem to be increasing. In 2019/2020, the number of children and young people charged with motor vehicle theft offences in Queensland increased by 9.9%,[181] and in the 15 years from 2005/06 to 2019/20, the number of children sentenced for the offence of unlawful use of a motor vehicle doubled.[182] Over the same period, children and young people accounted for 28% of all people sentenced for unlawful use of a motor vehicle in Queensland.[183] Unlawful entry with intent and motor vehicle theft comprised around 30% of all finalised charges against children in 2021/22.[184] More than half of all children sentenced for unlawful use of a motor vehicle are Indigenous.[185]

This type of offending is a particular problem in north Queensland. Between 2005/06 and 2019/20, Far North Queensland had the highest rate of unlawful possession of a motor vehicle offences, followed by North Queensland.[186] South East Queensland had the lowest rate of this kind of offending, yet there is still concern within the community about it.[187]

To respond appropriately, it is important to understand the motivations behind these offences. Interviews with Indigenous boys who have committed joyriding offences suggest that they are motivated by feelings of 'physical isolation' and 'boredom'.[188] They say they have nothing to do in their spare time, and cannot afford to travel to urban areas that provide more opportunities for 'entertainment and access to leisure sites'.[189] Children engage in joyriding 'for the fun' of it.[190] Boys' involvement in joyriding is also heavily motivated by their peers – it is generally viewed as a group activity, and even a 'rite of passage'.[191] It is said that performing risky driving manoeuvres shows they are 'a man'.[192] Children who commit joyriding offences do not consider their actions to be a serious crime, and the threat of imprisonment does not deter them.[193] When children 'break and enter' for the purpose of accessing keys, they do not do so with the intention of harming a person. Rather, this behaviour is directed at obtaining the vehicle.

Adolescents experience a 'maturity gap', that is, there is a mismatch between their physical and social age.[194] They are biologically mature enough to experience sexual relationships and contribute to the labour force, but socially they are encouraged, or even required, to delay these adult experiences and remain dependent upon their carers until well into their twenties. This 'role vacuum' results in adolescents seeking out ways to achieve independence, 'look older' and practise maturity.[195] They are motivated to engage in behaviours and activities that are reserved for adults such as driving cars, staying out late and using alcohol and drugs. Decisions about offending are highly influenced by the individual's social world.

If children commit joyriding offences because they lack 'economic and social power',[196] then **desistence is reliant on the establishment of prosocial alternatives, and increasing children's access to opportunities through education, employment and social circumstances**.[197] One study found that the death of a known person from joyriding was a key factor convincing young people to desist from offending, which could make restorative justice an effective intervention. Another intervention that has proven to be successful is vehicle programs, that is, programs that provide children with opportunities to learn to drive, and practise driving in a lawful way. Examples of such programs include the PCYC program 'Braking the Cycle', the Salvation Army's 'Drive for Life' program and learner driver programs operating within Indigenous communities.[198] In Tasmania, a program called 'U-Turn' diverted young people who had committed vehicle theft offences into a car maintenance training course which allowed them to obtain a Certificate 1 in Automotive.[199]

Family group meetings and Family-Led Decision Making

Family group conferences are a central feature of New Zealand's youth justice system – a family group conference must take place if an offence is 'not denied' by a child and the offence is too serious for diversion.[200] At the family group conference, a plan for the child is prepared following a conversation between all participants. Plans are presented to the Youth Court for approval, and the court monitors the plan until it is completed.[201] Proceedings against the child are withdrawn (if initiated in the first place) once the family group conference plan has been completed and the child will not receive a criminal record.[202] Practitioners and children generally report that family group conferences are inclusive, and represent an effective intervention for children who commit offences.[203] Whilst family group meetings are used extensively within the child protection system in Queensland, they are not routinely used in youth justice settings.

Family-Led Decision Making is a similar process that is currently being trialled in child protection and youth justice settings in Queensland. **Family-Led Decision Making facilitates the involvement of Indigenous families and communities in decision-making by allowing families to meet with members of their community first to develop a plan, and then to work with the Department to implement that plan.** Family-Led Decision Making has been operating in Queensland since 2016, when it began as a partnership with the Department of Child Safety. It involved Aboriginal and/or Torres Strait Islander-controlled organisations working with families and the Department of Child Safety to develop a plan to provide for the protective needs of children considered to be at risk. Family-Led Decision Making empowers Aboriginal and/or Torres Strait Islander people to take some control back over their family and community lives. Aboriginal and/or Torres Strait Islander-controlled organisations assist families to identify concerns, map out sources of support, and develop family and community-led solutions to the protective concerns. Meetings are held in a place that is culturally safe for the family, and co-convened by Aboriginal and/or Torres Strait Islander people and the department.[204]

A 2017 evaluation of Family-Led Decision Making found that families felt more comfortable, and opened up more, in these meetings.[205] Through yarning, families and community members were able to develop strategies to maintain care of children within their communities.[206]

Family-Led Decision Making was most successful when decisions had not already been made, and there was a genuine commitment to community-led interventions as an alternative to initiating formal processes.[207] The 'preparation phase' – where families meet with Aboriginal and/or Torres Strait Islander convenors without the department – was considered particularly important because it empowered families to do their own safety planning and draw on family and community resources to maintain care of their children.[208] The evaluation reported that children and extended family members also attended the meetings, unlike regular family group meetings where children rarely attend and parents typically attend without family support.[209] Family-Led Decision Making works because the decision-making body is considered legitimate by those affected.[210] Critics of restorative justice for Indigenous children have suggested that 'intercultural restorative justice' which takes place on country, and focuses not on 'personal responsibility' but rather on 'truth telling', trauma-informed practices, wrap-around support and a 'strengths-based approach' would work best for Aboriginal and/or Torres Strait Islander children.[211] Family-Led Decision Making answers this call for culturally safe restorative justice practices.

'On Country' programs

On country programs involve activities done 'on country', usually in the bush or on farms, that aim to create or re-establish social, traditional and cultural bonds, and strengthen individual and collective pro-social identity.[212] On country programs can be rehabilitative because they remove the child from their usual environment, which may be unsafe, and surround them with positive role models including elders and community leaders, and mentors.[213] They are successful in **supporting children to reconnect with culture, take a break from their lives (especially peers and illicit substances) and rethink their plans for the future**. They are particularly important for Indigenous children. On country programs can be short-term – in the form of camps – or they can involve longer-term residential placements.

There are several examples of successful on country programs currently in operation:

- The Mona Aboriginal Corporation in Mount Isa provides cultural education and engages children in cultural activities such as hunting and gathering, mechanical training and skills, and animal husbandry.[214]
- Warlpiri Youth Programs in the Northern Territory runs programs that enable children to be taught language on country by elders.[215] They have a 'healing focus' and provide individual case management to determine children's strengths and set goals.
- The Yiriman Project in Western Australia runs both short camps (that last 10 days) and 'caring for country' programs that place children with Aboriginal rangers for two to three months at a time.[216]
- Queensland Youth Justice is currently running a pilot on country program in Cairns, Mount Isa and Townsville for high-risk children for up to two months.[217]

Nature-based programs are another successful intervention used with children who commit offences. Nature-based programs include wilderness therapy, animal-assisted intervention, care farming and horticultural interventions. Wilderness therapy provides children with the opportunity to learn outdoor skills and engage in hiking and camping, where children work in small groups to build trust and foster teamwork skills. Animal-assisted interventions incorporate care of farm animals, pets or shelter animals and have been found to provide therapeutic benefits for young people.[218] Care farming and horticultural interventions involve children in farm work, landscaping and gardening.

There is emerging scientific research demonstrating that **contact with natural environments and outdoor activities are associated with improvement in physical and mental well-being, cognitive development and social interactions**.[219] In a recent meta-analysis of nature-based programs for vulnerable children, Overbey and colleagues found they can contribute to the improvement of psychosocial and behavioural issues, and these benefits are maintained post-program.[220] interpersonal skills, decision-making skills and self-esteem.

Queensland's experiment with bootcamps demonstrated that whilst the harsh conditions and militaristic style of bootcamps is not associated with reduced offending or positive outcomes for children, providing opportunities for physical activity, interaction with animals, connection to nature and teamwork can promote children's emotional well-being.[221] In its review of Queensland's bootcamp program, the Department of Justice and Attorney-General found that **activities such as running, bushwalking and personal training improved children's health and increased self-esteem**.[222] Horsemanship and stockman skills training taught children about discipline, responsibility and succeeding. Working with animals such as horses and cattle helped build confidence amongst children and acted as a form of therapy.[223] The report also found that team building activities such as football, hiking, canoeing and camping improved children's personal and interpersonal skills, and fostered positive relationships.

Speech therapy

Delivering speech pathology services to children in the youth justice system has been found to bring about positive changes to children's lives, indeed Woodward and colleagues describe **speech therapy as a 'new frontier' in youth justice**.[224] Speech and language difficulties amongst children in the youth justice system are often hidden or misinterpreted.[225] By observing the work of speech pathologists in detention centres, other practitioners have come to realise that there is a connection between speech and language difficulties and many of the behavioural and communication problems exhibited by children who commit offences.[226]

The benefits of speech pathology for children who commit offences extend beyond 'improved communication skills' and include 'increased confidence' and 'improved behaviour'.[227] It has been suggested that these benefits may lead to reduced recidivism.[228] Some have argued that such therapies are coming 'too late' in these children's lives, however research has shown that measurable improvements can still be achieved in adolescence.[229]

Mentoring programs

Youth mentoring programs aim to foster positive development in children by building relationships with slightly older people, often those who have experienced the same kinds of hardships in life. **Mentors assist children to develop a hope for the future as they observe that someone else has been through difficult times and come out the other side**.[230] Some mentoring programs focus on a specific activity, such as a sport, whilst others provide general role modelling and social support.[231]

In New Zealand, the Youth Court can make an order that a child attend a specific mentoring program.[232] Mentoring programs can last for up to 12 months and the organisation providing the mentoring services is required to provide a report to the court within the first six months of the order being made.[233] Mentoring programs can also be ordered as part of a child's family group conference plan – in fact, every family group conference must consider whether a child or young person should be required to attend a mentoring program.[234] Completion of a mentoring program can form part of a child's Supervision Order or Supervision with an Activity Order under the Act.[235]

The New Zealand Ministry for Children has said that the intended long-term outcomes of youth justice mentoring programs are to 'reduce serious and persistent re-offending', 'improve life outcomes for high risk children' and engage children in education, training or work.[236] This is achieved through the formation of a 'trusting and respectful relationship' between the young person and their mentor.[237] Mentoring programs must create an 'Individual Mentoring Plan', detailing the nature of the program, the young person's goals in the program and their 'strengths and needs'.[238] The Plan is to be 'jointly prepared' by the child and their mentor, and must be reviewed every 10 weeks.[239]

The potential value of mentoring programs in youth justice has been recognised in Australia. The review of the NSW Youth Koori Court Pilot recommended that Aboriginal and/or Torres Strait Islander people in their early twenties be recruited to act as mentors to Youth Koori Court participants.[240]

Education programs

Whilst it would be ideal for children to re-engage with mainstream educational environments, this is not always appropriate for children in the youth justice system. They may have missed years of schooling and have significant gaps in their skills and knowledge. Rigid requirements related to uniforms and attendance may be difficult for them to comply with. Often these children require a more flexible education alternative. 'Flexi-schools' can work well for these children, however places are limited. Also, formal education is not always the best alternative for older children. It can be more beneficial to connect older adolescents with vocational training and employment opportunities.

The 'T2S' (Transition to Success) program offers a mix of therapeutic and education services to children in the youth justice system, and it has successfully re-engaged a number of children in education and training. The program assists children to fill gaps in literacy and numeracy and, through partnership arrangements with corporations and other agencies, matches children with employment opportunities in the community. This is an important program that should be expanded.

7.6.4 Conclusions about diversion

Research has shown that **program-based orders – with embedded restorative and family-led elements – provide a viable alternative to detention or custodial remand**. Community-based orders lead to lower recidivism rates than custodial sentences.[241] Wilson and Hoge found that intervention programs are particularly effective in preventing recidivism amongst medium- to high-risk young offenders.[242] However, for low-level offenders, diversion is more effective in preventing recidivism.

It is important to ensure that program or activity-based orders do not have a net-widening or ratchetting-up effect. Children should be diverted from the system whenever possible at the earliest possible opportunity. It is important that police diversion options continue to expand, and that their use as an alternative to arrest and charge increases. Likewise, more children should have their charges dismissed by courts where a criminal process serves no useful purpose.

Nolan and colleagues have said that **community orders should only be imposed where completely necessary and unavoidable**, and should be accompanied by 'full explanations of the requirements of such orders and the costs of non-compliance' taking into account the 'child's age, developmental capacities and likely limited knowledge and experience of measures of this nature; potential fears and hopelessness about successfully completing orders; and how the barriers to successful compliance can be reduced and what support may be required'.[243]

In their 2019 report on adult sentencing, QSAC emphasised that any conditions attached to a community corrections order should be proportionate to the gravity of the offence, sufficiently explained to the person, and that and no more conditions should be added than are necessary to achieve the purposes of the order.[244] QSAC also said that the court should have to consider whether the person has the ability to comply with the order taking into account their personal circumstances. This is particularly important for children who are reliant on adults for transport and housing.

It should also be remembered that the success of community-based orders is contingent on the existence of **high-quality relationships between children and youth workers**.[245] Having someone in their life who cares can make all the difference to these children.[246]

There is a risk that by increasing the use of community-based orders, breaches will increase, leading to higher rates of remand.[247] Resources may be better spent on **ensuring appropriate options for housing and support for criminalised children in the community**. If their survival needs are met, children are likely to desist from offending.

7.7 Murri Court and other specialist children's lists

Problem-solving courts like Murri Courts can support defendants to make changes in their lives to prevent future offending, However, lengthy adjournment model courts do not translate well to a youth justice context. These courts involve a significant time commitment, and require children to attend court on a regular basis which has, itself, been found to increase children's risk of future offending.

The existing Youth Murri Courts and the High-Risk Youth Court seem to be working well for some children. They could be used effectively as an **alternative to detention** – either custodial remand or a detention order – given the substantial time commitment, surveillance and monitoring they involve. If they were added as sentence orders in section 175(1) of the *Youth Justice Act 1992* (Qld), this would remind judicial officers that requiring a child to proceed through a specialist court requires a substantial time commitment, and therefore **should be used as a sentencing option, rather than a diversionary pathway.**

There are several reasons to pause before recommending that Youth Murri Courts, or other adjournment-model courts, be 'rolled out' more broadly in a youth justice context:

- The Murri Court process is experienced as onerous by defendants. This is especially true for children. The formal Murri Court process requires defendants to appear before the court multiple times to have their progress monitored. Defendants can experience this as intrusive and time consuming, and some report that they would rather get the matter 'over and done with'.[248] Proceedings that deal with past offending can become meaningless to children if too much time passes between the incident and the penalty. It can also set children up to fail if there is an expectation that they continue to appear before the court when they may have no means of getting there, and may forget appointments.
- Adjournment model courts rely on the existence of a well-resourced social service sector. The 2019 Murri Court review found that specialist services required by participants were unavailable or inaccessible 50% of the time.[249] The success of Murri Courts relies on the capacity of community services to provide treatment and other supports that defendants require.
- Requiring a guilty plea and written informed consent can create barriers to participation, especially for Indigenous children. The 2019 Murri Court review noted that requiring a guilty plea can make the referral process coercive, and recommended that the requirement to plead guilty be removed.[250]
- Not all elders and respected persons are remunerated, yet they are expected to participate in mentions and assessments, coordinate service-delivery and write reports.
- Some communities do not have a community justice group, yet the Murri Court Practice Direction assumes that the Murri Court will be coordinated by the local community justice group. Community justice group representatives are relied upon to ensure children and families appear, however this requires a degree of case management which community justice groups may not have the resources to provide.

Having said this, the influence that elders can have on Aboriginal and/or Torres Strait Islander young people should not be under-estimated. **Children often have a great deal of respect for the elders**, and the elders who are involved in Youth Murri Courts are extremely dedicated to the children and their families. Reviews have identified the role of elders as essential to the success of the Murri Court process – not only for the children, but also for magistrates who rely on elders for information and advice.[251] The involvement of elders has broader ramifications beyond the court, providing social support to mothers and facilitating community connections. Elders should be strongly encouraged to be more involved in Queensland's Childrens Courts. Since 50% of children who appear in court are Aboriginal and/or Torres Strait Islander – and, in certain parts of Queensland, almost all children who appear before the Childrens Court are Indigenous – the court should be designed with their cultural needs in mind.

7.8 Secure schools instead of detention?

There is no doubt that a period of **detention is harmful to children because it exacerbates existing vulnerabilities and significantly increases the chances they will offend again**.[252] High rates of child imprisonment do not translate into lower crime rates; rather imprisonment makes existing social problems worse, impacts children's psychosocial development, 'routinises cultures of offending, violence and substance use' and 'leads to stigma, discrimination and poverty.'[253] Separating children from their families and communities adversely affects the development of children's personality regardless of the quality of conditions or relationships with staff.[254]

The *Youth Justice Act 1992* (Qld) emphasises that detention should only be used as a last resort.[255] In Queensland, very few children are sentenced to detention. Most children in detention are on remand. Of course, the fact that so many children serve lengthy periods on remand means that many children who might otherwise have been sentenced to detention are not because the time they have already served is taken into account in sentencing.

Some children say they would rather be in detention than in the community. It is not uncommon for children to commit offences in order to be put in detention. **It is important that we identify what it is about detention that makes it so attractive to these children.**

If children are to be detained, we should take advantage of the opportunity this presents to ensure they receive the assessments, interventions and treatment that they need so they can be returned to the community in a better position than when they left it. In his 2016 review of the England and Wales youth justice system, Taylor recommended that detention centres be replaced with 'secure schools' – small facilities, located close to home – where the focus is on education and training.[256] McCausland and Baldry also suggest a **shift in focus from incapacitation to rehabilitation**; they argue that there is an urgent need for alternative secure, therapeutic care options in the community for children with disabilities.[257] Lynch proposes that youth detention be considered similar to forced treatment for people with mental illness; it should not be seen as a punitive response, rather its purpose should be to **provide treatment and prevent harm** to self and others.[258] Any time in detention should be directed towards providing treatment, education and other supports sufficient to enable the child's safe release. Taylor says that secure schools should be led by school principals and staffed by specialist teachers, not corrections officers. Much could be learned from special schools, where staff already manage challenging behaviour of students without the presence of security guards.

Taylor suggests that short sentences be abolished for children. He argues that **children should only receive a period of detention in 'exceptional circumstances'** for example, where they 'pose a significant risk to the public.'[259] Taylor says that children who are detained should be placed in detention for a 'meaningful period of time', long enough to allow for intervention and change to occur.[260] He observes that for many children, **short sentences simply replicate their experiences in out of home care placements – they do not act as a deterrent and they do not achieve any rehabilitative goals.** Taylor suggests that any period of detention be planned around school term dates to minimise any disruption to their education, and to ensure that educational goals are able to be met during the period of their detention.

Currently, Queensland children who live in regional and remote areas are sent far away from home when they receive a period of detention, and this is a particular concern for Aboriginal and/or Torres Strait Islander children.[261] Being detained a long way from home limits opportunities for reintegration and regular visits from friends and families. **Smaller secure schools close to their communities would facilitate continuity of care and allow resettlement plans to be made well in advance of the child's release.**

7.9 Recording convictions

Both the *Youth Justice Act 1992* (Qld) and associated case law suggest that convictions should not ordinarily be recorded against children because this may impact on the child's opportunities for rehabilitation, for example by limiting their employment prospects.[262] The United Nations Committee on the Rights of the Child suggests that all child convictions be spent once a child turns 18.[263]

A court cannot record a conviction if a reprimand or good behaviour order is imposed.[264] In other cases, the court may record a conviction, however it must first consider the nature of the offence, the age of the child, any previous convictions the child has, and the impact of recording a conviction on the child's rehabilitation and future employment prospects.[265] Regardless, a finding of guilt against a child forms part of the child's criminal history for the purpose of subsequent sentences.[266] Cautions do not form part of the child's criminal history, but they can be taken into account by police and courts when making decisions about subsequent cautions and referrals to restorative justice.[267] This breaches a child's right to the presumption of innocence in circumstances where no offence was proven.

7.10 Breaches

It is not a criminal offence for a child to breach a sentencing order in Queensland.[268] However, if a child is proceeded against for a new offence, the court may have regard to the breach when determining the sentence for the new offence.[269]

If a child breaches a community-based order, but has not been charged with a new offence, youth justice officers may apply to the court for a finding that the child has breached the order.[270] Youth justice officers retain discretion as to whether to initiate breach action against a child. It has been observed that there is a culture of non-tolerance and a readiness to breach children for non-compliance with community orders, and that this significantly influences rates of custodial remand and custodial orders.[271] The statistics confirm this. Breach rates are consistently high in Queensland – only around 60% of community-based orders are successfully completed and around a quarter of children on community-based orders are subject to breach action.[272] In 2021/22, there were 278 finalised charges against children for a 'breach of justice order' offence.[273]

When youth justice officers apply to the court for a finding that the child has breached the order, the court can respond in various ways, depending on the order that has been breached.

- If a child breaches a community service order, the court is empowered to take certain action such as extending the period of the order, increasing the number of service hours or varying certain requirements.[274]
- No default period of imprisonment can be set in respect of a fine. If a child fails to pay a fine, the court can take no action, provide the child with more time to pay, or cancel the fine and impose a community service order.[275]
- At time of writing, if a child breaches a conditional release order, the court may revoke the order and order the child to serve the period of detention, or provide the child with further opportunity to satisfy the requirements of the order, which may involve varying the order or extending the time period.[276]

Youth justice officers (or the child themselves) can apply to the court for a community-based order to be varied or discharged, however such an application cannot be made on the basis that the child has breached the order.[277]

If a child commits a new offence while they are subject to a community-based order, and it is an indictable offence, the court may discharge the order and resentence the child, or take various others kinds of action depending on the nature of the order (including extending the period of the order, or increasing the number of hours' work).[278]

Of course, the most effective way of reducing the risk of children breaching their orders is to ensure the orders, and any conditions attached, are appropriate and realistic in the first place. Children may decide that the risk of being sanctioned is outweighed by their own reasons for breaching the order, especially where the end result is uncertain. Most often, it will be most appropriate to take no action when a child breaches an order. The adults who imposed the order may be just as blameworthy as the child, particularly where the order was too onerous for the child to comply. Predictable responses to reoffending for children could be devised that are therapeutic or supportive in nature. For example, the child might be required to meet with a youth justice worker to explain what happened, or attend an appointment with a trusted service provider, or participate in an informal restorative process.

7.11 Final remarks

The key principles that guide our youth justice system should be:

- Consistent with a 'minimal intervention, maximum diversion' approach, children should be diverted by police and the courts wherever possible.
- Courts should be able to dismiss charges and discharge children if they see no useful purpose in proceeding.
- A child's personal circumstances, including any history of trauma, child protection involvement, their cultural circumstances and history, and any disabilities they have or may have, should be taken into account when dealing with their charges. Often, a child will not have understood or appreciated what the consequences of their actions would be. A punitive response will not achieve the goal of community safety in such cases.
- If children cannot be diverted pre-charge, they could receive a diversionary order from a court. If courts were able to impose a 'diversion order' (similar to the UK and Canada), this would enable youth justice officers to undertake an assessment and decide, in consultation with the child and the child's family, what their intervention plan should look like. For some children, a restorative justice conference could be held. For others, participation in a family group conference or Family-Led Decision Making might be appropriate. Others might be asked to participate in a program associated with their offending (such as a vehicle program), or to engage with therapeutic services.
- If children fail to comply with their orders, their plan should be reviewed. The child's breach may say more about the plan than the child.
- Detention should be used as a last resort and only when all other options have been considered and ruled out. Detention centres should be rethought. They are currently extremely expensive to run – $1901 a day per child. Smaller facilities with an educational and treatment focus would be more cost-effective and more likely to result in a child's rehabilitation.
- Children's protective needs should be met in the community. More housing and community supports are needed to ensure children do not need to offend to obtain the necessities of life. Children should not need to commit offences in order to be 'housed' in detention.
- Families should be supported to retain care of their children to avoid child protection intervention, and all the trauma that goes along with it.

If community safety truly is the goal of the youth justice system, then our focus should be on protecting the rights of these vulnerable children, providing them with the nurturing they need, and giving them hope for the future.

Endnotes

1 See further L Forde, 'Welfare, Justice and Diverse Models of Youth Justice: A Children's Rights Analysis' (2021) 29 *The International Journal of Children's Rights* 920; H Kemshall, 'Risks, Rights and Justice: Understanding and Responding to Youth Risk' (2008) 8(1) *Youth Justice* 21; N Lynch and T Liefaard, 'What is Left in the "Too Hard Basket"? Developments and Challenges for the Rights of Children in Conflict with the Law' (2020) 28 *International Journal of Children's Rights* 89; R Smith, 'Welfare versus Justice – Again!' (2005) 5(1) *Youth Justice* 3.

2 Committee on the Rights of the Child, *General Comment No. 24 on children's rights in the child justice system*, CRC/C/G/24 (18 September 2019) [46].

3 *R v SCU* [2017] QCA 198 [55].

4 B Applegate and R K Davis, 'Public views on sentencing juvenile murderers: The impact of offender, offense and perceived maturity' (2006) 4(1) *Youth Violence and Juvenile Justice* 55; C Barretto, S Miers and I Lambie, 'The views of the public on youth offenders and the New Zealand criminal justice system' (2018) 62(1) *International Journal of Offender Therapy and Comparative Criminology* 129, 130.

5 *R v SCU* [2017] QCA 198 [79].

6 *Penalties and Sentences Act 1992* (Qld) s 9(1).

7 *R v SCU* [2017] QCA 198 [150].

8 *Youth Justice Act 1992* (Qld) s 2(e); see also *R v E; ex parte Attorney-General* [2002] QCA 417.

9 *Youth Justice Act 1992* (Qld) s 150(1), (2).

10 *Penalties and Sentences Act 1992* (Qld) s 9(2).

11 *Youth Justice Act 1992* (Qld) sch 1.

12 *Youth Justice Act 1992* (Qld) s 150(2)(d).

13 *Youth Justice Act 1992* (Qld) s 151.

14 *R v SCU* [2017] QCA 198 [117], [125].

15 Victorian Aboriginal Legal Service, *Submission to Sentencing Act Reform Project*, 2020, 10.

16 See also Judicial Commission of New South Wales, *Equality Before the Law Bench Book*, [6.3.1].

17 K Richards and L Renshaw, *Bail and remand for young people in Australia: A national research project*, 2000 (Australian Institute of Criminology), 68.

18 E Baldry et al, *A Predictable and Preventable Path: Aboriginal People with Mental and Cognitive Disabilities in the Criminal Justice System*, 2015, 110. Of course, incarceration does not guarantee that such treatment will be received: see R McCausland and E Baldry, 'I feel like I failed him by ringing the police': Criminalising disability in Australia' (2017) 19(3) *Punishment & Society* 290.

19 T Walsh and R Fitzgerald, *Logan Community Justice Centre: Community Consultation and Design Report,* 2020 (University of Queensland).

20 *Youth Justice Act 1992* (Qld) s 149, 175, 176A, 181. Note that restitution and compensation orders are not considered to be 'sentence orders': see generally ss 175, 181.

21 *Youth Justice Act 1992* (Qld) s 21.

22 *Youth Justice Act 1992* (Qld) s 24A. Note the police officer is considered to be the referring authority in such cases: s 24A(4).

23 *Mental Health Act 2016* (Qld) ss 22, 170, 172. A 'simple offence' is any offence (indictable or not) that is punishable, on summary conviction before a Magistrates Court, by fine, imprisonment, or otherwise: *Justices Act 1886* (Qld) s 4.

24 As to the definitions of 'mental infirmity' and 'mental disease' see *R v Falconer* (1990) 171 CLR 30; *Re Pitt* [2000] QCA 30; *A-G (Qld) v Bosanquet & Ors* [2012] QCA 367; *LAI v Director of Public Prosecutions (Qld) & Anor* [2016] QCA 287; *SCN v Director of Public Prosecutions (Qld) & Anor* [2016] QCA 237.

25 *R v Presser* [1958] VR 45; *Young v Director of Public Prosecutions (Qld)* [2019] QCA 247; *R v Cain* [2010] QCA 373; *Berg v Director of Public Prosecutions (Qld)* [2015] QCA 196.

26 *Mental Health Act 2016* (Qld) s 173, 177.

27 *Mental Health Act 2016* (Qld) s 174(2). For serious offences, the magistrate can transfer the matter to the Mental Health Court: ss 175(2), 176.

28 Note the court must also be reasonably satisfied that 'the nature and circumstances of the offence create an exceptional circumstance in relation to the protection of the community' and 'the making of a forensic order or treatment support order for the person may be justified': *Mental Health Act 2016* (Qld) s 175. Note also the provisions of the *Youth Justice Act 1992* (Qld) that allow a child to have an indictable matter dealt with summarily.

29 *Youth Justice Act 1992* (Qld) s 31(2).

30 *Youth Justice Act 1992* (Qld) s 35(1).

31 *Youth Justice Act 1992* (Qld) s 36.

32 *Youth Justice Act 1992* (Qld) s 31(3).

33 *Youth Justice Act 1992* (Qld) s 24A.

34 *Youth Justice Act 1992* (Qld) s 24A(4).

35 *Youth Justice Act 1992* (Qld) ss 162(1), 164.

36 *Youth Justice Act 1992* (Qld) s 162(1).

37 *Youth Justice Act 1992* (Qld) s 164(2).

38 *Youth Justice Act 1992* (Qld) ss 162(2), 165.

39 *Youth Justice Act 1992* (Qld) ss 162(2), 165. The Queensland Court of Appeal has held that it is an error to not consider referring the child to restorative justice once a finding of guilt is made: see *R v PBD* [2019] QCA 59, [32] and *R v PBE* [2019] QCA 185, [28]-[29].

40 *Youth Justice Act 1992* (Qld) s 165(6).

41 *Youth Justice Act 1992* (Qld) s 165(3).

42 *Youth Justice Act 1992* (Qld) s 175(1)(db).

43 *Youth Justice Act 1992* (Qld) s 192A.

44 Restorative Justice Evaluation Team, *Twelve Month Program Evaluation: Restorative Justice Project*, 2018 (Department of Child Safety, Youth and Women, 8.

45 Childrens Court of Queensland, *Annual Report 2021/22*, 24-25.

46 Childrens Court of Queensland, *Annual Report 2021/22*, 37; Childrens Court of Queensland, *Annual Report 2020/21*, 24, 48.

47 Childrens Court of Queensland, *Annual Report 2021/22*, 24; Childrens Court of Queensland, *Annual Report 2020/21*, 24.

48 Restorative Justice Evaluation Team, *Twelve Month Program Evaluation: Restorative Justice Project*, 2018 (Department of Child Safety, Youth and Women) 37, 41.

49 Ibid 39.

50 Ibid 40.

51 Ibid 42.

52 Ibid 42.

53 Ibid 54-55.

54 Ibid 43.

55 *Youth Justice Act 1992* (Qld) ss 24(1), 24A(3), 32, 164(3), 165(3).

56 Restorative Justice Evaluation Team, *Twelve Month Program Evaluation: Restorative Justice Project*, 2018 (Department of Child Safety, Youth and Women) 31.

57 *Youth Justice Act 1992* (Qld) s 164(2)-(3).

58 *Youth Justice Act 1992* (Qld) s 165(3).

59 *Youth Justice Act 1992* (Qld) s 238.

60 *Youth Justice Act 1992* (Qld) ss 240, 245.

61 Childrens Court of Queensland, *Annual Report 2021/22*, 38; Childrens Court of Queensland, *Youth Justice Bench Book*, 2020, 296.

62 Restorative Justice Evaluation Team, *Twelve Month Program Evaluation: Restorative Justice Project*, 2018 (Department of Child Safety, Youth and Women) 47-48.

63 *Youth Justice Act 1992* (Qld) s 31(3).

64 Restorative Justice Evaluation Team, *Twelve Month Program Evaluation: Restorative Justice Project*, 2018 (Department of Child Safety, Youth and Women) 65.

65 *Youth Justice Act 1992* (Qld) s 38(2).

66 Restorative Justice Evaluation Team, *Twelve Month Program Evaluation: Restorative Justice Project*, 2018 (Department of Child Safety, Youth and Women) 41

67 *Youth Justice Act 1992* (Qld) s 175(1)(a), (b), (c).

68 Childrens Court of Queensland, *Youth Justice Bench Book,* 242. Note 'reprimand' is not defined in the legislation.

69 *Youth Justice Act 1992* (Qld) s 188.

70 *Youth Justice Act 1992* (Qld) s 183(2).

71 *Youth Justice Act 1992* (Qld) s 189.

72 Childrens Court of Queensland, *Annual Report 2021/22,* 31 (n=1376).

73 Ibid (n=513).

74 *Youth Justice Act 1992* (Qld) s 190.

75 Childrens Court of Queensland, *Annual Report 2021/22,* 27, 31, 33.

76 *Youth Justice Act 1992* (Qld) s 172. The offence must be an 'eligible drug offence', which is defined at s 169 of the *Youth Justice Act 1992* (Qld) to be offences by a child against section 9 (possession of a dangerous drug) – so long as the quantity was below the prescribed amount and was for personal – and section 10(2), (4) or (4A) (possession of things) of the *Drugs Misuse Act 1986* (Qld).

77 *Youth Justice Act 1992* (Qld) ss 168(1), 172(2).

78 *Youth Justice Act 1992* (Qld) s 173(3)(b).

79 Childrens Court of Queensland, *Annual Report 2021/22,* 27, 31, 33.

80 *Youth Justice Act 1992* (Qld) s 193(1).

81 'Curfew' is defined in Schedule 4 of the *Youth Justice Act 1992* (Qld) as 'a requirement to remain at a stated place for stated periods.' In practice, this may mean a child is required to remain at their residence between 7pm and 7am to address the risk of night-time offending: see *The Queen v L* [1995] QCA 207, [4].

82 *Youth Justice Act 1992* (Qld) s 193(2).

83 *Youth Justice Act 1992* (Qld) s 193(2), (4).

84 *Youth Justice Act 1992* (Qld) s 175(1)(d).

85 *Youth Justice Act 1992* (Qld) s 194. See also ss 175(1)(d), 176(1)(a).

86 Childrens Court of Queensland, *Annual Report 2021/22,* 27, 31, 33.

87 *Youth Justice Act 1992* (Qld) s 195.

88 *Youth Justice Act 1992* (Qld) ss 175(1)(e), 200.

89 *Youth Justice Act 1992* (Qld) s 198.

90 *Youth Justice Act 1992* (Qld) s 197.

91 *Youth Justice Act 1992* (Qld) s 176A.

92 *Youth Justice Act 1992* (Qld) s 194A(1).

93 *Youth Justice Act 1992* (Qld) s 194A(2). The number of possible hours ranges from five hours for children 12 years of age, and 20 hours for children aged 15 years or over: s 176A(3).

94 Childrens Court of Queensland, *Annual Report 2021/22,* 36.

95 *Youth Justice Act 1992* (Qld) ss 175(1)(f), 203.

96 Childrens Court of Queensland, *Annual Report 2021/22,* 36.

97 *Youth Justice Act 1992* (Qld) s 175(2).

98 *Youth Justice Act 1992* (Qld) s 175(1)(g).

99 *Youth Justice Act 1992* (Qld) s 150(2)(b).

100 *Youth Justice Act 1992* (Qld) s 208.

101 *Youth Justice Act 1992* (Qld) s 207.

102 *R v F and P* [1997] QCA 98, [14]; *R v SCU* [2017] QCA 198.

103 *Youth Justice Act 1992* (Qld) s 209.

104 *Youth Justice Act 1992* (Qld) ss 175(1)(g)(i), 176.

105 *Youth Justice Act 1992* (Qld) s 175(1)(g)(ii).

106 *Youth Justice Act 1992* (Qld) s 218(1). This includes time spent in detention for other offences where the child is being sentenced for multiple offences: *R v CDR (No. 2)* [1996] 1 Qd R 69, 72.

107 *Youth Justice Act 1992* (Qld) s 220(1).

108 *Youth Justice Act 1992* (Qld) ss 219, 221(1). At time of writing, there is a Bill before the Queensland Parliament seeking to increase the length of conditional release orders to a maximum of six months: *Strengthening Community Safety Bill 2023* (Qld) clause 22.

109 *Youth Justice Act 1992* (Qld) ss 175(3), 176(4); *R v C and M* [2001] 1 Qd R 636, 638. Information must be provided to the court in the pre-sentence report indicating that an appropriate program is available to the child: *Youth Justice Act 1992* (Qld) s 223.

110 *Youth Justice Act 1992* (Qld) s 220; *R v SCU* [2017] QCA 198. A conditional release order has a similar effect to a suspended sentence.

111 Childrens Court of Queensland, *Annual Report 2021/22,* 23.

112 Childrens Court of Queensland, *Annual Report 2021/22,* 42.

113 Childrens Court of Queensland, *Annual Report 2021/22,* 42.

114 Childrens Court of Queensland, *Annual Report 2021/22,* 42.

115 *R v SCU* [2017] QCA 198 [108].

116 Ibid [107].

117 Ibid [110].

118 Queensland Sentencing Advisory Council, *Kids in court: The sentencing of children in Queensland*, 2021, 38.

119 Ibid 8, 21.

120 *Youth Justice Act 1992* (Qld) s 177; see also ss 178-182.

121 *Youth Justice Act 1992* (Qld) s 181.

122 *Youth Justice Act 1992* (Qld) ss 181(a), 235(2). Parents may elect to pay an amount of compensation on the child's behalf if the child accepts a 'moral obligation' to pay them back: *The Queen v L* [1995] QCA 207. Note also that a compensation order may be made against the child's parents in certain circumstances if it appears to the court that the parent's inadequate supervision of the child contributed to their offending: *Youth Justice Act 1992* (Qld) s 258(1).

123 *Youth Justice Act 1992* (Qld) ss 235(5), 183(1). The amount of compensation payable cannot exceed 20 penalty units: s 235(2)(b).

124 *Youth Justice Act 1992* (Qld) s 254.

125 *Domestic and Family Violence Protection Act 2012* (Qld) ss 22, 37.

126 *Domestic and Family Violence Protection Act 2012* (Qld) s 22(1).

127 Childrens Court of Queensland, *Annual Report 2021/22*, 27, 31, 33.

128 *New Zealand Police/Oranga Tamaraki v SD* [2021] NZYC 360, [121] (*'SD'*).

129 *R v SCU* [2017] QCA 198 [105].

130 This is also true of adults, of course: see *Eastman v R* (2000) 203 CLR 1, 21 (Gaudron J).

131 *R v SCU* [2017] QCA 198 [104].

132 Ibid [16].

133 *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1)(a)(i).

134 *Children, Youth and Families Act 2005* (Vic) s 360(1)(a)-(c). As to possible conditions, see ss 363, 365: undertaking by the child or the child's parents.

135 *Oranga Tamariki Act 1989* (NZ) s 282(1).

136 T Walsh, 'From child protection to youth justice: Legal responses to the plight of 'Crossover Kids'' (2019) 46(1) *University of Western Australia Law Review* 90; *New Zealand Police/Oranga Tamaraki v SD* [2021] NZYC 360 [68]-[69].

137 See also *New Zealand Police/Oranga Tamaraki v L* [2020] NZYC 117 (assault, unlawful taking of motor vehicles, aggravated robbery, theft of clothes). In dismissing all these charges, His Honour referred to the child's age (14 years at time of offending), time spent on remand (four months), trauma resulting from significant child protection and abuse history, and 'the need to look to improve outcomes for young Māori': at [37].

138 *Mental Health Act 2016* (Qld) ss 170, 172; *Youth Justice Act* 1992 (Qld) s 61.

139 *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) ss 12, 14.

140 *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) s 4(1). This does not include temporary substance-induced mental disorders: s 4(2)(d), (3).

141 *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) s 5.

142 See further L Steele, L Dowse and J Trofimovs, 'Who is Diverted?: Moving beyond Diagnosed Impairment towards a social and political analysis of diversion' (2016) 38(2) *Sydney Law Review* 179.

143 R McCausland and E Baldry, 'I feel like I failed him by ringing the police': Criminalising disability in Australia' (2017) 19(3) *Punishment & Society* 290.

144 T Walsh and R Fitzgerald, *Logan Community Justice Centre: Community Consultation and Design Report,* 2020 (University of Queensland) 43-44. See also B O'Carroll, 'Lawyers' experiences with fitness to plead to summary offences' (2013) 49(2) *Australian & New Zealand Journal of Criminology* 221.

145 C Cunneen and B Goldson, 'Restorative justice? A critical analysis' in B Goldson and J Muncie (eds), *Youth, Crime and Justice*, 2015, 142.

146 Ibid 138; B Goldson and J Muncie, 'Towards a global "child friendly" juvenile justice' (2012) *International Journal of Law, Crime and Justice* 47, 56. See also J Hodgson, 'Offending Girls and Restorative Justice' (2020) 22(2) *Youth Justice* 166.

147 *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, UNECOSOC Res 2002/12, UN Doc E/RES/2002/12 (24 July 2002); *Report of the Eleventh United Nations Congress on Crime Prevention and Criminal Justice,* UN Doc A/CONF.203/18 (17 May 2005) 64-67.

148 *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, UNECOSOC Res 2002/12, UN Doc E/RES/2002/12 (24 July 2002) 40.

149 See generally J Braithwaite, *Crime, shame, and reintegration,* 1989; S Maruna et al, *Youth conferencing as shame management: results of a long-term follow-up study*, 2007 (ARCS), 24-25.

150 S Maruna et al, *Youth conferencing as shame management: results of a long-term follow-up study*, 2007 (ARCS) 29.

151 M Suzuki and W Wood, 'Restorative Justice Conferencing as a 'Holistic' Process: Convenor Perspectives' (2017) 28(3) *Current Issues in Criminal Justice* 277, 286.

152 S Maruna et al, *Youth conferencing as shame management: results of a long-term follow-up study*, 2007 (ARCS) 50-52; M Suzuki and W Wood, 'Is restorative justice conferencing appropriate for youth offenders?' (2017) 18(4) *Criminology & Criminal Justice* 450, 460.

153 M Suzuki and W Wood, 'Is restorative justice conferencing appropriate for youth offenders?' (2017) 18(4) *Criminology & Criminal Justice* 450; N Lynch, 'Restorative Justice through a Children's Rights Lens' (2010) 18(2) *The International Journal of Children's Rights* 161, 173-174.

154 S Little, A Stewart and N Ryan, 'Restorative Justice Conferencing: Not a Panacea for the Overrepresentation of Australia's Indigenous Youth in the Criminal Justice System' (2018) 62(13) *International Journal of Offender Therapy and Comparative Criminology* 4067, 4079. Having said this, it seems that restorative justice is more effective at preventing recidivism amongst Indigenous children than traditional court processes: see K J Bergseth and J A Bouffard, 'Examining the effectiveness of a restorative justice program for various types of juvenile offenders' (2013) 57 *International Journal of Offender Therapy and Comparative Criminology* 1054.

155 M Suzuki and W Wood, 'Restorative Justice Conferencing as a 'Holistic' Process: Convenor Perspectives' (2017) 28(3) *Current Issues in Criminal Justice* 277, 287.

156 S Maruna et al, *Youth conferencing as shame management: results of a long-term follow-up study*, 2007 (ARCS) 58-61.

157 B Goldson and J Muncie, 'Towards a global "child friendly" juvenile justice' (2012) *International Journal of Law, Crime and Justice* 47, 58; C Cunneen and B Goldson, 'Restorative justice? A critical analysis' in B Goldson and J Muncie (eds), *Youth, Crime and Justice*, 2015, 149-150; I Marder, 'Institutionalising restorative justice in the police: key findings from a study of two English police forces' (2020) 23(4) *Contemporary Justice Review* 500, 519; K Daly 'Restorative justice: the real story' (2002) 4(1) *Punishment and Society* 55, 72.

158 B Goldson and J Muncie, 'Towards a global "child friendly" juvenile justice' (2012) *International Journal of Law, Crime and Justice* 47, 58; I Marder, 'Institutionalising restorative justice in the police: key findings from a study of two English police forces' (2020) 23(4) *Contemporary Justice Review* 500, 519; A Newbury, ''I Would Have Been Able to Hear What They Think': Tensions in Achieving Restorative Outcomes in the English Youth Justice System' (2011) 11(3) *Youth Justice* 250, 261; C Cunneen and B Goldson, 'Restorative justice? A critical analysis' in B Goldson and J Muncie (eds), *Youth, Crime and Justice*, 2015, 145; M Rossner and J Bruce, 'Trajectories and typologies of pre-sentence restorative justice rituals' (2018) 51(4) *Australian & New Zealand Journal of Criminology* 502.

159 N Lynch, 'Restorative Justice through a Children's Rights Lens' (2010) 18(2) *The International Journal of Children's Rights* 161, 180.

160 L McAra and S McVie, 'Youth crime and justice: Key messages from the Edinburgh Study of Youth Transitions and Crime' (2010) 10(2) *Criminology and Criminal Justice* 179, 182; B Goldson and J Muncie, 'Towards a global "child friendly" juvenile justice' (2012) *International Journal of Law, Crime and Justice* 47. The Childrens Court Annual Report 2021/22 reports that around half of all victims of children's crimes are aged under 20 years: Childrens Court of Queensland, *Annual Report 2021/22*, 44; J Hodgson, 'Offending Girls and Restorative Justice' (2020) 22(2) *Youth Justice* 166.

161 J Hodgson, 'Offending Girls and Restorative Justice' (2020) 22(2) *Youth Justice* 166; C Cunneen and B Goldson, 'Restorative justice? A critical analysis' in B Goldson and J Muncie (eds), *Youth, Crime and Justice*, 2015, 151.

162 B Goldson and J Muncie, 'Towards a global "child friendly" juvenile justice' (2012) *International Journal of Law, Crime and Justice* 47, 58, 59. See also A Newbury, ''I Would Have Been Able to Hear What They Think': Tensions in Achieving Restorative Outcomes in the English Youth Justice System' (2011) 11(3) *Youth Justice* 250, 252; S Maruna et al, *Youth conferencing as shame management: results of a long-term follow-up study*, 2007 (ARCS) 50-52.

163 M Suzuki and W Wood, 'Is restorative justice conferencing appropriate for youth offenders?' (2017b) 18(4) *Criminology & Criminal Justice* 450, 453; S Maruna et al, *Youth conferencing as shame management: results of a long-term follow-up study*, 2007 (ARCS) 48.

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